NORTH CAROLINA COURT OF APPEALS REPORTS

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1. Elected and sworn in 1 January 2001.
2. Elected and sworn in 2 January 2001 to replace John B. Lewis, Jr. who retired 1 January 2001.
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4. Elected and sworn in 10 January 2001.
5. Appointed to a new position by Governor James B. Hunt, Jr. and sworn in 9 January 2001.
6. Appointed to a new position by Governor James B. Hunt, Jr. and sworn in 1 February 2001.

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BETTY J. SOUTHER, PETITIONER v. NEW RIVER AREA MENTAL HEALTH DEVELOPMENT DISABILITIES AND SUBSTANCE ABUSE PROGRAM, RESPONDENT

No. COA99-1092

(Filed 6 February 2001)

Public Officers and Employees— termination—insubordination—evidence insufficient

The trial court correctly reversed a decision of the State Personnel Commission, which had upheld the termination of petitioner's employment, where petitioner had worked as an habilitation assistant providing care in the home of a severely disabled client; petitioner complained of sexual harassment by the father of the client; respondent allowed petitioner to take vacation time and to care for the client in petitioner's own home while undertaking an investigation; respondent concluded that petitioner's allegations were without merit and asked petitioner to resume caring for the client in the client's home; and petitioner's employment was terminated when she refused. Petitioner had the burden of proving that her termination was not for just cause; respondent contended that petitioner was dismissed for insubordination following her failure to attend a meeting with her supervisors and her refusal to provide service to her client. Based upon a de novo review of the proceeding, the refusal to attend the meeting did not constitute insubordination because she had a reasonable understanding from State Personnel Guidelines that she was entitled to an initial meeting with only her immediate supervisor rather than a joint meeting

with several people, one of whom she perceived to be hostile, when she was not aware that her claims had been investigated and feared that she might lose her job. Furthermore, her refusal to comply with the directive to return to the client's home was reasonable under circumstances in which she was not aware that her complaints had been investigated and was given no alternative to returning to what she considered an unacceptable working environment.

Judge EDMUNDS dissenting prior to 31 December 2000.

Appeal by respondent from order entered 21 May 1999 by Judge L. Todd Burke in Superior Court, Wilkes County. Heard in the Court of Appeals 17 May 2000.

Legal Services of the Blue Ridge, by Charlotte Gail Blake, for petitioner-appellee.

McElwee Firm, PLLC, by Elizabeth K. Mahan and William H. McElwee, III, for respondent-appellant.

WYNN, Judge.

Respondent New River Area Mental Health appeals from the trial court's order reversing its termination of petitioner Betty J. Souther. We affirm.

New River employed Souther in September 1988 as an habilitation assistant for the Community Alternatives Program For People With Mental Retardation. The Community Alternatives Program allows disabled individuals to avoid institutionalization by receiving care at home. Under the program, habilitation assistants provide personal and respite care to the disabled participants. The assistants typically serve one client at a time.

During Souther's employment with New River, Randy Johnson was her immediate supervisor; Suzanne Tate was the Director of Developmental Disabilities and Johnson's supervisor; and, Dorothy Beamon was the Area Director and supervisor of New River's mental health programs.

In 1988, New River assigned Souther to care for Robinette Jenkins, the daughter of Lester and Virginia Jenkins. Robinette was severely disabled and required constant assistance with personal maintenance. In late June or early July 1993, Souther informed Lester

Jenkins that she was having trouble with her neighbors; so, he allowed her to move her trailer onto his lot. Later in 1993, Souther complained to her immediate supervisor, Johnson, that Mr. Jenkins was sexually harassing her and expressed concerns about working in the Jenkins' home. Upon receiving these complaints, New River allowed Souther to take vacation time and to care for Robinette in her own home; at the same time, New River undertook an investigation of her complaints. New River's investigation concluded that Souther's allegations were without merit. Accordingly, at a meeting on 20 September 1993, Beamon asked Souther to resume assisting Robinette in the Jenkins' home. Souther, however, refused. Thereafter, New River terminated her employment.

Souther appealed to the Office of Administrative Hearings. After conducting an evidentiary hearing, the assigned Administrative Law Judge entered a Recommended Decision to affirm the dismissal for just cause. Souther appealed to the State Personnel Commission, which conducted a whole record review and adopted the recommended findings and conclusions of the Administrative Law Judge and recommended that New River "find and conclude that it had just cause to terminate Souther for her unacceptable personal conduct due to her refusal to obey a reasonable work [order]." Thereafter, Souther brought a Petition for Judicial Review before the Superior Court in Wilkes County. The trial court granted the petition and, "after hearing the arguments of counsel and reviewing the official record, including the transcript of the administrative hearing, and the memoranda submitted by counsel," found that New River's decision to terminate Souther was "arbitrary and capricious and not supported by substantial evidence in light of the whole record." From the trial court's order reversing Souther's termination, New River appeals.

Our review of a superior court order regarding an agency decision consists of: " '(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994)).

> The proper standard for the superior court to apply depends upon the issues presented on appeal. Where the petitioner alleges that the agency decision was either unsupported by the evidence, or arbitrary and capricious, the superior court applies the "whole

> record test" to determine whether the agency decision was supported by substantial evidence contained in the entire record. Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency.

Avant v. Sandhills Center for Mental Health, 132 N.C. App. 542, 546, 513 S.E.2d 79, 82 (1999) (internal citations omitted).

Both parties contend the superior court, in reviewing the Administrative Law Judge's decision, appropriately employed the "whole record" standard. However, this Court has held that a superior court's determination of whether a termination was for "just cause" based upon personal misconduct is a question of law, and that questions of law are to be reviewed *de novo*. *See Amanini*, 114 N.C. App. at 677, 678, 443 S.E.2d at 119, 120. A *de novo* review "requires a court to consider a question anew, as if not considered or decided by the agency." *Id.* at 674, 443 S.E.2d at 118.

We note that the *Amanini* court observed that "[s]eparate panels of this Court [] appear to have reached differing conclusions concerning the proper standard of appellate review" of orders of the superior court affirming or reversing a decision of an administrative agency. *Id.* at 675, 443 S.E.2d at 118. After an extended review and discussion of the issue, the *Amanini* court held that the proper standard of review is whether the superior court applied the proper scope of review and did so properly. *Id.* at 675-76, 443 S.E.2d at 118-19. Despite some continuing inconsistencies within the court, *see Mendenhall v. N.C. Dep't of Hum. Res.*, 119 N.C. App. 644, 650, 459 S.E.2d 820, 824 (1995) (citation omitted) ("When an appellate court reviews the decision of a lower court (as opposed to reviewing an administrative agency's decision on direct appeal), the scope of review is the same as for other civil cases. However, this review also requires an examination of the entire record."), we believe that the analysis in *Amanini* is persuasive. We will employ the proper standard of review regardless of that employed by the reviewing trial court. *See Amanini*, 114 N.C. App. at 675, 677, 443 S.E.2d at 118, 119 ("[T]he manner of our review is [not] governed merely by the label an appellant places upon an assignment of error; rather, we first determine the actual nature of the contended error, then proceed with an application of the proper scope of review. [] [W]here the initial reviewing court should have conducted *de novo* review, this Court will

directly review the State Personnel Commission's decision under a *de novo* review standard.")

A state employee may be dismissed only for "just cause." N.C. Gen. Stat. § 126-35 (1995). An employee challenging his or her termination for just cause has the burden of proving that the agency's decision was improper. As our Supreme Court has said:

> [A]n employee terminated pursuant to the "just cause" provision of N.C.G.S. § 126-35 should bear the burden of proof in an action contesting the validity of that termination. Petitioner, the terminated employee, is the party attempting to alter the *status quo*. The burden should appropriately rest upon the employee who brings the action, even if the proof of that position requires the demonstration of the absence of certain events or causes. Neither party in a "just cause" termination dispute has peculiar knowledge not available to the opposing party. A terminated employee may readily utilize the procedures outlined in chapter 126 and section 1A-1 of the North Carolina General Statutes, as well as title 26 of the North Carolina Administrative Code, to obtain any and all necessary information to establish and advocate his or her position.

Peace v. Employment Sec. Comm'n of North Carolina, 349 N.C. 315, 328, 507 S.E.2d 272, 281-82 (1998). Just cause may result either from unacceptable job performance or unacceptable personal conduct. *See Amanini* at 679, 443 S.E.2d at 120. The difference is important because an employee must receive certain warnings before being terminated for unsatisfactory job performance, while no warnings are required for termination based on personal misconduct. *See id.* at 679, 443 S.E.2d at 121. However, "[t]he categories are not mutually exclusive, as certain actions by employees may fall into both categories, depending upon the facts of each case." N.C. Admin. Code tit. 25, r. 1J.0604 (June 2000).

Although New River never specifically stated the grounds for Souther's dismissal, Beamon's letter terminating petitioner read in pertinent part:

> Over the past weeks, your relationship with your client's family has deteriorated to the point that you refuse to provide in-home services to your client in her home. As you have been aware, the main purpose of the work you do for us is to enable clients to live in their own homes.

> You refused to meet with me and your supervisor on 9-15-93, after being required by your supervisor to do so for the purpose of getting services flowing to your client again. Recently, you have spent a great deal of time and energy discussing with various staff how stressful it is for you to work here.

Thus, New River's finding of just cause was based on (1) petitioner's refusal to provide service to her client, and (2) petitioner's failure to attend the 15 September 1993 meeting with her supervisors.

New River contends that these reasons for dismissal constitute insubordination. "Insubordination" is defined as "the refusal to accept a reasonable and proper assignment from an authorized supervisor." *Mendenhall*, 119 N.C. App. at 651, 459 S.E.2d at 824 (citation omitted). Insubordination has been defined more broadly as "1. A willful disregard of an employer's instructions . . . . 2. An act of disobedience to proper authority; esp. a refusal to obey an order that a superior officer is authorized to give." *Black's Law Dictionary* 802 (7th ed. 1999). Thus, insubordination involves two elements: (1) A reasonable and proper instruction or assignment by an authorized supervisor; and (2) A willful or intentional refusal to comply with such instruction or assignment. We must therefore determine the reasonableness of the requests made by New River for Souther to return to the Jenkins' home and to attend the 15 September 1993 meeting, and the reasonableness of Souther's failure to comply with those requests. We note that, because insubordination is a form of personal misconduct, *see Amanini*, 114 N.C. App. at 679, 334 S.E.2d at 121, if Souther's conduct constituted insubordination, then New River was not required to provide warnings to her before her discharge.

We first consider the 15 September 1993 meeting, which was called for the purpose of reviewing the results of the investigation into petitioner's allegations and to re-establish service to Robinette. We assume *arguendo* that the request by Beamon and Johnson that Souther attend the meeting was reasonable and proper. Our inquiry thus proceeds to whether Souther's refusal to comply with this reasonable request was willful.

"The conduct of an employee cannot be termed willful misconduct if it is determined that the employee's actions were reasonable and taken with good cause." *Urback v. East Carolina Univ.*, 105 N.C. App. 605, 608, 414 S.E.2d 100, 102, *disc. review denied*, 331 N.C. 291, 417 S.E.2d 70 (1992). What constitutes a "reasonable" action by petitioner is necessarily a subjective determination. *See, e.g., Mendenhall*

(holding that under whole record test, a petitioner was improperly terminated for insubordination where petitioner refused to care for AIDS patient on the basis of legitimate and reasonable health concerns). Therefore, we will review the record in some detail to determine the reasonableness of Souther's actions.

The record shows that on 14 September 1993, Johnson and Beamon met with Tate to discuss Souther's allegations and the results of Johnson's abbreviated investigation into those allegations. At that meeting, Beamon, the Area Director, decided on the basis of Johnson's investigation and report that Lester Jenkins had not sexually harassed Souther and that Souther's allegations were unfounded. Following the 14 September 1993 meeting, Beamon called Souther to arrange for a meeting with Beamon and Johnson.

According to Souther's account of this telephone call from Beamon on 14 September 1993, Beamon was very angry with Souther and spoke rudely to her. Beamon informed Souther during this call that she did not believe Souther's account of the events concerning Lester Jenkins. Souther testified that she was worried about meeting with Beamon and Johnson together on 15 September. Furthermore, she understood from her copy of the State Employees' Grievance Policy that she first was entitled to a meeting alone with her immediate supervisor, Johnson, rather than a joint meeting with both Johnson and Beamon.

On 15 September 1993, Souther sent a letter to Johnson asking for his help in resolving her complaint. When Souther failed to show up for the 15 September meeting, Beamon called Souther again. According to Beamon's notes from this conversation, Souther repeatedly expressed her reservations about meeting with the supervisors without an attorney present, and indicated that she could not meet with the supervisors without an attorney.

The North Carolina Administrative Code, as it existed in 1993, provided that "[p]rior to dismissal of a permanent employee on the basis of personal conduct, there shall be a pre-dismissal conference between the employee and the person recommending dismissal. This conference shall be held in accordance with the provision of 25 NCAC 1J .0606(2), (3)." 25 NCAC 1J .0608(c) (effective 1 July 1989). The requirements for the pre-dismissal conference provided in part that "[t]he Supervisor or designated management representative shall schedule and conduct a pre-dismissal conference with the employee. Advance notice of the pre-dismissal conference must be given to the

employee. A second management representative or security personnel may be present at management's discretion." 25 NCAC 1J .0606(2) (effective 1 September 1991).

Following the hearing of this matter, an Administrative Law Judge issued a recommended decision which included findings of fact and conclusions of law. In her conclusions of law, the Administrative Law Judge found that "[t]he presence of more than one management person at the [20 September 1993] conference was a violation of [State Personnel Commission] rules regarding who is to attend pre-dismissal conferences." Nonetheless, the Administrative Law Judge found that, because Souther was permitted to have her attorney present at the 20 September meeting, "she was not unduly prejudiced by this procedural violation."

Souther's understanding that she was entitled, pursuant to these State Personnel Commission guidelines, to an initial meeting with only Johnson was not inherently unreasonable. Furthermore, Souther was worried by what she perceived to be a hostile attitude on behalf of Beamon, and feared that she might lose her job. It is apparent from the record that Souther perceived that Beamon and Johnson did not believe her allegations, and Souther was not aware that her claims had been investigated at all. Moreover, the record supports Souther's contention that she understood from Beamon's telephone call on 14 September 1993 that Beamon, Tate and Johnson (who were all present at the 14 September discussion) would all be present at the proposed 15 September meeting, which would have been a clear violation of the requirements for the pre-dismissal conference (as was the presence of all three at the 20 September meeting). These facts indicate the basis of Souther's failure to attend the 15 September 1993 meeting, which failure appears under the circumstances to have been reasonable. Thus, Souther's refusal to attend the meeting did not constitute insubordination.

We must next determine whether Souther's refusal at the 20 September 1993 meeting to re-establish in-house care for Robinette amounted to insubordination. A careful review of the record on appeal reveals the reasonableness of this action as well.

The investigation which was performed by New River into Souther's allegations of sexual harassment by Lester Jenkins appears to have been limited at best. Souther testified that she initially believed that Lester Jenkins' comments that she should get out and date, and asking for sex with her, were "one big joke." However, he

persisted, and she testified that when Lester Jenkins forthrightly stated without euphemisms that he wanted to have sex with her, she knew his comments had not been a joke. According to petitioner, she notified Johnson and asked him to talk to Lester Jenkins. She wanted Johnson to "tell [Lester Jenkins] that this was bothering [her], and . . . to leave that kind of jokes alone because . . . they weren't appropriate for the work."

On 17 August 1993, Souther first contacted Johnson regarding her concerns, reporting, according to Johnson's notes from the conversation, that Lester Jenkins "had said or done something which caused [Souther] emotional pain and hurt." Souther also expressed her desire to tell Johnson the details regarding the incident but was hesitant to do so as she did not feel she would be believed. At this point Johnson took no action, though he was clearly aware that something had occurred between Souther and Lester Jenkins which was causing Souther some distress.

On 19 August 1993, Souther again spoke with Johnson; and, according to Johnson's notes, she informed Johnson that "Jenkins offered to help her complete moving into her new trailer if she would repay him with sexual favors." According to Souther's testimony before the Administrative Law Judge, she informed Johnson that Lester Jenkins' comments were bothering her, and asked Johnson to talk to Lester Jenkins alone as she did not want the situation to hurt his wife, with whom Souther had become very close over the years during which she had cared for Robinette. Johnson informed both Tate and Beamon of Souther's allegations for the first time on 19 August 1993.

Later that same day, Johnson visited with Mrs. Jenkins at the Jenkins' residence and, contrary to Souther's wishes, discussed Souther's allegations with her. Mrs. Jenkins informed Johnson that there had been some noticeable tension between Souther and her husband, and that her husband had apparently remarked to Souther that, "Today, I'll help you move your bed into your new trailer. I don't think anyone will say anything about us being in the bedroom at the same time."

After meeting with Mrs. Jenkins, Johnson met with Souther at her home. At that time, Souther informed Johnson in more detail concerning the comments made to her by Lester Jenkins. They also agreed that Souther should take some leave time until 30 August, to coincide with Johnson's vacation. Johnson was out of town on vaca-

tion from 20 August until 30 August 1993. During this time, neither Johnson nor Tate nor Beamon made any further attempts to investigate Souther's allegations. Tate testified that she was in Colorado attending training sessions from approximately 25 August until 13 September 1993. Beamon testified that she had no contact with Johnson regarding the matter between 19 August and approximately 14 September 1993.

After Johnson returned from vacation on 30 August 1993, Souther called Johnson to inform him that she still had some reservations about caring for Robinette in the Jenkins' home, and they arranged for Souther to temporarily care for Robinette in Souther's home. The record shows that Souther's reservations at this point were reasonable, as no further investigation had been performed beyond Johnson's limited interview of Mrs. Jenkins on 19 August. Furthermore, Souther was unaware that any investigation whatsoever had been performed. Johnson testified before the Administrative Law Judge that he agreed that it was reasonable for Souther to still have concerns about returning to work on 30 August 1993 as no work had been done on investigating her complaint at that time.

On 31 August 1993, Johnson spoke with Souther on the telephone and again met with her in person to discuss her allegations in more detail. Johnson did not investigate the matter further until 13 September 1993, when he met with the Jenkins' and their son, Ray Jenkins, at the Jenkins' residence. At this meeting, Johnson learned that Lester Jenkins had indeed made comments of a sexual nature to Souther, comments which Lester Jenkins considered to have been made in a joking manner. Johnson also learned that Mrs. Jenkins believed that Souther actually thought Lester Jenkins was asking to have sex with Souther. Johnson himself testified that he could understand how Lester Jenkins' comments could have been interpreted by Souther to mean that he wanted to have sex with her. No further action was taken until Johnson's meeting with Tate and Beamon on 14 September.

From the evidence in the record, it appears that neither Johnson nor anyone else from New River ever met with Lester Jenkins alone to discuss Souther's allegations. Johnson acknowledged that he considered the possibility that Lester Jenkins might be less candid discussing the allegations in the presence of his wife. Furthermore, Souther had asked that Johnson's inquiry be "low-key," and asked that Johnson not involve Mrs. Jenkins. Nonetheless, Johnson first dis-

cussed Souther's allegations with Mrs. Jenkins alone on 19 August, and later on 13 September with the Jenkins' and their son. These were the only instances in which Johnson met with the Jenkins'. Johnson testified that he asked Souther to meet with him together with the Jenkins', a request with which Souther refused to comply. Johnson admitted, however, that he did not think it unusual that Souther might be hesitant to discuss her allegations person to person with Lester Jenkins, particularly in front of Mrs. Jenkins.

Johnson also testified that he never told or asked Lester Jenkins to refrain from making any further jokes to Souther involving sexual connotations or innuendo. Johnson stated that he did not inform Souther until 20 September 1993, at the pre-dismissal conference immediately following which Souther was dismissed, that he had talked with the Jenkins' concerning Souther's allegations. According to Souther, she was *never* informed by anyone at New River that her complaints had been investigated, and was instead only informed that her allegations were deemed unfounded and she was not believed.

In the hearing before the Administrative Law Judge, when asked whether she felt that her complaint had been properly investigated, Souther responded, "to this day, if they've investigated it, I don't know it." No one ever conveyed to Souther that Lester Jenkins, in the 13 September 1993 meeting with Johnson, had offered to apologize to Souther. Souther testified that if she had been informed of the investigation and of Lester Jenkins' offer to apologize, she would have returned to work as requested. There was also testimony that Johnson suggested to Souther the option of working with another family instead of the Jenkins. However, when Souther requested that this option be pursued, Johnson informed her that no other families were available.

At the 20 September 1993 meeting, Souther was given the ultimatum of either returning to the Jenkins' home to provide in-house care for Robinette or losing her job. *See* N.C. Gen. Stat. § 143-422.2 (1996) and Section 703(a)(1) of Title VII (as amended, 42 U.S.C.A. § 2000e-2(a)(1) (1994)). *See* 29 C.F.R. § 1604.11(a) (1999) ("Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, . . . or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating,

hostile, or offensive working environment.") Souther testified that she did not feel safe in the Jenkins' home. Under these circumstances, unaware that her complaints had been investigated and given no alternative to returning to what she considered to be an unacceptable working environment, Souther's refusal to comply with New River's directive to return to the Jenkins' home was reasonable.

As noted above, petitioner has the burden of proving that her termination was not for "just cause." Based on all of the testimony and following a *de novo* review of the proceedings, we believe that Souther's refusal to attend the 15 September 1993 meeting and to return to work in the Jenkins' home was reasonable and did not constitute insubordination. As Souther's conduct did not amount to insubordination, New River lacked just cause to fire her. The order entered by the trial court, reversing the decision of the Commission, is therefore,

Affirmed.

Judge MARTIN concurs.

Judge EDMUNDS dissents in a separate opinion written prior to 31 December 2000.

EDMUNDS, Judge, dissenting.

Because I believe petitioner failed to meet her burden of proving that respondent's decision was improper, *see Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998), I respectfully dissent.

The majority correctly points out that petitioner's dismissal was based upon her insubordination in failing to attend the 15 September 1993 meeting with her supervisors and in refusing to re-establish services to her client. Accordingly, in conducting a *de novo* review of this case, *see Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 678, 443 S.E.2d 114, 118 (1994), this Court must review the entire record, *see id.*, to determine whether petitioner has proven *either* (1) that the instructions given by her supervisors were improper or unreasonable *or* (2) that her refusal to comply with the instructions was neither willful nor intentional, *see Mendenhall v. N.C. Dept. of Human Resources*, 119 N.C. App. 644, 651, 459 S.E.2d 820, 824 (1995). If petitioner fails to meet her burden for either of

the reasons given for her termination, respondent's decision should stand.

The 15 September 1993 Meeting

On 13 September 1993, Randy Johnson (Johnson), petitioner's immediate supervisor, met with Mr. and Mrs. Jenkins to discuss their relationship with petitioner. Mr. Jenkins acknowledged making some of the remarks of which petitioner had complained, but stated that he was joking and that he thought he and petitioner were good enough friends that he could banter with her. After this meeting, Johnson spoke with Suzanne Tate (Tate), his supervisor, and they decided to meet with petitioner in an attempt to resolve the situation. Accordingly, on 14 September 1993, Dorothy Beamon (Beamon), Area Director and supervisor of New River's health programs, telephoned petitioner to set up a meeting for the next day. Johnson was present when Beamon made the call, and he understood that petitioner would attend the meeting. However, petitioner did not show up on 15 September 1993; when Beamon called petitioner after waiting for her for thirty minutes, petitioner refused to attend.

At the hearing, when asked about the 15 September meeting, petitioner stated that Beamon called her on the fifteenth and sounded "angry and upset." Beamon "made [a] statement about the meeting, and I told her I didn't know anything about a meeting." On cross-examination, she likewise stated that although she did remember Beamon calling her, she did not recall being asked to attend a meeting on the fifteenth. When asked why petitioner attended the 20 September meeting but not the 15 September meeting, petitioner couldn't "recall."

However, under continued questioning, petitioner finally admitted that she knew that the meeting had been scheduled and had decided not to attend: "I knew that if I went, it was going to be one person, me, against the three of them, and I was scared." The following colloquy then occurred:

Q. All right, Ms. Souther, it is true then that you were asked to be at a meeting by your employer on September the 15th and that you did not attend that meeting?

A. Yes, sir.

. . . .

A. I was given a copy when hired of the State Employee's Grievance Policy. According to that, my first meeting will be with my immediate supervisor. When she called, she was angry, and I asked her to talk to Randy on what it was about. She was very, very, very angry at me.

. . . .

Q. Okay. So, your reason for ignoring your employer's request that you attend a meeting on the 15th day of September was because she was angry when she called you—

A. Yes, sir.

Q. —and asked you to come?

A. Yes, sir.

On redirect examination, petitioner testified further:

Q. Why did you not go to [the 15 September] meeting?

A. Because when Ms. Beamon called me about the September 15th meeting, she was very unpleasant. She was rude. She was very angry. I asked her to talk to Randy so she would understand what had happened, and she said Randy was with her in her office and that she did not believe anything and wanted me to meet with all three. I felt like—at that point, I was scared of losing my job when I heard her anger. I didn't think that I could handle all three of them. I knew if I met with them—whatever took place in the meeting, the three of them would agree on what was said and on what was not. I asked [an attorney] to go with me simply to hear what took place.

Additionally, as part of her case, petitioner offered into evidence her handwritten position letter to the Equal Employment Opportunity Commission, in which she stated,

> The first response from Mr. Randy Johnson in regards to my being sexually harassed was a phone call telling me to come to a meeting with him, Randy Johnson the case manager, Ms. Suzanne Tate the CAP/MR/DD Coordinator and Ms. Dorothy R. Beamon the Area Director of New River Mental Health Center. At this point I felt my job might be in jeopardy and asked if I could have a lawyer present. I was told no. I asked Mr. Johnson if I could meet with just him, Mr. Randy Johnson and Ms. Suzanne Tate. I was told no. I did not attend the meeting because I was very con-

cerned, upset, worried, scared and felt I could not deal with the three of them, alone.

Petitioner then rested her case.

The foregoing recitation constitutes the whole of petitioner's evidence regarding the meeting. She presented no evidence that respondent's request to meet was in any way improper or unreasonable. Moreover, the only reasons given for petitioner's refusal to attend was that Beamon was angry and rude and that petitioner was "scared." The majority finds that petitioner acted reasonably because she understood that more than one management person would be present at the meeting and because she perceived that management did not believe her allegations. I cannot agree. Although there was evidence contradicting petitioner's contentions that Beamon displayed anger or rudeness toward petitioner, and although petitioner's credibility was tattered at the end of her examination, even giving petitioner the benefit of the doubt and assuming that Beamon was overtly angry, petitioner was the employee in an employment relationship. Her fear and perception regarding the attitudes or beliefs of supervisors are insufficient to establish that her refusal to attend a proper meeting was reasonable. Accordingly, I would reverse the decision of the trial court based upon petitioner's willful and intentional refusal to attend the 15 September 1993 meeting.

Request to Resume Services to Robinette

I also believe petitioner failed to satisfy her burden with regard to respondent's request to re-establish care to Robinette and her family. Again, petitioner was required to carry the burden of establishing that respondent's request was unreasonable or that her refusal to comply was justified or unintentional. *See Mendenhall*, 119 N.C. App. at 651, 459 S.E.2d at 824.

Petitioner claimed that Mr. Jenkins sexually harassed her and that she was neither advised of respondent's investigation of her complaints nor that anyone had spoken with Mr. Jenkins about her allegations. However, petitioner's credibility was an issue in resolving these disputed matters. She claimed that if she had been advised that an investigation had taken place and that a representative of respondent had spoken with Mr. Jenkins, she would have returned to work in the Jenkins home. She testified at the hearing that at the 20 September 1993 meeting attended by her, her attorney, Beamon, Tate, and Johnson, Beamon called petitioner a "liar," that Beamon "knew

[Mr. and Mrs. Jenkins] longer than [petitioner] had, [and] that [Beamon] did not believe [petitioner]," and that Johnson also said he did not believe petitioner's allegations. Petitioner claimed that she was not given a choice between resuming services to the Jenkins family or losing her job.

When cross-examined at the hearing, petitioner was confronted with notes taken by Johnson during meetings with petitioner and maintained in a log of supervision. Petitioner denied practically everything recorded in Johnson's notes:

> Q. All right. I'm going to read you a paragraph. And I want you to tell me whether or not you said this to Randy Johnson. "In a meeting with Betty later that day, August 19, 1993, Betty said she wanted Mr. Jenkins to stop yelling at her. The yelling brought back painful memories. She would ask why he could not go somewhere else to get his needs met." . . .
>
> . . . .
>
> Q. . . . "She explained Mr. Jenkins told her that he would help her move to her new trailer, and she could repay him with sexual favors. According to Betty, he indicated how she could repay him by saying 'You know what I mean.' " Now, I've just read you a paragraph from Mr. Johnson's notes that he will testify that he made on the 19th, and I'm asking you if you agree that that is what you said to him on the 19th? That's not what you said to him?
>
> A. No.

Petitioner denied meeting Johnson again in person on 31 August 1993 and stated she had only met with him once prior to the September meeting. She also denied everything in Johnson's notes of the 31 August meeting:

> Q. I want to read to you a part of what purports to be a note, and I want you to tell me if this is correct or incorrect. You were talking with Randy Johnson. . . . [Johnson] asked her if she, Mr. Jenkins and [he] could meet. Betty responded no. She said she did not feel that she should be there. She explained that she could not handle it. An ambulance would probably have to be called for her. Betty stated that she wanted me to meet with Lester alone and guarantee her safety. She wants (a) Mr. Jenkins to change his behavior. She

clarified that to mean no more comments about sexual relations. (2) [sic] She [wanted] . . . Mr. Jenkins to treat her with respect—no more yelling. And she wanted to work with Robin in her home—Betty's home—until she is in a better emotional state. Now, is that an accurate summation of what was said?

A. No.

Q. So, these notes are wrong too?

A. No. No.

Q. Okay. What's wrong about them?

A. All of it.

Her testimony is in sharp contrast with that provided by respondent's agents. Johnson testified that he met with Mr. Jenkins after petitioner made her complaints and had investigated her allegations, and that at the 20 September 1993 meeting Beamon gave petitioner the option of returning to work at the Jenkins home or termination. Petitioner asked to be terminated. Tate testified that Beamon advised petitioner that Johnson had met with the Jenkins, that she (Beamon) was satisfied that the investigation had been handled properly, and that it was safe for petitioner to return to the Jenkins home. Petitioner refused. Beamon testified that she advised petitioner that her complaints had been investigated, that she believed Mr. Jenkins' statement that his comments were made in jest, and that there had been no sexual harassment. In addition, both Mr. and Mrs. Jenkins testified at the hearing and described their deteriorating relationship with petitioner.

Based upon this and other evidence presented at the hearing, I respectfully disagree with the majority's holding that petitioner has met her burden as to this issue. Looking first to the propriety and reasonableness of respondent's request, it is doubtless that respondent had the authority to request petitioner's return to work at the Jenkins home; therefore, the request was proper. As to the reasonableness of the request, respondent accommodated petitioner by allowing her to take vacation time and care for Robinette in petitioner's own home while undertaking an investigation of the matter. As part of his investigation, Johnson spoke on several occasions with Mr. and Mrs. Jenkins, who candidly discussed two questionable incidents and gave unvarying statements throughout the investigation and during the

hearing. By contrast, petitioner's statements to Johnson during his investigation were inconsistent with her testimony at the hearing. Accordingly, respondent's request that petitioner return to work was made after an adequate investigation and was reasonable.

As to the reasonableness of petitioner's refusal to comply, I do not believe that petitioner's uncorroborated testimony is sufficient to satisfy her burden of proof. Both the Administrative Law Judge (ALJ), who heard this petition and observed the witnesses, and the State Personnel Commission found petitioner's evidence insufficient to alter the *status quo*. *See Peace*, 349 N.C. at 328, 507 S.E.2d at 281. Although petitioner stated that Mr. Jenkins made a number of statements to her asking for sex, Mr. Jenkins provided a plausible explanation for his comments. Petitioner denied ever making the statements to which Johnson testified. Despite petitioner's claims that she was not advised of respondent's investigation of her complaints and that she would have returned to work had she been told, Johnson, Tate, and Beamon all testified that petitioner was advised both of the investigation and its findings and of the conversations the investigators had with Mr. and Mrs. Jenkins. Other evidence of petitioner's erratic behavior as witnessed by the Jenkins and Johnson also was presented. Accordingly, I believe the trial court erred in reversing the recommended decisions of the ALJ and the State Personnel Commission.

For the reasons stated herein, I respectfully dissent.

TERRY EVANS, PLAINTIFF v. UNITED SERVICES AUTOMOBILE ASSOCIATION AND USAA CASUALTY INSURANCE COMPANY, DEFENDANTS

No. COA99-1162

(Filed 6 February 2001)

1. Appeal and Error— appealability—interlocutory discovery order—attorney-client privilege—substantial right

Although interlocutory discovery orders are generally not appealable, defendants' appeal from an order partially granting plaintiff's request for the production of documents affects a substantial right and is immediately appealable because: (1) where a party asserts a statutory privilege which directly relates to the

matter to be disclosed under an interlocutory discovery order and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right; and (2) defendants' assertion of the common law attorney-client privilege affects a substantial right which would be lost if not reviewed before the entry of final judgment.

2. Appeal and Error— appealability—production of internal documents—no request for trial court to bifurcate discovery

Although defendants contend the trial court erred in an action for breach of contract and bad faith against an insurer by requiring defendants to produce internal documents relating to the bad faith issue prior to a demonstration that the pertinent homeowners' policy provides coverage for plaintiff, this issue is not properly before the Court of Appeals because there was no request that the trial court bifurcate discovery or enter an order under the provisions of N.C.G.S. § 1A-1, Rule 26(d) to sequence or time discovery so that discovery related to the bad faith issues would follow the completion of discovery related to the coverage issues.

3. Evidence— work product privilege—burden on party asserting

A party asserting work product privilege bears the burden of showing: (1) that the material consists of documents or tangible things; (2) which were prepared in anticipation of litigation or for trial; and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer, or agent.

4. Discovery— claims diary entries—no abuse of discretion—no work product privilege

The trial court did not abuse its discretion by denying work product protection to a large number of the claims diary entries prepared by the insurance company defendants detailing actions taken by defendants during the course of plaintiff's insurance claim because documents prepared before an insurance company denies a claim generally will not be afforded work product protection since a reasonable possibility of litigation only arises after an insurance company has made a decision with respect to the claim of its insured.

5. Evidence— attorney-client privilege—burden on party asserting

A party asserting the attorney-client privilege bears the burden of establishing that: (1) the relation of attorney and client existed at the time the communication was made; (2) the communication was made in confidence; (3) the communication relates to a matter about which the attorney is being professionally consulted; (4) the communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated; and (5) the client has not waived the privilege.

6. Discovery— claims diary entries—no abuse of discretion—no attorney-client privilege

The trial court did not abuse its discretion by determining that a large number of the claims diary entries prepared by the insurance company defendants detailing actions taken by defendants during the course of plaintiff's insurance claim were not protected by the attorney-client privilege and were discoverable, because: (1) an insurance company and its counsel may not avail themselves of the protection afforded by the attorney-client privilege if the attorney was not acting as a legal advisor when the communication was made; and (2) the trial court did protect twenty-one diary entries that were either requests to counsel for advice and opinions, or were counsel's reply to such requests.

7. Discovery— investigative report—no abuse of discretion—no work product privilege

The trial court did not abuse its discretion by compelling discovery of an investigative report compiled by independent claim adjusters hired by the insurance company defendants even though defendants sought to invoke the work product privilege, because: (1) defendants hired the adjusters as part of its investigation into plaintiff's claim and considered the report in making a decision about whether to deny the claim; and (2) it cannot be said as a matter of law that defendants could reasonably anticipate litigation of a coverage question before the investigative procedure was completed and before defendants denied plaintiff's claim.

8. Discovery— internal memoranda—no abuse of discretion— no attorney-client privilege for all documents

The trial court did not abuse its discretion by compelling discovery of four out of a total of thirteen of the insurance company defendants' internal memoranda even though defendants contend they were protected by the attorney-client privilege, because: (1) the four discoverable memoranda generated by defendants' in-house counsel were merely brief notations with regard to action being or to be taken on the claim; and (2) the undiscoverable memoranda appear to have been either generated by defendants' claims counsel or directed to counsel focusing on a legal question.

9. Discovery— online procedures manual—no abuse of discretion

The trial court did not abuse its discretion by ordering the discovery of four portions of insurance company defendants' online procedures manual containing information to assist in the investigation and disposition of insurance claims, because it cannot be said as a matter of law that the information sought is not reasonably calculated to lead to the discovery of admissible evidence. N.C.G.S. § 1A-1, Rule 26(b)(1)

Appeal by both plaintiff and defendants from orders entered 16 June 1999 and 12 July 1999 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 21 August 2000.

On 11 May 1996, Robert and Helen Evans were attending a yard sale at the home of Terry and Kay Collins Evans, their son and daughter-in-law. On that date, Kay Collins Evans was the named insured in a homeowners' policy issued by defendant USAA Casualty Insurance Company (USAA Casualty). While Robert and Helen Evans were at plaintiff Terry Evan's home, Terry started the engine of a 1978 Mustang automobile he was restoring in his garage. The automobile lurched forward, striking Robert Evans and pinning Helen Evans under the car. Plaintiff's brother-in-law, Lee Grubb, was injured when he attempted to lift the automobile off Helen Evans.

On 12 May 1996, plaintiff reported the accident to defendant USAA Casualty. The following day, a company manager at USAA Casualty sent an "early alert" to the company's senior claims counsel and to the litigation supervisor. The claim was assigned to Bruce

Nath, a senior claims examiner. On 14 May 1996, Nath advised plaintiff that the homeowners' policy might not provide coverage for the accident because of the "motor vehicle exclusion."

Several days later, defendant USAA Casualty advised plaintiff that it was investigating his claim under a reservation of rights. Defendant hired an independent adjuster to gather information about the accident. After completing its investigation, defendant denied coverage on 31 May 1996 for injuries arising from the 11 May 1996 accident and closed its file.

Following its denial of coverage, defendant received correspondence from attorneys for plaintiff's parents and for Grubb. On 17 September 1996, an attorney for Grubb forwarded a settlement package to defendant. Defendant returned the package and reiterated its denial of coverage. Because the claimants had retained attorneys and were contesting the denial of coverage, defendant officially reopened its file on 8 October 1996 "in anticipation of further developments."

On 9 June 1998, Robert and Helen Evans filed suit against Terry Evans. USAA Casualty declined to defend the lawsuit because of its position that its homeowners' policy did not provide coverage to Terry Evans. Likewise, Terry Evans did not defend the lawsuit, and his parents obtained a default judgment against him on 22 September 1998 in the total amount of $1,048,198.91, far exceeding USAA Casualty's policy limits of $300,000.00. A notice of the judgment was sent to defendant USAA Casualty on 22 October 1998. The following day, defendant USAA Casualty consulted outside counsel.

On 18 November 1998, plaintiff filed this suit against both USAA Casualty and United Services Automobile Association, alleging breach of contract, bad faith, and unfair and deceptive trade practices. Plaintiff alleged that defendant United States Automobile Association (USAA) is either the parent company of USAA Casualty—which USAA allegedly directs and controls—or acts jointly with USAA Casualty in issuing insurance policies. In the course of discovery, plaintiff sought to obtain a complete copy of defendants' claims file relating to the incident in question, including copies of reports generated as the result of defendants' investigation, legal opinions obtained by defendants from both in-house and private counsel, and the substance of discussions among defendants' personnel (including their attorneys) who participated in the decision to deny coverage to the plaintiff. Defendants provided a detailed log identifying all docu-

ments in question, but declined to produce many of the documents, alleging that some were protected by the attorney-client privilege, while others were generated in anticipation of litigation. Plaintiff moved to compel discovery of the material defendants alleged to be privileged.

The trial court conducted an *in camera* review of the documents in question, ordered the production of some of them, but found that others were "protected from disclosure by the attorney-client privilege and/or are matters prepared in anticipation of litigation." Defendants filed a motion for relief from the trial court's order, submitting an affidavit from the director of insurance operations for defendants explaining the procedure for making decisions about the denial of coverage. The trial court then entered a second order partially reversing its earlier order, finding that additional portions of the defendants' claims diary were privileged and not subject to production. Both plaintiff and defendants appealed.

Robinson & Lawing, L.L.P., by Robert J. Lawing and H. Brent Helms, for plaintiff appellant-appellee.

Kilpatrick Stockton L.L.P., by James H. Kelly, Jr., and Susan H. Boyles, for defendant appellants-appellees.

HORTON, Judge.

[1] Both plaintiff and defendants appeal from orders partially granting requests for the production of documents. Such interlocutory discovery orders are generally not appealable because they usually do not affect a substantial right that would be lost if the trial court's rulings are not reviewed before final judgment. *Mack v. Moore*, 91 N.C. App. 478, 480, 372 S.E.2d 314, 316 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989). Plaintiff moves to dismiss defendants' appeal as interlocutory, while defendants argue that, because the trial court's orders require that they produce material protected by the attorney-client privilege, their appeal involves a substantial right. We agree with defendants' contention.

We note first that the trial court attempted to certify the matter for appeal pursuant to Rule 54(b) of the Rules of Civil Procedure, finding that its rulings affected a substantial right of defendants. The trial court's order was not, however, "final" in nature, and the trial court may not make an interlocutory order immediately appealable by a Rule 54(b) certification. *Lamb v. Wedgewood South Corp.*, 308

N.C. 419, 425, 302 S.E.2d 868, 871 (1983). After careful consideration, however, we find that the trial court's order affects a substantial right of defendants under the holding of our Supreme Court in *Sharpe v. Worland*, 351 N.C. 159, 522 S.E.2d 577 (1999).

In *Sharpe*, the trial court ordered the production of documents concerning the participation of the defendant physician in a Physician's Health Program. Defendants physician and hospital appealed, contending that the records were protected by a statutory privilege and therefore were not subject to disclosure. This Court dismissed defendants' appeal, holding that it was interlocutory and did not affect a substantial right of defendants. In reversing our decision, our Supreme Court held that where "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under [N.C. Gen. Stat. §] 1-277(a) and 7A-27(d)(1)." *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581. Here, defendants assert the common law attorney-client privilege, and we believe that the reasoning of *Sharpe* applies. We hold, therefore, that defendants' appeal affects a substantial right which would be lost if not reviewed before the entry of final judgment and deny plaintiff's motion to dismiss the appeal.

In this case both plaintiff and defendants bring forward numerous assignments of error, presenting two important questions of first impression for our consideration: first, whether the plaintiff in an action for breach of contract and "bad faith" against an insurer is entitled to discover internal documents relating to the bad faith issue prior to demonstrating that defendants' policy provides coverage for plaintiff; second, whether and to what extent either "work product" immunity or attorney-client privilege protect an insurer's claim file (including internal memoranda, correspondence, and legal opinions) from discovery in a "bad faith" claim against the insurer.

I. Bifurcation of Discovery

[2] Defendants argue that the trial court erred in requiring them to produce internal documents because there has not yet been a determination that the homeowners' policy issued by defendants provides coverage for plaintiff's claim.

We are aware that the appellate courts in several of our sister states have held that a plaintiff is not entitled to discover internal

documents generated by an insurer until the plaintiff proves that there is coverage under the policy. *See, for example, Bartlett v. John Hancock Mut. L. Ins. Co.*, 538 A.2d 997, 1000-01 (R.I. 1988); and *Allstate Ins. Co. v. Swanson*, 506 So. 2d 497, 498 (Fla. Dist. Ct. App. 1987). The Federal District Court of Montana has also held that the coverage question must be resolved in favor of the plaintiff before the defendant insurer may be required to produce its claims file. *In re Bergeson*, 112 F.R.D. 692, 697 (D. Mont. 1986). In a similar factual setting, however, the Federal District Court for the Middle District of North Carolina denied the defendant's motion to bifurcate coverage and bad faith claims for discovery purposes, holding that it is "better to require that the discovery of the underlying contract claim and the bad faith claim proceed at the same time . . . ." *Ring v. Commercial Union Ins. Co.*, 159 F.R.D. 653, 658 (M.D.N.C. 1995).

Plaintiff argues that this question is not properly before us on this appeal, because it was not raised in the trial court. Rule 10(b)(1) of our Rules of Appellate Procedure provides in pertinent part that "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). In *Eason*, defendant contended that the trial court erred in denying his motion to suppress evidence seized pursuant to a search warrant because the officer serving the warrant allegedly failed to comply with the provisions of N.C. Gen. Stat. § 15A-252. In declining to consider defendant's argument, our Supreme Court stated that "[n]othing in the record before us indicates that the trial court had anything before it referring to the officer's alleged violation of the statute when it denied the defendant's motion. This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *Eason*, 328 N.C. at 420, 402 S.E.2d at 814.

Here, there was no request that the trial court bifurcate discovery or enter an order pursuant to the provisions of Rule 26(d) to sequence or time discovery so that discovery related to the bad faith issues would follow the completion of discovery related to the coverage issues. Thus, we must agree with plaintiff that this important issue is not properly before us at this time.

As it seems likely, however, that this question will continue to arise in the trial courts, we point out that our Rules of Civil Procedure permit the parties to use discovery methods in any sequence, *unless*

the trial court "upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise . . . ." N.C. Gen. Stat. § 1A-1, Rule 26(d) (1999). Thus, it appears that a party may move that the trial court in its discretion schedule discovery so that discovery related to a coverage question precedes discovery related to a bad faith claim. Before making its decision on a motion to bifurcate the issues or to sequence discovery, the trial court should consider, among other things, the factual context in which the question arises, as well as the existence and nature of the coverage dispute. Further, since the determination of the existence of coverage under an insurance policy is a question of law for decision by the trial court, the trial court may choose to expedite a hearing to determine the coverage question.

Because the bifurcation issue is not properly before us at this time, we overrule this assignment of error.

II. Immunity and Privilege Issues

"The primary purpose of the discovery rules is to facilitate the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial." *Bumgarner v. Reneau*, 332 N.C. 624, 628, 422 S.E.2d 686, 688-89 (1992). Rule 26 provides for a broad scope of discovery:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . .

N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (1999). The test of relevancy set out in Rule 26(b)(1) is much less stringent than the standard of relevancy found in N.C. Gen. Stat. § 8C-1, Rule 401 (1999). For discovery purposes, information need only be "reasonably calculated to lead to the discovery of admissible evidence . . . ." N.C. Gen. Stat. § 1A-1, Rule 26(b)(1).

Both parties in the instant case appeal orders by the trial judge compelling and denying discovery of certain documents. These orders contain neither findings of fact nor conclusions of law. Instead, the orders list each document as discoverable or "protected from disclosure by the attorney-client privilege and/or are matters prepared in anticipation of litigation." The purpose of requiring find-

ings of fact and conclusions of law by trial courts is to allow meaningful review by the appellate courts. *O'Neill v. Bank*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979). Rule 52(a)(2) of the North Carolina Rules of Civil Procedure states, however, that "[f]indings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party . . . ." N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (1999).

Here, the record does not reveal that either party requested that the trial judge make findings of fact. It has been repeatedly held by our Supreme Court that, "[w]hen the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment." *Estrada v. Burnham*, 316 N.C. 318, 324, 341 S.E.2d 538, 542 (1986); *Sherwood v. Sherwood*, 29 N.C. App. 112, 113-14, 223 S.E.2d 509, 510-11 (1976). Thus, it is within the trial judge's discretion whether to make findings of fact "if a party does not choose to compel a finding through the simple mechanism of so requesting." *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987). Further, it is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion. *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E.2d 479, 480, *disc. review denied*, 293 N.C. 589, 239 S.E.2d 264 (1977); *Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 143, 146 S.E.2d 53, 62 (1966). We must therefore examine the trial court's application of the work product doctrine and the attorney-client privilege under an abuse of discretion standard.

The documents that plaintiff seeks to discover may be organized into four categories: (A) entries in a "claims diary"; (B) a report by outside investigator Ward-THG; (C) internal memoranda; and (D) internal policy manuals. We will examine in detail the trial court's rulings as they relate to the documents in each category.

A.

Defendants' "claims diary" is a document containing about 115 computer entries dated 12 May 1996 through 30 December 1998, detailing actions taken by defendants during the course of plaintiff's claim, including summaries of conferences with in-house and outside counsel. Many of the entries are brief procedural "summaries" or notes containing little pertinent information, privileged or otherwise. After reviewing the claims diary *in camera*, the trial court found that

twenty-one entries were protected in whole or part by the attorney-client privilege. Following a second hearing, the court found that four additional diary entries were shielded from discovery under the work product doctrine. The trial court then ordered production of the remaining portions of the claims diary. The documents submitted to the trial court for its *in camera* inspection were filed as a part of the record on appeal and have been carefully examined by this Court. The claims diary contains handwritten marginal notes apparently made by the trial court beside the entries found to be protected, designating each entry as "privileged," or occasionally "privileged atty."

Defendants argue that all of the diary entries are protected from discovery by either the "work product" doctrine or the attorney-client privilege, and that plaintiff is entitled to none of the information in the claims diary. Rule 26 of our Rules of Civil Procedure tempers its broad grant of the power to discover any matter relevant to pending litigation through an exemption for privileged matter (such as the attorney-client privilege), provision for protective orders, and a qualified immunity for documents and other tangible things prepared "in anticipation of litigation." N.C. Gen. Stat. § 1A-1, Rule 26(b)(3). The protection given to matters prepared in anticipation of trial, or "work product," is not a privilege, but a "qualified immunity." *Willis v. Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976). "The protection is allowed not only [for] materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Id.* If a document is created in anticipation of litigation, the party seeking discovery may access the document only by demonstrating a "substantial need" for the document and "undue hardship" in obtaining its substantial equivalent by other means. N.C. Gen. Stat. § 1A-1, Rule 26(b)(3). Materials that are prepared in the ordinary course of business, however, are not protected by the work product immunity. *Willis*, 291 N.C. at 35, 229 S.E.2d at 201. Furthermore, work product containing the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought" is not discoverable. N.C. Gen. Stat. § 1A-1, Rule 26(b)(3); *National Union Fire Ins. v. Murray Sheet Metal*, 967 F.2d 980, 983-84 (4th Cir. 1992).

The primary reasons for the protection given by Rule 26 to materials prepared in anticipation of litigation are to maintain the adversarial trial process and to ensure that attorneys are properly prepared

for trial by encouraging written preparation. *Hickman v. Taylor*, 329 U.S. 495, 510-12, 91 L. Ed. 451, 462-63 (1947). Attorneys should not be deterred from adequately preparing for trial because of fear that the fruits of their labors will be freely accessible to opposing counsel. *Id.* at 511, 91 L. Ed. at 462. Allowing discovery of work product could have a "demoralizing" effect on the legal profession. *Id.* Finally, allowing discovery of work product could lead to a party's attorney being called as a witness. *Id.* at 517, 91 L. Ed. at 465 (Jackson, J., concurring).

[3] Balanced against the importance of protecting work product is the fundamental consideration that procedural rules should be construed to allow discovery of all relevant information in order to facilitate a trial based on the true and complete issues. *See Hickman*, 329 U.S. at 507, 91 L. Ed. at 460. "Because work product protection by its nature may hinder an investigation into the true facts, it should be narrowly construed consistent with its purpose[,]" which is to "safeguard the lawyer's work in developing his client's case." *Suggs v. Whitaker*, 152 F.R.D. 501, 505 (M.D.N.C. 1993); *accord, Pete Rinaldi's Fast Foods v. Great American Ins.*, 123 F.R.D. 198, 201 (M.D.N.C. 1988). Therefore, the party asserting work product privilege bears the burden of showing "(1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer or agent." *Suggs*, 152 F.R.D. at 504-05; *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 355 (4th Cir. 1992); *Rinaldi*, 123 F.R.D. at 201.

[4] This Court has recently noted that the phrase "in anticipation of litigation" encompasses a concept without sharply defined boundaries. *Cook v. Wake County Hospital System*, 125 N.C. App. 618, 623, 482 S.E.2d 546, 550, *disc. review allowed*, 346 N.C. 277, 487 S.E.2d 543 (1997). In the context of insurance litigation, determining whether a document was created in anticipation of litigation is particularly challenging because the very nature of the insurer's business is to investigate claims, and from the outset the possibility exists that litigation will result from the denial of a claim. Because insurance companies regularly investigate claims, such investigations would normally seem to be in the ordinary course of business rather than in anticipation of litigation. *See* M. Elizabeth Medaglia, *et al.*, *Privilege, Work Product, and Discovery Issues in Bad Faith Litigation*, 32 Tort & Ins. L.J. 1, 12 (1996).

Our decision in *Cook v. Wake County Hospital System* provides some guidance in determining whether documents are prepared in the ordinary course of business, rather than in anticipation of litigation. In *Cook*, plaintiff was injured in a fall on the premises of defendant hospital. Pursuant to the hospital's risk management policies, a form entitled "Hospital Incident or Accident Report" was prepared by hospital personnel within twenty-four hours after the accident. After plaintiff filed suit, defendant declined to produce the accident report, and plaintiff sought to compel its production. We held that the trial court erred in failing to require the production of the accident report, which was prepared in furtherance of a "number of nonlitigation, business purposes." *Cook*, 125 N.C. App. at 625, 482 S.E.2d at 551. "In short, the accident report would have been compiled, pursuant to the hospital's policy, regardless of whether [plaintiff] intimated a desire to sue the hospital or whether litigation was ever anticipated by the hospital." *Id.* at 625, 482 S.E.2d at 551-52. Because the accident report was prepared as a part of routine procedure, it was not protected from discovery as a document prepared in anticipation of litigation.

We are aware that there is disagreement among our sister jurisdictions as to whether insurance claims files should be granted work product privilege. Some courts require direct involvement of an attorney before granting protection. *See, for example, Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372 (N.D. Ill. 1972). Other cases appear to indicate that any document prepared as a result of an accident should be considered as being prepared in anticipation of litigation. *See, for example, Almaguer v. Chicago, Rock Island & Pacific Railroad Co.*, 55 F.R.D. 147, 149 (D. Neb. 1972). We do not believe that this complex question is capable of a simple "bright-line" answer, however, and elect to follow the case-by-case approach of the federal courts in North Carolina. *See, for example, Suggs*, 152 F.R.D. at 506; *Rinaldi*, 123 F.R.D. at 202.

Here, defendants carried out the investigative process and ultimately denied plaintiff's claim. It appears that the investigation stage of the claims process is one carried out in the ordinary course of an insurer's business within the meaning of *Willis* and *Cook*. Until defendants determined that their homeowners' policy did not provide coverage to plaintiff, we cannot say as a matter of law that defendants "reasonably" anticipated litigation. Consequently, we do not believe that material prepared in the course of the investigatory process is normally entitled to the Rule 26 qualified work product immunity. We

acknowledge the possibility of litigation in any such case with catastrophic injuries, but decline to hold that even in such tragic cases litigation can be reasonably anticipated prior to a decision on coverage. Even in cases where coverage is clear, a plaintiff might well disagree with an insurer about the damages to be paid. While that is also true as to almost any case, we cannot conclude that there is a reasonable possibility of litigation in every case.

Thus, documents prepared before an insurance company denies a claim generally will not be afforded work product protection. *See Ring*, 159 F.R.D. at 656 ("the general rule is that a reasonable possibility of litigation only arises after an insurance company has made a decision with respect to the claim of its insured."). This general rule is not absolute, of course, and an insurer may produce evidence of circumstances that support the conclusion that it reasonably anticipated litigation prior to denial of the claim. "[I]f the insurer argues it acted in anticipation of litigation before it formally denied the claim, it bears the burden of persuasion by presenting specific evidentiary proof of objective facts demonstrating a resolve to litigate." *Rinaldi*, 123 F.R.D. at 202.

After an exhaustive review of the entries in the claims file at issue in the case before us, we cannot say on this record that the trial court abused its discretion in denying "work product" protection to a large number of the claims diary entries. We now consider whether the trial court abused its discretion in determining that some of the entries in the claims diary were not protected by the attorney-client privilege.

Like the work-product exception, the attorney-client privilege may result in the exclusion of evidence which is otherwise relevant and material. Thus, courts are obligated to strictly construe the privilege and limit it to the purpose for which it exists. *Upjohn Co. v. United States*, 449 U.S. 383, 66 L. Ed. 2d 584 (1981); *State v. Smith*, 138 N.C. 700, 50 S.E. 859, 860 (1905).

The attorney-client privilege operates to protect confidential communications between attorneys and their clients. "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389, 66 L. Ed. 2d at 591. The privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable counsel to give sound

and informed advice. *Upjohn*, 449 U.S. at 390, 66 L. Ed. 2d at 592; *Jones v. Marble Co.*, 137 N.C. 237, 239, 49 S.E.2d 94, 95 (1904).

[5] The burden of establishing the attorney-client privilege rests upon the claimant of the privilege. A privilege exists if "(1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated, and (5) the client has not waived the privilege. *State v. McIntosh*, 336 N.C. 517, 523-24, 444 S.E.2d 438, 442 (1994) (quoting *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981)).

[6] The mere fact that the evidence relates to communications between attorney and client alone does not require its exclusion. "Only confidential communications are protected. If it appears by extraneous evidence or from the nature of a transaction or communication that they were not regarded as confidential, or that they were made for the purpose of being conveyed by the attorney to others, they are stripped of the idea of a confidential disclosure and are not privileged." *Dobias v. White*, 240 N.C. 680, 684-85, 83 S.E.2d 785, 788 (1954) (citation omitted). Thus, although the protection given to communications between attorney and client apply equally to in-house counsel, *see generally Upjohn*, 449 U.S. 383, 66 L. Ed. 2d 584; *Shelton v. American Motors Corp.*, 805 F.2d 1323 n.3 (8th Cir. 1986), an insurance company and its counsel may not avail themselves of the protection afforded by the attorney-client privilege if the attorney was not acting as a legal advisor when the communication was made.

Here, it appears that the twenty-one diary entries found by the trial court to be protected by the attorney-client privilege were either requests to counsel for advice and opinions, or were counsel's reply to such requests. Upon careful review of the record, we find no evidence that the trial court abused its discretion when it ordered the partial production and partial protection of the claims diary entries.

B.

[7] Defendants also argue that the trial judge erred in compelling discovery of an investigative report compiled by independent claim

adjusters (Ward-THG) hired by defendants. The report, dated 22 May 1996, contains an accident report, interviews with plaintiff and the investigating police officer, and photographs of the accident scene. Defendants argue that the trial court erred in failing to find the Ward-THG report shielded from discovery as work product. We disagree. Defendants hired Ward-THG as part of its investigation into plaintiff's claim and considered the report in making a decision about whether to deny the claim. As we point out above, we cannot find as a matter of law that defendants could "reasonably anticipate" litigation of a coverage question before the investigative procedure was completed and before defendants denied plaintiff's claim. We find no evidence that the trial judge abused his discretion in ordering the production of the Ward-THG report.

C.

[8] Next, both parties argue that the trial court erred in its order regarding production of defendants' internal memoranda. Of the thirteen documents marked as exhibits, the trial court required that defendants produce four of the documents. All of the remaining documents appear to have been either generated by defendants' claims counsel or directed to counsel, and all appear to be focused on the central legal question of whether the automobile at issue in this case was in "dead storage" at the time of the accident in question. Applying our decisions with regard to attorney-client privilege as discussed above, we cannot find that the trial court abused its discretion in declining to order production of these documents. The four memoranda ordered to be produced by the trial court were also generated by defendants' in-house counsel, but are brief notations with regard to action being, or to be, taken on the claim. While there is a cogent argument that several of the memoranda ordered disclosed are protected by attorney-client privilege, we cannot find that the order requiring their production was an abuse of discretion by the trial court.

D.

[9] Finally, defendants contend that the trial court erred in ordering the production of four portions of defendants' online procedures manual, a reference database containing voluminous information to assist in the investigation and disposition of insurance claims. The document marked Exhibit 17 is a detailed description of intracompany claims handling procedures. Plaintiff argues that he is entitled to discover this document to determine whether defendants complied

with their own internal procedures in denying the homeowners' claim giving rise to this litigation. Likewise, Exhibit 20 is a document which contains guidelines for referring claim files to in-house or private counsel for resolution of legal issues. There is no evidence of record that defendants' employees consulted these procedural manuals in making the coverage decision in this case, and defendants argue that their contents are irrelevant to this litigation. While the documents might not be admitted at a future trial, we cannot say as a matter of law that the information sought is not "reasonably calculated" to lead to the discovery of admissible evidence. *See* N.C. Gen. Stat. § 1A-1, Rule 26(b)(1). Therefore, considering the broad parameters of relevancy in the discovery process, we cannot say that the trial court abused its discretion in ordering production of Exhibits 17 and 20.

Exhibit 18 is a distillation of research into court decisions involving the definition of "dead storage," and suggests some of the facts and circumstances that are important in determining when an automobile is in "dead storage" for insurance purposes. Exhibit 19 is a collection of laws and regulations in the area of claims handling and unfair claims practices. Defendants argue that this information is available to plaintiff elsewhere, and to require production of these documents gives plaintiff the benefit of defendants' research. While this is an argument a trial court may properly consider in ordering production of documents of this sort, in this case we cannot find that the trial court abused its discretion in requiring their production.

We find support for our position in the decisions of other jurisdictions and the federal courts. *See, for example, Blockbuster Entertainment Corp. v. McComb Video*, 145 F.R.D. 402, 404-05 (M.D. La. 1992) (policy manuals are discoverable); *Hoechst Celanese v. National Union*, 623 A.2d 1099, 1107 (Del. 1991) (internal policy memoranda and guidelines discoverable).

In summary, we have reviewed the trial court's rulings on these discovery motions under an abuse of discretion standard, there having been no request that the trial court make findings of fact or conclusions of law with regard to its rulings. We also stress that important related questions, such as waiver of the attorney-client privilege and a demonstration of the necessity for production of documents otherwise protected as work product, are not before us on this appeal but are for another day.

It appearing that the trial court conscientiously examined all documents in question herein and soundly exercised its discretion in

light of case law interpreting our discovery rules, the orders of the trial court must be, and hereby are

Affirmed.

Chief Judge EAGLES and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. VANCE CLEGG

No. COA99-1554

(Filed 6 February 2001)

1. Bail and Pretrial Release— domestic violence—unconstitutional detention—effect on superseding charges

The statute permitting detention of a defendant arrested for domestic violence for a period of up to 48 hours to await a hearing before a judge on the conditions of pretrial release, N.C.G.S. § 15A-534.1(b), was unconstitutionally applied to defendant in violation of procedural due process as to the original charge of assault on a female where defendant was not taken before a judge until Monday afternoon some 39 hours after he was arrested although judges were available earlier in the day. However, defendant's unconstitutional detention did not entitle him to dismissal of a superseding indictment charging him with assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury because: (1) the defendant's original assault on a female charge was dismissed by the State; (2) the State has a compelling interest in the superseding felony assault charges when the victim's injuries were more serious than had been originally suspected; and (3) defendant has failed to prove he was irreparably prejudiced in the prosecution of the superseding charges by his unconstitutional detention.

2. Criminal Law— self-defense—whether someone was aggressor—jury inquiry—additional instruction

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury by responding to a jury question concerning whether someone was an aggressor for purposes of the self-defense rule and by giving an additional instruction based on the

jury's inquiry as contemplated by N.C.G.S. § 15A-1234(a), because: (1) defendant has not demonstrated that he was prejudiced by the trial court's failure to allow him an opportunity to be heard; (2) defendant's concession that the court's answer to the jury's inquiry was correct shows there was no prejudice in the trial court's response; and (3) any prejudice resulting from the trial court's answer, if at all, was suffered by the State.

3. Criminal Law— requested jury instruction—ability to evict trespassers—adequate self-defense instruction

The trial court did not abuse its discretion in a prosecution for assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury by denying defendant's request for an additional instruction on the ability to evict trespassers, because: (1) there was no jury confusion since the trial court instructed on self-defense concerning whether defendant could be an aggressor, and not on trespass or the ability to evict trespassers; and (2) the evidence did not warrant an instruction on the ability to evict trespassers when defendant used excessive force.

Appeal by defendant from judgment entered 29 April 1999 by Judge Robert H. Hobgood in Superior Court, Durham County. Heard in the Court of Appeals 9 November 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Donald R. Esposito, Jr., for the State.

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

TIMMONS-GOODSON, Judge.

Vance Clegg ("defendant") was convicted of assault inflicting serious bodily injury and assault inflicting serious injury. The trial court arrested judgment for the assault inflicting serious injury conviction. The court sentenced defendant to a term of nineteen to twenty-three months imprisonment. Defendant now appeals.

The State's evidence at trial tended to show the following: Defendant and his girlfriend Jacquetta Sanders ("Sanders") had been dating for approximately one year. While defendant and Sanders were watching television in defendant's bedroom, an argument developed. Defendant locked the front door and punched Sanders in the face. As

Sanders fell to the floor, defendant continued to strike her. Sanders then hit defendant in the face with a shoe, and at some point defendant hit Sanders with that same shoe. Defendant further struck Sanders on the side of her head with a "fake tree," picked up a glass ashtray from a table in the living room, and hit her about her face and head with the ashtray. Defendant threw the ashtray at Sanders. As Sanders attempted to block the ashtray with her hand, the ashtray shattered.

Defendant asked Sanders to leave, at which time she left the residence and subsequently sought medical treatment at a local hospital. Sanders testified at trial that the actual assault occurred in the early morning hours of 28 February 1998.

Medical records disclosed that upon being seen at the hospital, Sanders complained of pain and swelling to her lip, and difficulty moving her left hand and wrist. An examination revealed no significant trauma or injury to Sanders' teeth and mid-face. Sanders reported that the injury to her wrist was the result of her boyfriend throwing an ashtray at her.

As a result of her injuries, Sanders had surgery to correct cut tendons in her left hand. Dr. Lawrence Levine, the surgeon who performed the procedure, testified that the injury to the tendons could have been caused by an ashtray and that as a result of the injury, Sanders suffered impaired functioning to her left hand. Sanders' hospital bills totaled approximately $16,000.

In addition to her testimony concerning the 28 February incident, Sanders testified that two or three days before the incident, as she was leaving defendant's house in her car, defendant grabbed her by the hair, pulled her into his house, punched and kicked her about the head, and banged her head against the floor. Sanders stated that as a result, she sustained bruises and swelling on her back and face, a black eye, and a knot on her forehead. Sanders did not seek medical treatment for these injuries.

Durham police officers R.D. Miller ("Miller") and J.A. Carlett ("Carlett") interviewed Sanders concerning the 28 February incident. Based on Sanders' recount of that incident, Officer Miller obtained a warrant for defendant's arrest.

Defendant testified to a very different version of the facts. According to defendant, Sanders picked him up from work on 27 February, and while the couple were en route to his home, he

received a page. After arriving at his house, defendant continued to receive pages, but he did not answer them. Sanders became angered by the pages, because she felt that they were contacts from another woman. Defendant testified that Sanders then became "shrill" and "real loud." Sanders further began cursing and poking defendant in the head. Defendant twice requested that Sanders leave, but she continued to "fuss and cuss."

Defendant further testified that he took Sanders by the arm, "escort[ed]" her out of the bedroom toward the front door, and told her their relationship was over. Sanders continued to curse and scream. As defendant attempted to remove Sanders from the house, she grabbed defendant's box cutter, partially opened it, and approached him with it. Defendant attempted to block Sanders and move out of her reach. Defendant testified that the box cutter's blade was fairly dull. Defendant stated that while Sanders continued to approach him with the box cutter, he threw an ashtray at her "to get the box cutter out of her hand" and "to defend [him]self and [his] home after [he] asked her to leave." Defendant further testified that he was scared Sanders would "really hurt" him or kill him with the box cutter. Defendant stated that he did not hit Sanders with a shoe or "fake tree." Sanders left after the ashtray hit her hand.

Defendant testified that after the encounter, he had knife cuts on his arms, his sweater was bloody, and he was "bleeding real bad." Defendant noted that he visited the emergency room because the swelling in his arm became so painful, he "couldn't take it no more." Defendant's mother, Geraldine Peace ("Peace"), testified that when she saw defendant after the incident, his arm and knuckles were bloody. Peace further testified that defendant told her shortly after the incident, that he and Sanders had gotten into a fight and he threw an ashtray at Sanders to prevent her from cutting him. Peace also stated that her son and Sanders had a good relationship prior to the 28 February incident and that she had never seen them act violently toward each other.

Defendant's main complaint when being seen at the emergency room were multiple abrasions and lacerations on his left hand. Defendant had fifteen to twenty minor lacerations on his left forearm and a deeper cut on his left hand, which required sutures. Dr. Peter Brady ("Dr. Brady"), who attended to defendant's injuries following the 28 February incident, testified that defendant's injuries could have been caused by a box cutter. Dr. Brady further testified that the shallowness of the wounds on defendant's arm might be due to a dull

blade, a blade that was not fully extended, or the thick clothing worn by defendant.

Peace testified that after she took defendant to the emergency room, she and defendant visited the magistrate's office to swear out a warrant against Sanders. However, defendant was arrested before he could take any action.

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[1] We first address defendant's contention that the trial court erred in denying his motion to dismiss the charges against him on the grounds that North Carolina General Statutes section 15A-534.1(b) was unconstitutionally applied to him. On a motion by defendant, the trial court "must dismiss the charges stated in a criminal pleading if it determines that . . . [t]he defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (1999). "A motion to dismiss under section 15A-954(a)(4) is to be granted only sparingly." *State v. Roberts*, 135 N.C. App. 690, 695, 522 S.E.2d 130, 133 (1999) (citation omitted), *disc. review denied*, 351 N.C. 367, 543 S.E.2d 142 (2000).

Defendant was originally arrested for assault on a female on Saturday, 28 February 1998, and placed in custody around 7:00 p.m. Defendant was denied bond by a magistrate, who noted on defendant's "Release Order" to "[h]old 48 hours, must bring before a judge/magistrate for bond hearing prior to 48 hours of being released[.]" The magistrate also wrote "domestic violence" on the order. On Monday, 2 March 1998, Durham County District Court convened at 9:00 a.m. and Durham County Superior Court convened at 10:00 a.m. Defendant was taken to district court at approximately 2:00 p.m., and sometime between 2:00 p.m. and 5:00 p.m., defendant was given a $500 secured bond.

The State determined that Sanders' injuries were more serious than originally surmised. On 25 March 1998, the State dismissed defendant's assault on a female charge and arrested defendant for assault with a deadly weapon inflicting serious injury. Based on that charge, defendant's secured bond was set at $500. Defendant was subsequently indicted for assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury.

Defendant moved to dismiss the charges against him, relying exclusively on *State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277

(1998), a case announced after the original assault on a female charge was dismissed. Following a hearing, the trial court denied defendant's motion. The court found as fact that although there were several district and superior court judges available before defendant was brought to court, "defendant spent almost 48 hours, approximately 39 hours including two nights in jail without bond." The court therefore found that defendant was not brought to court at the first available opportunity.

The court concluded that based on the magistrate's order and the delay in bringing defendant before a judge or magistrate, defendant was unconstitutionally detained under section 15A-534.1. The trial court refused, however, to dismiss defendant's current assault charges, because "[t]he defendant's original 'domestic violence charge' was dismissed by the [State] and the [State] has a compelling interest in the superceding felony indictments."

The court further found:

> [The superceding assault] charges came about after the district attorney's office discovered the victim allegedly was more seriously injured than had been originally suspected, and who allegedly had incurred some $17,000 in medical bills. . . . Presumably, under defendant's theory expounded to the Court, should the victim incur . . . complications and die, the [State] would be precluded from seeking a murder indictment against [him].

Defendant contends on appeal that the court was correct in finding that section 15A-534.1 was unconstitutionally applied to him in accordance with *Thompson*. We agree.

Section 15A-534.1 provides, in pertinent part:

> (a) In all cases in which the defendant is charged with assault on or communicating a threat to a spouse or former spouse or a person with whom the defendant lives or has lived as if married, with domestic criminal trespass, or with violation of an order entered pursuant to Chapter 50B, Domestic Violence, of the General Statutes, the judicial official who determines the conditions of pretrial release shall be a judge, ...
>
> . . . .
>
> (b) A defendant may be retained in custody not more than 48 hours from the time of arrest without a determination being made

> under this section by a judge. If a judge has not acted pursuant to this section within 48 hours of arrest, the magistrate shall act under the provisions of this section.

N.C. Gen. Stat. § 15A-534.1(a), (b) (1999).

In *Thompson*, 349 N.C. 483, 508 S.E.2d 277, the defendant was arrested on three charges, one of which was a domestic violence charge. No evidence was presented indicating that the victim and the defendant were in a domestic partner relationship. On the defendant's release order, instead of authorizing defendant's release pending trial, the magistrate "denied bond, designated defendant as a 'Domestic violence' arrestee, and ordered him sent to jail." *Id.* at 489, 508 S.E.2d at 280. The defendant's commitment order did not authorize his release for a bond hearing until forty-eight hours later. Defendant was arrested on a Saturday.

Although two superior court and two district court judges were available Monday morning, the defendant's bond hearing was held on Monday afternoon. Thus, the "[d]efendant was not brought before a judge upon the opening of court on Monday morning. He, instead, remained in jail until Monday afternoon, almost forty-eight hours after his arrest." *Id.* at 497, 508 S.E.2d at 285-86.

The *Thompson* defendant argued on appeal that section 15A-534.1(b) was facially unconstitutional and unconstitutionally applied to him in violation of procedural due process, substantive due process, and the Double Jeopardy Clause of the United States Constitution. The Court rejected the argument that section 15A-534.1(b) was unconstitutional on its face. *Id.* at 496, 508 S.E.2d at 285. However, the Court agreed with the defendant that the statute was unconstitutional as applied, concluding:

> Under these discrete facts, we agree with defendant that the magistrate's order automatically detaining him without a hearing until well into the afternoon, while available judges spent several hours conducting other business, violated his procedural due process rights to a timely pretrial-release hearing under N.C.G.S. § 15A-534.1(a).

Id. at 498, 508 S.E.2d at 286. The Court further concluded, "Because defendant did not obtain his hearing before a judge regarding his bail and conditions of release 'as soon as [was] reasonably feasible,' defendant was detained longer than necessary to serve the State's interest in having a judge, rather than a magistrate, determine the

conditions of his pretrial release." *Id.* at 502, 508 S.E.2d at 289 (alteration in the original) (citation omitted).

The *Thompson* court made it clear that in determining whether section 15A-534.1 is unconstitutionally applied, courts should analyze the particular circumstances of each case. *Id.* at 498, 508 S.E.2d at 286. The Court further noted that it was disposing of the case "solely upon procedural due process grounds." *Id.* at 503, 508 S.E.2d at 289.

We find *Thompson* on all fours with the circumstances surrounding defendant's pretrial detention for the assault on a female charge. Defendant's release order specified that he was to be held forty-eight hours and brought before the court prior to that time. Despite the availability of judges earlier in the day, defendant was not taken in front of a judge until sometime between 2:00 p.m. and 5:00 p.m., approximately thirty-nine hours after he was placed in custody. We conclude that under *Thompson*, this delay was unreasonable. As such, "defendant was not given an opportunity to be heard 'at a meaningful time and in a meaningful manner,' and the application of N.C.G.S. § 15A-534.1(b) violated his procedural due process rights." *Id.* at 502, 508 S.E.2d at 289 (citation omitted).

Furthermore, we reject the State's contention that the trial court should not have applied *Thompson* retroactively. Our appellate courts have applied the analysis of *Thompson* in at least three cases where the defendants were arrested prior to the *Thompson* decision. *See, e.g., State v. Malette*, 350 N.C. 52, 509 S.E.2d 776 (1999) (defendant arrested on 3 December 1995); *State v. Gilbert*, 139 N.C. App. 657, 535 S.E.2d 94 (2000) (defendant arrested on 30 October 1997); *State v. Jenkins*, 137 N.C. App. 367, 527 S.E.2d 672 (defendant arrested on 8 May 1998), *disc. review denied*, 352 N.C. 153, 544 S.E.2d 234 (2000). Accordingly, we conclude that the court correctly applied *Thompson*, finding that defendant's procedural due process rights were violated by his detention for the now dismissed assault charge.

Although we find defendant was unconstitutionally detained in connection with the original charge, defendant must further demonstrate that the violation of his constitutional procedural due process rights in relation to the dismissed charge irreparably prejudiced the present case. N.C. Gen. Stat. § 15A-954(a)(4). Defendant asserts on appeal, as he did below, that sound policy dictates that the superceding indictment should have been dismissed because "the State should

not be rewarded for failing to initially bring the correct charges." Defendant also contends, "[T]o hold otherwise would encourage the State to bypass *Thompson* by holding 'domestic violence' defendants in custody and bring new charges based on the same conduct." Such practices, defendant argues, violate due process as guaranteed by our State and United States Constitutions. We are not so persuaded.

Defendant's argument, albeit novel and creative, is not supported by any authority, *cf. State v. Thompson*, 110 N.C. App. 217, 429 S.E.2d 590 (1993) (holding that where appellant fails to cite authority in support of an argument, the assignment of error upon which that argument is based will be deemed abandoned), nor do we find that it has merit in relation to the present case. No misconduct can be imputed to the State, because it could not have known that our Supreme Court would later render the application of section 15A-534.1 unconstitutional. Furthermore, the State did not dismiss the assault on a female charge and subsequently file different, more severe charges against defendant to avoid the consequences of an unconstitutional pretrial detention. Rather, as found by the trial court, the State's actions were based on information that Sanders' injuries were more serious than originally thought. Defendant has therefore failed to prove he was irreparably prejudiced in the prosecution of the superceding charges by his unconstitutional detention.

Aside from his reliance on *Thompson*, defendant does not argue that the violation of his rights in relation to the dismissed charge had any unconstitutional consequence to or otherwise affected his prosecution on the superceding charges. Accordingly, we find no error in the trial court's refusal to dismiss the superceding charges.

[2] We next address defendant's contention that the trial court erred in responding to a jury question and further erred in refusing to give an additional instruction based on the jury's inquiry.

The trial court instructed the jury on self-defense and the duty to retreat:

> [S]elf-defense is an excuse only if the defendant himself was not the aggressor. If he voluntarily entered into the fight, he was the aggressor unless he thereafter attempted to abandon the fight and gave notice to his opponent that he was doing so.
>
> . . . When a person who is free from fault bringing on a difficulty is attacked in his own home, the law imposes on him no duty to retreat before he can justify his fighting in self-defense

> regardless of the character of the assault, but is entitled to stand his ground, to repel force with force and to increase his force so as not only to resist, but also to overcome the assault and secure himself from all harm. This, of course, would not excuse the defendant if he used excessive force in repelling the attack and overcoming his adversary.
>
> If you found Vance Clegg was not the aggressor in this incident and that he was in his own home at the time the incident occurred, the law allows him to stand his ground and defend himself from the assault being made upon him, regardless of the nature of the assault. However, he would not be excused if he used excessive force.

After the jury began deliberations, the trial court brought the jury members back into the courtroom and asked them whether they had reached a verdict. The foreperson stated that they had not but did have a question. The foreperson asked, "For purposes of deciding whether someone is aggressive or the aggressor, is asking to leave the house and refusing adequate to be deemed the aggressor?" The trial court answered, "No," and excused the jury. The court then asked both the State and defendant whether they had "any objections, corrections or additions of [sic] the answers to the question posed by the jury?" Both answered, "None."

Upon reflection, defendant informed the court that he had an objection to the court's answer to the jury's question and requested additional jury instructions on the ability to evict trespassers. The court denied the objection. Defendant further objected, arguing that the jury's question was ambiguous. The court overruled the objection, noting that it had already instructed the jury on self-defense and in its opinion, it "ha[d] adequately instructed [the jury] on [the] available defense under the law."

Defendant argues on appeal that the jury's question was ambiguous, in that it could have been asking (1) "whether the fact that Sanders was asked to leave and she refused was sufficient to deem *her* an aggressor," or (2) "whether the fact that defendant asked Sanders to leave and she refused was sufficient to deem *defendant* an aggressor." Defendant argues that the court's response constituted an additional instruction, and therefore neither he nor the State were not afforded an opportunity to discuss the question in violation of section 15A-1234(c) of our General Statutes. Defendant further argues that

the trial court's answer to the jury's question was ambiguous and therefore prejudicial. We disagree with defendant's arguments.

A trial court may give "additional instructions" to respond to jury inquiries, to correct an erroneous instruction, to clarify an ambiguous instruction, or to instruct the jury on law which should have been included in the original instructions. N.C. Gen. Stat. § 15A-1234(a) (1999).

> Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. The parties upon request must be permitted additional argument to the jury if the additional instructions change, by restriction or enlargement, the permissible verdicts of the jury. Otherwise, the allowance of additional argument is within the discretion of the judge.

N.C.G.S. § 15A-1234(c).

Assuming, *arguendo*, that the trial court's response to the jury's inquiry was an additional instruction as contemplated by section 15A-1234(a), defendant has not demonstrated that he was prejudiced by the court's failure to allow him an opportunity to be heard. Defendant concedes in his brief that if the jury was asking "whether the fact that Sanders was asked to leave and she refused was sufficient to deem *her* an aggressor," the court's response in the negative was "probably correct." Given defendant's concession that the court's answer to this interpretation of the jury's inquiry was correct, we find no prejudice in the court's response. *Cf. State v. Rich*, 132 N.C. App. 440, 512 S.E.2d 441 (1999) (finding that where additional instructions were correct, different outcome was not likely and therefore defendant suffered no prejudice), *aff'd*, 351 N.C. 386, 527 S.E.2d 299 (2000).

Defendant argues that if the jury was asking "whether the fact that defendant asked Sanders to leave and she refused was sufficient to deem *defendant* an aggressor," the court's response was "incorrect or misleading." We also find no prejudice in the court's response to this interpretation of the inquiry because the response, right or wrong, was beneficial to defendant. From this response, a jury would tend to infer that defendant was not an aggressor under those circumstances, and according to the court's self-defense instruction, he was entitled to defend himself against an unprovoked attack. Thus, the prejudice resulting from the court's answer, if at all, was suffered by the State. Accordingly, this argument fails.

[3] Defendant next argues that the trial court should have granted his request for an instruction on the ability to evict trespassers. Defendant asserts that the jury's question indicated their confusion as to whether defendant could legally evict Sanders if she were a trespasser. Defendant contends that the evidence was sufficient to warrant an instruction on his ability to evict trespassers, and such an instruction would have clarified the jury's confusion. With this argument, we also disagree.

It is within the trial court's discretion to determine whether additional instructions are needed to dispel jury confusion. *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986). We therefore apply an abuse of discretion standard of review in determining whether the court erred in refusing to give defendant's requested instruction.

First, it is illogical for the court to assume that the jury's question demonstrated their confusion concerning whether Sanders was a trespasser or whether defendant had a right to use force in evicting her, because the court did not instruct the jury on trespass or the ability to evict trespassers. Rather, in the context of the court's self-defense instruction, the jury was more than likely asking whether defendant could be considered an aggressor, in that he started a fight by asking Sanders to leave. *See cf. State v. Dial*, 38 N.C. App. 529, 533, 248 S.E.2d 366, 368 (1978) (citation omitted) (Jury instructions "must be read contextually, and an excerpt will not be held prejudicial if a reading of the instructions in their entirety leaves no reasonable ground to believe that the jury was misled.")

Second, assuming defendant's request was timely, the evidence did not warrant an instruction on the ability to evict trespassers. Where "a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance." *State v. Garner*, 340 N.C. 573, 594, 459 S.E.2d 718, 729 (1995) (citations omitted). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions . . . , courts must consider the evidence in the light most favorable to [the] defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citations omitted).

It is a well-established principle:

> [W]hen a trespasser invades the premises of another, the latter has the right to remove him, and the law requires that he should first request him to leave, and if he does not do so, he should lay

> his hands gently upon him, and if he resists, he may use sufficient force to remove him, taking care, however, to use no more force than is necessary to accomplish that object.

State v. McCombs, 297 N.C. 151, 157, 253 S.E.2d 906, 911 (1979) (citations omitted). However, a person may not use deadly force or force likely to cause great bodily harm against a trespasser already in his home. *See State v. King*, 49 N.C. App. 499, 504, 272 S.E.2d 26, 30 (1980) (discussing trespass in case concerning defense of habitation instruction).

Assuming that the jury accepted defendant's account of the evidence as true, Sanders may have at some point become a trespasser. However, the evidence establishes that defendant used more force than was necessary to evict Sanders. According to his own testimony, defendant threw the glass ashtray at Sanders. Sanders testified that the ashtray was six inches across and three to four inches thick. Given the nature of the ashtray and Sanders' resulting injuries, the evidence demonstrated that defendant used force at least great enough to cause serious bodily injury. Because he was not allowed to use such force in evicting a trespasser, the evidence did not support defendant's requested instruction.

Furthermore, defendant himself never testified that he threw the ashtray in an effort to evict Sanders. Instead, defendant testified that he was attempting "to get the box cutter out of [Sanders'] hand" and "to *defend* [him]self and [his] home after [he] asked her to leave." (Emphasis added.) Peace likewise testified that defendant told her shortly after the incident that he threw the ashtray in an effort to prevent Sanders from cutting him. Based on this and other testimony, we conclude the court "adequately instructed [the jury] on [the] available defense under the law[,]" self-defense. Therefore, we find no abuse of discretion in the court's refusal to give an instruction on defendant's ability to evict trespassers.

Finally, defendant assigns as error the admission of evidence concerning a prior incident between him and Sanders for the purpose of demonstrating defendant's intent in relation to the 28 February incident. We have reviewed defendant's argument, and find it to be wholly without merit.

In our judgment, defendant received a fair trial, free from prejudicial error.

No error.

Judges MARTIN and EDMUNDS concur.

Judge EDMUNDS concurred prior to 31 December 2000.

BENJAMIN F. McCALLUM, PLAINTIFF-APPELLEE v. NORTH CAROLINA COOPERATIVE EXTENSION SERVICE OF N.C. CAROLINA STATE UNIVERSITY AND PATRICIA BARBER IN HER OFFICIAL CAPACITY, DEFENDANTS-APPELLANTS

No. COA99-1434

(Filed 6 February 2001)

1. **Appeal and Error— appealability—denial of summary judgment—collateral estoppel—substantial right**

The denial of a motion for summary judgment based on collateral estoppel may affect a substantial right and defendants' appeal, although interlocutory, was properly before the Court of Appeals.

2. **Collateral Estoppel and Res Judicata— collateral estoppel—state constitutional claim—issues previously litigated in federal court**

Collateral estoppel may prevent the re-litigation of issues that are necessary to the decision of a North Carolina constitutional claim and that have been previously decided in federal court. Holding that state courts are never barred from hearing state constitutional claims, even when such issues have been previously litigated in the federal courts, would violate the underlying principle of judicial economy that precipitated the creation of the collateral estoppel and res judicata doctrines.

3. **Collateral Estoppel and Res Judicata— collateral estoppel—employment termination—discriminatory intent and improper motivation—previously litigated in federal court**

The trial court erred when it refused to grant defendants' motion for summary judgment based on collateral estoppel of plaintiff's claims of racial discrimination, equal protection violations, and retaliatory discharge. The issues of defendants' discriminatory intent and improper motivation were tried in federal

court after full discovery, with resolution of those issues being material and necessary to the judgment in that court.

4. Public Officers and Employees— state employee—termination—due process—employee at will

An Agricultural Extension Agent was barred from bringing a due process claim arising from his discharge because he was an employee-at-will with no cognizable property right in his employment. A letter appointing defendant County Extension Director upon which plaintiff relied to contend that there were mutually explicit understandings of continued employment revealed no understanding regarding plaintiff's status as an Agricultural Extension Agent, a document concerning tenure for the County Extension Director merely expressed the possibility of continued employment as an agent if plaintiff failed to perform satisfactorily in the Director position, and, although the plaintiff's termination was not first discussed with the Richmond County Board of Commissioners, as had been agreed in a memorandum of understanding between the Board and defendants, the Board's role did not extend to actual authority over the extension service's ability to discharge employees.

Appeal by defendants from order entered 13 July 1999 by Judge Michael E. Beale in Richmond County Superior Court. Heard in the Court of Appeals 21 September 2000.

In August 1995, defendant North Carolina Cooperative Extension Service (NCCES) of North Carolina State University discharged plaintiff Benjamin F. McCallum from his employment as an Agricultural Extension Agent. In April 1997, plaintiff filed a complaint in Richmond County Superior Court against NCCES and the District Extension Director for Richmond County, alleging retaliatory discharge and equal protection violations under the United States Constitution, race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, and a violation of his rights under Article I, §§ 1, 12, 14, and 19 of the North Carolina Constitution. Defendants removed the action to the United States District Court for the Middle District of North Carolina. After the completion of discovery, defendants moved for summary judgment. On 4 January 1999, the United States District Court granted defendants' motion for summary judgment on all claims based on violations of federal law and dismissed without prejudice the claims based on alleged violations of the North Carolina Constitution. In granting summary judgment, the

federal court stated that plaintiff had failed to show any discriminatory intent by NCCES. Further, the federal court found that plaintiff could not show a causal connection between any constitutionally protected activities and his discharge from employment.

In February 1999, plaintiff filed a second complaint in Richmond County Superior Court, in which he again alleged that he was discharged from employment in violation of the North Carolina Constitution. Defendants moved for summary judgment, contending that plaintiff's claims for violation of equal protection rights, racial discrimination, and retaliatory discharge were barred under the doctrine of collateral estoppel because of the federal court adjudications, and that plaintiff's due process claim was barred because plaintiff was an at-will employee with no property right in his employment. Defendants further contended that, if plaintiff were subject to the State Personnel Act, then he had an alternate remedy under that Act which he had not exhausted.

On 13 July 1999, the trial court denied defendants' motion for summary judgment, and they appealed to this Court.

McSurely & Osment, by Alan McSurely and Ashley Osment, for plaintiff appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Celia Grasty Lata, for defendant appellants.

HORTON, Judge.

[1] The denial of summary judgment is not a final judgment, but rather is interlocutory in nature. We do not review interlocutory orders as a matter of course. *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). If, however, "the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review[,]" we may review the appeal under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1). *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party. *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Whether a substantial right is affected is determined on a case-by-case basis. *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982).

We have ruled that "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999); *Derwort v. Polk County*, 129 N.C. App. 789, 790, 501 S.E.2d 379, 380 (1998). As a state agency, NCCES is shielded by sovereign immunity from suits based on torts committed while performing a governmental function. Therefore, to the extent defendants' appeal is based on an affirmative defense of immunity, this appeal is properly before us.

Further, our Supreme Court has ruled that the denial of a motion for summary judgment based on the defense of *res judicata* (or claim preclusion) is immediately appealable. *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). Under the doctrine of *res judicata*, a final judgment on the merits in a prior action precludes a second suit involving the same claim between the same parties. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). Denial of a summary judgment motion based on *res judicata* raises the possibility that a successful defendant will twice have to defend against the same claim by the same plaintiff, in frustration of the underlying principles of claim preclusion. *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161. Thus, the denial of summary judgment based on the defense of *res judicata* can affect a substantial right and may be immediately appealed. *Id.*

Like *res judicata*, collateral estoppel (issue preclusion) is " 'designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally.' " *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (quoting *Commissioner v. Sunnen*, 333 U.S. 591, 599, 92 L. Ed. 898, 907 (1948)). Under collateral estoppel, parties are precluded from retrying fully litigated issues that were decided in any prior determination, even where the claims asserted are not the same. *McInnis*, 318 N.C. at 428, 349 S.E.2d at 557. The denial of summary judgment based on collateral estoppel, like *res judicata*, may expose a successful defendant to repetitious and unnecessary lawsuits. Accordingly, we hold that the denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right, and that defendants' appeal, although interlocutory, is properly before us.

Summary judgment is appropriate when there is no genuine issue as to any material fact, and a party is entitled to a judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). Defendants

assert, on two separate grounds, that they are entitled to such judgment. Defendants first contend that issues dispositive of plaintiff's claims of racial discrimination, equal protection violations and retaliatory discharge have already been litigated to final judgment by the federal court, and that collateral estoppel bars re-litigation of these issues. Second, they argue that plaintiff was an at-will employee with no property right in his employment. We will consider each argument separately.

I. Collateral Estoppel

[2] Under the doctrine of collateral estoppel, when an issue has been fully litigated and decided, it cannot be contested again between the same parties, even if the first adjudication is conducted in federal court and the second in state court. *King*, 284 N.C. at 359, 200 S.E.2d at 807. Plaintiff argues, however, that collateral estoppel cannot bar a state constitutional claim based on a denial of equal protection or due process, regardless of previous federal court adjudications, because only North Carolina courts can " '[answer] with finality' " " '[w]hether rights guaranteed by the Constitution of North Carolina have been provided . . . .' " *Evans v. Cowan*, 122 N.C. App. 181, 184, 468 S.E.2d 575, 577, *disc. review denied, appeal retained*, 343 N.C. 510, 471 S.E.2d 634, *affirmed*, 345 N.C. 177, 477 S.E.2d 926 (1996) (quoting *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984)). Plaintiff contends that since "[o]ur courts . . . when construing provisions of the North Carolina Constitution, are *not* bound by opinions of the federal courts 'construing even identical provisions in the Constitution of the United States[,]' " defendants' collateral estoppel argument fails. *Evans*, 122 N.C. App. at 183-84, 468 S.E.2d at 577. Plaintiff also bases his argument upon our recent decision in *City-Wide Asphalt Paving, Inc. v. Alamance County*, 132 N.C. App. 533, 513 S.E.2d 335, *appeal dismissed and disc. review denied*, 350 N.C. 826, 537 S.E.2d 815 (1999), which held that neither *res judicata* nor collateral estoppel barred plaintiff's state constitutional claims, even though plaintiff's claims under the federal constitution had been previously litigated in federal court.

We find neither *Evans* nor *City-Wide* controlling in the instant case. Unlike the case before us, the issue before the *Evans* Court was "whether plaintiff's state constitutional claims against defendants are barred by *res judicata*"—not by collateral estoppel. *Evans*, 122 N.C. App. at 183, 468 S.E.2d at 577. In *Evans*, plaintiff's claims, based on violations of both the federal and the state constitutions, were initially litigated in federal court, which granted summary judgment to

defendants as to all but the state constitutional claims. On remand to state court, defendants argued that plaintiff's claims under the state constitution were identical to plaintiff's claims under the federal constitution, and therefore plaintiff's subsequent litigation was barred under the doctrine of *res judicata*. Affirming that North Carolina courts " 'have the authority to construe our own constitution differently from the construction . . . of the Federal Constitution,' " this Court held that "the claims asserted by the plaintiff in the State Court on the basis of the North Carolina Constitution are not identical to the claims asserted by the plaintiff in the Federal Court on the basis of the United States Constitution . . . ." *Evans*, 122 N.C. App. at 184, 468 S.E.2d at 577. Thus, concluded the Court, the doctrine of *res judicata* did not bar plaintiff's claim.

We also find the decision in *City-Wide* distinguishable from the instant case. There, plaintiff appealed its state constitutional law claims to this Court from the trial court's grant of defendants' summary judgment motion. Confusing the principles of collateral estoppel with those of *res judicata*, defendants argued that, because plaintiff's claims under the U.S. Constitution had been previously determined, and because those claims were identical to plaintiff's claims based on violations of the North Carolina Constitution, plaintiff was collaterally estopped from re-litigating "identical issues . . . determined by the federal court." *City-Wide*, 132 N.C. App. at 536, 513 S.E.2d at 337. Defendants failed to specify, however, what the "identical issues" decided by the federal court were. This Court rejected defendants' argument, reaffirming *Evans*' principle that claims brought under the North Carolina Constitution must be independently determined from claims brought under the U.S. Constitution. Thus, neither *res judicata* nor collateral estoppel barred plaintiff's claims.

Like the defendants in *City-Wide*, plaintiff in the instant case conflates the doctrines of collateral estoppel and *res judicata*. The *City-Wide* defendants argued that, because the *claims* in the federal and state courts were essentially identical, the *issues* to be decided by each court were necessarily the same and collateral estoppel barred their re-litigation. Here, plaintiff contends that, because his *claims* in federal and state court are different, the *issues* cannot be the same, and that therefore collateral estoppel cannot apply. We disagree. Although plaintiff's present state court claims are different from those brought in federal court, his state court claims may contain issues previously litigated and determined in the federal court. Thus,

plaintiff may be collaterally estopped from re-litigating these issues. To hold otherwise, as plaintiff suggests we should, would mean that state courts are *never* barred from hearing state constitutional claims or issues pertinent to such claims, even when such issues have been previously litigated in the federal courts. Such a finding would directly violate the underlying principle of judicial economy that precipitated the creation of the collateral estoppel and *res judicata* doctrines as expressed in *King* and *Bockweg*. We reaffirm, therefore, that collateral estoppel may prevent the re-litigation of issues that are necessary to the decision of a North Carolina constitutional claim and that have been previously decided in federal court.

[3] To determine whether collateral estoppel prevents the re-litigation of issues presented by plaintiff in the instant case, we must first ascertain whether issues raised by the present litigation and dispositive of plaintiff's claim are identical to issues decided by the federal court. Collateral estoppel applies when the following requirements are met:

> (1) [t]he issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

King, 284 N.C. at 358, 200 S.E.2d at 806. Here, plaintiff asserts claims under the North Carolina Constitution against defendants for racial discrimination, equal protection violations and retaliatory discharge. We will consider the applicability of collateral estoppel for each claim in turn.

To prevail upon a claim for racial discrimination in either a federal or state court in North Carolina, a plaintiff must establish improper motivation on defendant's part by proffering evidence of discriminatory intent. *Dept. of Correction v. Gibson*, 308 N.C. 131, 138, 301 S.E.2d 78, 83 (1983) (adopting federal guidelines for discrimination cases in North Carolina and noting that the plaintiff carries the burden of showing intentional discrimination by defendant). In the instant case, the issue of whether defendants intentionally discriminated against plaintiff was fully litigated in the federal court. After reviewing all of the evidence, the federal court found that plaintiff failed to present "any 'direct evidence of a purpose [by defend-

ants] to discriminate [against plaintiff] or circumstantial evidence of sufficiently probative force to raise a genuine issue of material fact.' " The federal court then granted defendants' motion for summary judgment on plaintiff's claim for racial discrimination. We hold that the issue of discriminatory intent by defendants was conclusively determined in the federal court, and thus plaintiff is collaterally estopped from re-litigating that issue in this action.

Plaintiff's failure in federal court to establish discriminatory intent by defendants also bars litigation of his equal protection violation claim in state court. In order to prevail upon an equal protection violation claim under the North Carolina Constitution, "the burden is upon the complainant to show the intentional, purposeful discrimination upon which he relies." *Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971). As the federal court has already conclusively ruled against plaintiff upon the issue of discriminatory intent by defendants, collateral estoppel prevents the plaintiff from proceeding on this claim.

Plaintiff also alleges a claim against defendants for retaliatory discharge. During his employment with NCCES, plaintiff was President of the North Carolina Association of Extension Minorities (NCAEM), a group organized to promote African-American interests within the extension agency. Plaintiff asserts that in his capacity as President, he often "spoke out on matters of public concern regarding trends and activities within the Extension Service that were adverse to the interests of African American extension agents and farmers." Plaintiff argues that defendants fired him for his NCAEM leadership, thus violating his constitutionally protected rights of freedom of speech and association.

In challenging an adverse employment decision for violation of constitutional rights, an employee must show that the "protected activity was a substantial or motivating factor in the employer's decision." *Lenzer v. Flaherty*, 106 N.C. App. 496, 509, 418 S.E.2d 276, 284, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992). Although evidence of retaliation may often be completely circumstantial, the causal connection between the protected activity and the discharge "must be something more than speculation." *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 237, 382 S.E.2d 874, 882, *disc. review denied*, 325 N.C. 704, 388 S.E.2d 449 (1989).

In the instant case, plaintiff argued in the federal court that his membership in NCAEM, among other things, triggered defendants'

decision to fire him. The federal court found no evidence, direct or indirect, to support plaintiff's claim, stating that "[n]o reasonable jury could find that McCallum's activities with the NCAEM . . . were a 'motivating part' of his termination . . . ." Thus, the federal court ruled against plaintiff on the exact issue that plaintiff now raises in state court. Plaintiff is therefore collaterally estopped from seeking a state court resolution on the issue of a causal connection between plaintiff's constitutionally protected activities and the adverse employment action taken by defendants. Because the lack of a causal connection is fatal to plaintiff's claim for retaliatory discharge, defendants are entitled to summary judgment on this claim.

The issues of defendants' discriminatory intent and improper motivation were tried in the federal court after full discovery; resolution of those issues was material and necessary to the judgment in that court. The doctrine of collateral estoppel therefore bars the relitigation of these issues in our state trial courts. Because plaintiff cannot, as a matter of law, succeed on his claims, the trial court erred when it refused to grant defendants' motion for summary judgment on plaintiff's claims of racial discrimination, equal protection violations, and retaliatory discharge.

II. Due Process

[4] Defendants also argue that they are entitled to summary judgment on plaintiff's claim that his right to due process as guaranteed by the North Carolina Constitution was violated. Defendants contend that plaintiff is an at-will employee and is, therefore, not entitled to a property right in his employment that would support a claim for due process violations. Alternatively, defendants argue that, if plaintiff is not an at-will employee, he has statutory remedies under the State Personnel Act which he must first exhaust before seeking constitutional reparations.

In North Carolina, both private and public employees may be classified as "at-will" employees. An employer may discharge an "at-will" employee for any reason, including those which are arbitrary, irrational, or illogical, without incurring liability. *Woods v. City of Wilmington*, 125 N.C. App. 226, 229, 480 S.E.2d 429, 432 (1997). An at-will employee has no protected property right in his employment, unless such right is created by statute, ordinance or contract. *Evans v. Cowan*, 132 N.C. App. 1, 6-7, 510 S.E.2d 170, 174; *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 321, 507 S.E.2d 272, 277

(1998). A property interest may also be created if there are " 'mutually explicit understandings that support [a] claim of entitlement . . . .' " *Woods*, 125 N.C. App. at 232-33, 480 S.E.2d at 433 (quoting *Perry v. Sindermann*, 408 U.S. 593, 601, 33 L. Ed. 2d 570, 580 (1972)). Once a property interest in employment is established, it is protected by Article I, Section 19 of the North Carolina Constitution, which states that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19; *Woods*, 125 N.C. App. at 230, 480 S.E.2d at 432.

The State Personnel Act provides one means by which public employees may gain a protected right in employment. Section 126-35 of that Act provides that "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a) (1999). Section 126-5, however, specifically exempts from the protection of the State Personnel Act all "[i]nstructional . . . staff . . . of The University of North Carolina." N.C. Gen. Stat. § 126-5(c1)(8) (1999).

Plaintiff was employed as an Agricultural Extension Agent with the North Carolina Cooperative Extension Service when he was discharged. The Smith-Lever Act created cooperative extension services "[i]n order to aid in diffusing among the people of the United States useful and practical information on subjects relating to agriculture, home economics, and rural energy, and to encourage the application of the same." Smith-Lever Act, 7 U.S.C. § 341 (1994). Cooperative agricultural extension work "consist[s] of the development of practical applications of research knowledge and giving of instruction . . . in agriculture." *Id.* at § 342. Thus, NCCES was established "for the specific purpose of extending the educational service of the University to the people of the state . . . ."

Extension agents are "professional member[s] of the faculty of North Carolina State University or North Carolina A&T State University," both of which are part of The University of North Carolina. One of an agent's main functions is to "[d]evelop[] and maintain[] a comprehensive understanding of the role of the North Carolina Cooperative Extension Service as an educational agency." According to the Associate Dean of the College of Agriculture and Life Sciences at North Carolina State University, who also serves as Director of NCCES, extension agents are "EPA" positions. "EPA" is an abbreviation designating those employees who are exempt from the

State Personnel Act. We find that, as an Agricultural Extension Agent, plaintiff was part of the instructional staff of the UNC system and therefore exempt from the State Personnel Act. Plaintiff cannot establish a property right through the State Personnel Act.

Plaintiff contends that, even if he is not subject to the State Personnel Act, there remain genuine issues of material fact that support plaintiff's claim of a property interest based on "mutually explicit understandings" of continued employment between plaintiff and defendants. To support his claim, plaintiff points out that defendants' letter of July 1993 appointing him to the County Extension Director position did not explicitly state that the position would be "at-will." Plaintiff notes that it was defendants' policy at the time to write "AT WILL" on appointment letters to emphasize the at-will nature of the employment. Because plaintiff's letter lacked the words "AT WILL," he argues that the appointment letter is evidence of "mutually explicit understandings" of plaintiff's continued employment with defendants. We disagree. Plaintiff was discharged from his position as an agent, not as a director. We find that the letter appointing plaintiff to the position of County Extension Director reveals no understanding between plaintiff and defendants regarding his status as an Agricultural Extension Agent. Thus, the appointment letter cannot establish a property right for plaintiff.

Plaintiff also points to an addendum of a document entitled "North Carolina Cooperative Extension Service Promotion and Tenure Policy for County Extension Director" that plaintiff received when he was appointed to the County Extension Director position. The addendum states that, if after one year plaintiff's performance as Director is "unsatisfactory," then he would be reappointed "to a position comparable to the position previously held, if appropriate." Plaintiff contends that this document illustrates the "mutually explicit understandings" of continued employment that existed between himself and NCCES. Again, we must disagree with plaintiff. The tenure policy's conditional language—"if appropriate"—expresses the possibility, not a guarantee, of continued employment as an agent if plaintiff fails to perform satisfactorily in the Director position. Such a qualified statement cannot create the "mutually explicit understandings" of continued employment necessary to create a constitutionally protected property right.

Finally, plaintiff refers this Court to a Memorandum of Understanding that exists between defendants and the Richmond County Board of Commissioners (Board) as a further example of

"mutually explicit understandings." As an agricultural extension service agent, plaintiff worked jointly for both NCCES and Richmond County, both of whom paid plaintiff's salary as an agent. To ensure a smooth working relationship, NCCES and the Board executed a "Memorandum of Understanding," in which NCCES agreed to discuss any termination procedures with the Board before discharging agents working in Richmond County. NCCES, however, discharged plaintiff without first discussing the matter with the Board. The Board subsequently expressed their displeasure with NCCES's action in a document entitled "Resolution Protesting the Procedure of the North Carolina Extension Service and the A & T State Agricultural Extension Program in Discharging Farm Agent Ben McCallum." In the resolution, the Board acknowledges that "the ultimate authority to appoint or separate employees in the Extension Service is the right of the Extension Service and the County Commissioners have no veto power . . . ." Because the Board's role in plaintiff's employment does not extend to any actual authority over NCCES's ability to discharge employees, the Memorandum of Understanding between the Board and NCCES could not create any expectations or "mutually explicit understandings" of continued employment between plaintiff and defendants. We do not find any evidence of such "mutually explicit understandings" that would transform plaintiff's "at-will" employment status and create a property right in plaintiff's employment. Plaintiff therefore remains an "at-will" employee.

In summary, because plaintiff was an employee at-will with no cognizable property right in his employment, he is barred from bringing a due process claim. There being no material issues of fact in dispute, defendants are therefore entitled to judgment as a matter of law. The trial court erred in failing to grant defendants' motion for summary judgment. The judgment of the trial court is, therefore, reversed and remanded for entry of an order granting defendants' motion for summary judgment.

Reversed and remanded with directions.

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. RAPHEAL DWAYNE McEACHIN

No. COA00-144

(Filed 6 February 2001)

1. Homicide— first-degree murder—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of first-degree murder (which resulted in a second-degree murder conviction) where the defendant retrieved a gun from a vehicle and said he would kill the group with whom the victim was walking; defendant subsequently said that he thought he "got one" because he had "seen one drop"; eleven spent shell casings were recovered at the scene and matched a gun used by defendant; defendant admitted firing shots into the air until the gun was emptied; victim identified defendant as the person who shot him; and the victim died of a gunshot wound to the head.

2. Evidence— witness's prior conviction—not probative of truthfulness—introduction not plain error

There was no plain error in a murder prosecution where evidence was introduced concerning a defense witness's pending burglary charge which was not probative of the witness's propensity for truthfulness or untruthfulness, but did not have a probable impact on the jury's determination of the witness's truthfulness because the State presented evidence that the witness had previously been convicted of burglary and the witness testified that he had consumed 4 forty-ounce beers on the evening of the shooting.

3. Criminal Law— prosecutor's argument—defendant's prior convictions

The trial court's failure to intervene ex mero motu in one instance and to grant an objection in another in the prosecutor's closing argument in a murder prosecution did not result in prejudicial error where defendant had testified on cross-examination that he had been convicted of voluntary manslaughter and the prosecutor argued that defendant had killed before. Such evidence is not admissible as substantive evidence and the prosecutor's statements were improper; however, the State presented overwhelming evidence of defendant's guilt and the trial court instructed the jury that it was not to consider evidence of defendant's prior convictions as evidence of defendant's guilt.

Appeal by defendant from judgment dated 16 February 1999 by Judge Steve A. Balog in Richmond County Superior Court. Heard in the Court of Appeals 23 January 2001.

Attorney General Michael F. Easley, by Assistant Attorneys General Daniel P. O'Brien and Amy C. Kunstling, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defenders Bobbi Jo Markert and Daniel R. Pollitt, for defendant-appellant.

GREENE, Judge.

Rapheal Dwayne McEachin (Defendant) appeals a judgment dated 16 February 1999, entered after a jury rendered a verdict finding him guilty of second-degree murder.

The State presented evidence at trial that on 26 August 1997, Robert Kelly (Kelly), John Paul Morrison (Morrison), and Perry Dawkins (Dawkins) were sitting on some "crossties" on Page Street in Hamlet. Kelly testified Natasha Johnson (Johnson) lived in a house located approximately twenty feet from where Kelly and the other men were sitting. During the evening, Morrison walked "down the street" with Johnson, and Morrison and Johnson had an argument. At that time, Defendant, whose nickname is "Boobie," was standing in front of Johnson's house. Defendant "lifted his shirt up like he might have a gun or something." A few seconds later, Kelly saw Morrison fire a gun; however, Kelly could not see what direction Morrison was firing because it was dark. After Morrison fired his gun, Kelly, Morrison, and Dawkins began walking toward a "big field" located off of Page Street. The parties walked in the direction of a business called Rob's Place, which was located across the field. As the parties were walking away from Johnson's house, a car driven by Dwayne Jones (Jones) pulled up near the parties. Defendant stood at the window of the car, and Kelly saw Jones pass something out of the window to Defendant. Defendant then said, " 'I'll kill all you n----,' " and began firing in the direction of the three men. The three men began to run across the field and Kelly heard approximately twelve shots fired. Dawkins was struck by a bullet and fell to the ground. He subsequently died as a result of a gunshot wound to the head. Kelly testified that none of the parties in the field fired any weapons while Defendant was shooting at them.

Jones testified that on the night of the shooting, he drove his girlfriend's vehicle down Page Road. As the vehicle approached the area

near Johnson's house, Jones saw Morrison "running towards the [vehicle] from [Johnson's] house." Defendant approached the vehicle and said, " 'They're shooting at me. They're shooting at me.' " Defendant appeared "frantic," and he asked Jones whether Jones had a gun in the vehicle. Jones then gave Defendant a nine[-]millimeter gun, and Defendant ran in the direction of Rob's Place. Jones immediately began to back the vehicle down Page Road and, as he parked the vehicle, he heard gun shots. Defendant then approached the parked vehicle and got into the vehicle. Defendant told Jones, " 'I think I got one' " because Defendant had "seen one drop." Jones subsequently drove Defendant to the home of a friend, and Defendant put the gun given to him by Jones under a bed.

Dawkins' father testified that he arrived at the scene of the shooting before any medical assistance arrived. Dawkins' father asked Dawkins how badly he was hurt, and Dawkins replied, " 'I don't think I'm going to make it, dad.' " Dawkins' father then asked Dawkins who "did it to him." Dawkins replied, "that he didn't know the guy's real name but he called him Boobie."

Aprille Grant Sweatt (Sweatt), a crime scene specialist for the Richmond County Sheriff's Department, testified that she was assigned to collect evidence from the scene of the shooting incident. Sweatt testified she collected eleven "RP 9[-]millimeter Rugger spent shell casing[s]" at the location where the shooting took place.

Larry Bowden (Bowden), a detective with the Richmond County Sheriff's Department, testified that on 27 August 1997, he spoke with Jones. After speaking with Jones, Bowden recovered a "9[-]millimeter Rugger handgun" from under a mattress in a residence in Hamlet. Jones had a key to the residence and was the "caretaker" of the residence. After the recovery, the gun and the spent shell casings were sent to the North Carolina State Bureau of Investigation (SBI). Ronald Marrs (Marrs), a firearms expert employed as a special agent with the SBI, testified he examined the spent shell casings and the gun. Based on his examination, Marrs concluded the spent shell casings were fired from the gun "to the exclusion of all other firearms."

At the close of the State's evidence, Defendant made a motion to dismiss the charge of first-degree murder on the ground "the State has not shown sufficient evidence of a specific intent to kill." The trial court denied the motion.

Johnson testified for Defendant that on the evening of 26 August 1997, Morrison asked her to come out of her house and speak to him.

Johnson and Morrison then walked down Page Street. While they were talking, they had an argument and Johnson began walking back to her house. When she reached her mailbox, Morrison began firing a gun in her direction and she ran into her house. Defendant was inside Johnson's house at that time, and Johnson's child was sitting on the front porch steps. Defendant ran outside during the shooting. Johnson then heard shots fired from "[p]robably two or three" guns.

Defendant also called Shawn Wilkerson (Wilkerson) to testify on his behalf. Prior to Wilkerson taking the stand and outside the presence of the jury, the State noted that Wilkerson had criminal charges pending against him, including a burglary charge. The State indicated its intent to question Wilkerson about these charges during cross-examination, stating the charges related to Wilkerson's credibility. The State noted Wilkerson's attorney was present in the courtroom and that Wilkerson might "want to take the Fifth rather than be questioned about those pending charges." The trial court then questioned Wilkerson to enquire whether he had spoken to his attorney regarding the possible effect of his testimony on the pending charges, and Wilkerson indicated that he had discussed this issue with his attorney. Defendant did not raise any objections at that time to the State's proposed line of questioning.

Wilkerson testified during direct examination that he was in a vehicle with Jones on the night of the shooting incident. Wilkerson testified that as he and Jones were driving on Page Road, Defendant approached the vehicle and said that someone was "shooting at him." Defendant reached into the vehicle and took out a gun. Wilkerson then heard Defendant fire the gun. After he heard the gunshots from the gun fired by Defendant, Wilkerson heard "[t]wo more guns."

During cross-examination, Wilkerson testified he had consumed "[f]our 40[-]ounce beers" on the night of the shooting. The State asked Wilkerson "what [he had] been tried and convicted of or pled guilty [to] in the last 10 years for which [he] could receive a jail sentence of 60 days or more." Wilkerson responded that he had been convicted of "drug paraphernalia," "first[-]degree [burglary]," numerous "DWI[s]," "driving while license revoked, breaking and entering, larceny, [and] threats." The State then questioned Wilkerson regarding his pending burglary charge, and the following statements were made:

> [State]: And you've got a pending burglary charge now, is that right?

[Wilkerson]: Yes, sir.

[State]: Whose house did you break into?

[Wilkerson]: I did not know the person's name.

[Defense counsel]: Your Honor, objection.

THE COURT: Just a moment. Sustained as to the form of the question.

[State]: You broke into somebody's house in the nighttime on that one, didn't you?

[Defense counsel]: Objection.

THE COURT: It's overruled.

[State]: Didn't you?

[Wilkerson]: Did I break into someone's house?

[State]: Yes, sir.

[Wilkerson]: That has nothing to do with this case here what my charge is.

[State]: You broke into someone's house, didn't you?

[Wilkerson]: Yes, sir, I did.

[State]: In the middle of the night?

[Wilkerson's counsel]: Your Honor, I would raise an objection.

THE COURT: It's his response. It's his privilege. You may go to your next question.

[State]: It was during the nighttime that you broke into that house, isn't that right?

[Wilkerson]: Correct.

[State]: And you were going into that house to steal things, isn't that right?

[Wilkerson]: No.

[State]: Just to look around?

[Defense counsel]: Objection.

THE COURT: Overruled.

[State]: I don't think I have anything else for this witness your honor.

Defendant testified that on the night of the shooting he was playing with several children on Johnson's front porch. Defendant stated that while he was on the porch he saw Morrison standing near the house. After Defendant told Morrison to "chill out," Morrison began firing a gun in Defendant's direction. Defendant ran into the house and, when he realized Johnson's child was still on the front porch, he ran back onto the porch to get the child. Morrison continued firing his gun in the direction of the porch and Defendant ran back into the house. A few minutes later, Defendant came out of the house for a second time. He saw Jones driving down the road and he approached Jones' vehicle. Defendant then "grabbed [a] gun" from Jones and ran after Morrison. Defendant fired shots "in[to] the air" until "the gun went empty." While he was firing the gun, Defendant saw Morrison and Kelly firing guns in Defendant's direction; however, he did not see Dawkins. After Defendant finished firing his gun, he jumped into Jones' vehicle and the parties drove away from the scene. Defendant testified he did not shoot Dawkins.

During cross-examination, the State asked Defendant "what [he had] been tried and convicted of in the last ten years for which [he] could receive a jail term of 60 days or more." Defendant responded that he had been convicted of "voluntary manslaughter" and "simple assault."

At the close of all the evidence, Defendant renewed his motion to dismiss the charge of first-degree murder. The trial court denied the motion.

During its closing argument, the State made the following statement: "Members of the jury, a killer sits among us, [Defendant]. He's killed before and the State contends that we've shown to you he's killed again." Defendant did not object to this statement. Later in its closing argument, the State made the following statement: "[D]efendant has got everything to lose. He's killed before . . . . [He] admitted that he was convicted of voluntary manslaughter, taking the life of another person. He's got every reason to get up here and give you a fabrication, members of the jury." Defendant objected to this statement, and the trial court overruled the objection.

Subsequent to closing arguments, the trial court instructed the jury, in pertinent part:

> When evidence has been received that at an earlier time . . . [D]efendant was convicted of criminal charges, you may consider this evidence for one purpose only. If, considering the nature of the crimes, you believe that this bears on truthfulness, then you may consider it, together with all other facts and circumstances bearing upon . . . [D]efendant's truthfulness, in deciding whether you will believe or disbelieve his testimony at this trial. It is not evidence of . . . [D]efendant's guilt in this case. You may not convict him on the present charge because of something he may have done in the past.

After its deliberations, the jury returned a verdict finding Defendant guilty of second-degree murder. Defendant then made a motion in open court to set aside the verdict based on the State's statements in its closing argument that Defendant had "killed before." The trial court denied Defendant's motion.

The issues are whether: (I) the record contains substantial evidence Defendant killed Dawkins; (II) admission of evidence regarding Wilkerson's pending burglary charge pursuant to Rule 608(b) of the North Carolina Rules of Evidence was plain error; and (III) the statements made by the State during its closing argument that Defendant had "killed before," referring to Defendant's previous conviction for voluntary manslaughter, were improper and, if so, whether the statements resulted in prejudicial error.

I

[1] Defendant argues the record does not contain substantial evidence Defendant killed Dawkins and, therefore, the charge of first-degree murder should have been dismissed. We disagree.

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). First-degree murder is

the "unlawful killing of a human being with malice, premeditation, and deliberation." *State v. Truesdale*, 340 N.C. 229, 234, 456 S.E. 2d 299, 302 (1995).

In this case, the evidence, viewed in the light most favorable to the State, shows that prior to his death Dawkins identified Defendant as the person who shot him. A reasonable person could find this evidence is sufficient to show Defendant killed Dawkins. Moreover, the State presented substantial circumstantial evidence Defendant shot Dawkins, including the following evidence: Defendant retrieved a gun from Jones' vehicle and said, " 'I'll kill all you n-----' "; after the shooting, Defendant told Jones that he thought he " 'got one' " because he had "seen one drop"; eleven spent shell casings were recovered from the scene and these shell casings matched the gun recovered by Bowden; the recovered gun was the gun used by Defendant; Defendant admitted firing shots "in[to] the air" until the gun he was using "went empty"; and Dawkins died from a gunshot wound to the head. A reasonable person could infer, based on this circumstantial evidence, that Defendant shot Dawkins. *See State v. Triplett*, 316 N.C. 1, 5, 340 S.E.2d 736, 739 (1986) (when a motion to dismiss "puts into question the sufficiency of circumstantial evidence, the court must decide whether a reasonable inference of the defendant's guilt may be drawn from the circumstances shown").[1] Accordingly, the trial court properly denied Defendant's motion to dismiss the charge of first-degree murder.

II

[2] Defendant argues evidence of Wilkerson's pending burglary charge was inadmissible under Rule 608(b) of the North Carolina Rules of Evidence. Defendant contends admission of this evidence was plain error.[2]

1. Defendant does not argue in his brief to this Court that the record does not contain substantial evidence Defendant acted with "malice" and "premeditation and deliberation." We, therefore, do not address these issues. *See* N.C.R. App. P. 28(b)(5).

2. Additionally, Defendant argues in his brief to this Court that the issue of whether evidence regarding Wilkerson's pending burglary charge was inadmissible under Rule 608(b) was properly preserved for appellate review. The record shows, however, that Defendant did not object to this line of questioning on the ground it violated Rule 608(b). Rather, after Wilkerson testified that he did have a pending burglary charge against him and that he had broken into someone's home, Defendant made a general objection. The issue of whether this evidence was inadmissible under Rule 608(b), therefore, was not properly preserved for appellate review. *See* N.C.R. App. P. 10(b)(1). Accordingly, we only address Defendant's argument that admission of this evidence was plain error. *See* N.C.R. App. P. 10(c)(4).

The test for plain error places the burden on a defendant to show that error occurred and that the error was a " ' "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." ' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Consequently, the defendant must show the error "had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 379. Thus, if this Court determines an error constitutes "plain error," the defendant is entitled to a new trial.

A witness may be impeached under Rule 608(b) based on specific acts of misconduct where:

> (i) the purpose of the inquiry is to show conduct indicative of the actor's character for truthfulness or untruthfulness; (ii) the conduct in question is in fact probative of truthfulness or untruthfulness; (iii) the conduct in question is not too remote in time; (iv) the conduct did not result in a conviction; and (v) the inquiry takes place during cross-examination.

State v. Bell, 338 N.C. 363, 382, 450 S.E.2d 710, 720 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995); N.C.G.S. § 8C-1, Rule 608(b) (1999). Examples of conduct probative of the truthfulness or untruthfulness of a witness include " 'use of false identity, making false statements on affidavits, applications or government forms (including tax returns), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others.' " *State v. Morgan*, 315 N.C. 626, 635, 340 S.E.2d 84, 90 (1986) (quoting 3 D. Louisell & C. Mueller, *Federal Evidence* § 305, at 228-29 (1979)).

In this case, the State attempted to impeach Wilkerson pursuant to Rule 608(b) by questioning him regarding a pending burglary charge. Wilkerson testified he broke into someone's house during the nighttime and, as a result, was charged with burglary. Evidence of this conduct by Wilkerson was not probative of his propensity for truthfulness or untruthfulness. *See Bell*, 338 N.C. at 382-83, 450 S.E.2d at 721 (evidence witness committed larceny, without more, was not probative of witness's propensity for truthfulness or untruthfulness). Admission of this evidence was, therefore, error.[3] Nevertheless, the

3. Although evidence a witness has committed a burglary is not probative of his character for truthfulness and, thus, is not admissible under Rule 608(b), evidence the witness has been *convicted* of burglary may be admissible under Rule 609 provided the conviction falls within the time period set out in Rule 609 regarding admission of evi-

admission of this evidence is "plain error" only if the evidence had "a probable impact on the jury's finding of guilt." Because the State presented evidence under Rule 609 of the North Carolina Rules of Evidence that Wilkerson previously was convicted of first-degree burglary and Wilkerson testified he consumed "[f]our 40[-]ounce beers" on the evening of the shooting, evidence that Wilkerson had a pending burglary charge for breaking into someone's home in the nighttime did not have a probable impact on the jury's determination of whether Wilkerson's testimony was truthful. This evidence, therefore, did not have a "probable impact on the jury's finding of guilt." Accordingly, the admission of this evidence was not plain error.

III

[3] Defendant argues the trial court erred by failing to intervene ex mero motu when the State stated during its closing argument to the jury, without objection, that Defendant "killed before and . . . he's killed again." Defendant also argues the trial court erred by overruling Defendant's objection to the State's subsequent statement during its closing argument that Defendant "killed before."

When a defendant appears as a witness at trial, evidence of the defendant's past convictions may be admissible for the purpose of attacking the defendant's credibility as a witness. N.C.G.S. § 8C-1, Rule 609(a). Such evidence, however, is not admissible as substantive evidence to show the defendant committed the crime charged. *State v. Tucker*, 317 N.C. 532, 543, 346 S.E.2d 417, 423 (1986). Additionally, when evidence is admitted pursuant to Rule 609 for the purpose of impeaching the defendant, it is improper for the State to suggest in its closing argument to the jury that the evidence is substantive evidence of the defendant's guilt. *Id.* at 543-44, 346 S.E.2d at 423-24.

When a defendant does not object at trial to an improper jury argument, the trial court must intervene ex mero motu if the argument is "so grossly improper as to be a denial of due process." *State v. Zuniga*, 320 N.C. 233, 257, 357 S.E.2d 898, 914, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). The trial court's failure to properly

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dence of prior convictions. N.C.G.S. § 8C-1, Rule 609 (1999). The North Carolina Legislature, therefore, has not imposed a requirement under Rule 609 that a *conviction* used to impeach a witness be probative of the witness's propensity for truthfulness. *Compare* Fed. R. Evid. 609(a) (prior conviction may be admissible for purpose of attacking credibility of witness if crime was "punishable by death or imprisonment in excess of one year" or if crime "involved dishonesty or false statement, regardless of the punishment").

intervene during such an argument constitutes error. *State v. Sexton*, 336 N.C. 321, 363, 444 S.E.2d 879, 903, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). Additionally, when the State makes an improper jury argument and the defendant objects to the argument, the trial court's failure to sustain the objection and instruct the jury not to consider the State's improper argument is error. *State v. Thompson*, 118 N.C. App. 33, 42, 454 S.E.2d 271, 276, *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995). The defendant, however, is entitled to a new trial based on either of these errors only when the errors are prejudicial. *Id.*; N.C.G.S. § 15A-1443 (1999). When an error is not constitutional, it is prejudicial only upon a showing by the defendant that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a).

In this case, the State's jury argument that Defendant had "killed before and . . . he's killed again" and the State's subsequent statement that Defendant had "killed before" suggested to the jury that it could consider evidence of Defendant's prior conviction for voluntary manslaughter as substantive evidence.[4] These statements were, therefore, improper. *See Tucker*, 317 N.C. at 543-44, 346 S.E.2d at 423-24. Assuming, without deciding, that the first statement was grossly improper and, therefore, required intervention by the trial court, we must determine whether the trial court's failure to intervene was prejudicial error. Likewise, we must determine whether it was prejudicial error for the trial court to overrule Defendant's objection to the second statement that Defendant had "killed before." As discussed in Part I of this opinion, the State presented overwhelming evidence at trial of Defendant's guilt. Based on this evidence, and considering the trial court's instruction to the jury that it was not to consider evidence of Defendant's prior convictions as evidence of Defendant's guilt in this case, there is not a reasonable possibility that "had the error in question not been committed, a different result would have been reached at trial." *See State v. Vines*, 105 N.C.

4. The State argues in its brief to this Court that its second statement that Defendant had "killed before," to which Defendant objected, was not made for the purpose of arguing Defendant's previous conviction for voluntary manslaughter was substantive evidence. Rather, the State argues its statement that Defendant had "killed before" suggested to the jury that Defendant's previous conviction related to the truthfulness of his testimony at trial. The record shows, however, that when the State's comment Defendant had "killed before" is reviewed in the context of the State's closing argument, which included a statement Defendant had "killed before and the State contends . . . he's killed again," the statement suggested to the jury that Defendant's previous conviction was substantive evidence Defendant committed the crime charged.

App. 147, 156, 412 S.E.2d 156, 163 (1992) (trial court's failure to intervene ex mero motu during grossly improper jury argument not prejudicial error considering strong and convincing case against defendant); *Thompson*, 118 N.C. App. at 42, 454 S.E.2d at 276 (overwhelming evidence of defendant's guilt may render error harmless). The trial court's failure to intervene and its subsequent overruling of Defendant's objection, therefore, did not result in prejudicial error. Further, these errors, considered cumulatively with the erroneous admission of evidence regarding Wilkerson's pending burglary charge, did not result in prejudicial error. Accordingly, Defendant is not entitled to a new trial.

No error.

Judges HORTON and TYSON concur.

RACHEL N. JENKINS, EMPLOYEE, PLAINTIFF-APPELLANT v. EASCO ALUMINUM CORP., EMPLOYER; HARTFORD SPECIALTY RISK SERVICES, CARRIER, DEFENDANT-APPELLEES

No. COA00-22

(Filed 6 February 2001)

1. Workers' Compensation— plaintiff's doctor—testimony disregarded

The Industrial Commission erred in a workers' compensation case by failing to indicate that it considered the testimony of a doctor specializing in vocational analysis when the Commission found that the job plaintiff returned to do after her injury was suitable employment and was a competitive job in the local job market because, while the Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony, it may not wholly disregard competent evidence.

2. Workers' Compensation— failure to consider motion to submit newly discovered evidence—failure to rule on objection

The Industrial Commission abused its discretion in a workers' compensation case by failing to consider plaintiff employee's motion to submit newly discovered evidence and by failing to rule

on plaintiff's objection to defendant employer's submission of new evidence at the hearing before the full Commission.

3. Workers' Compensation— findings of fact—insufficient

The Industrial Commission failed to make sufficient findings of fact in a workers' compensation case to support its conclusion that plaintiff employee was not entitled to a 10% increase in compensation for defendant employer's alleged violation of a statutory safety requirement under N.C.G.S. § 97-12, because: (1) the Commission inexplicably failed to make any findings based on the testimony of plaintiff's coworker, although the deputy commissioner who originally heard this case made at least three findings based on her testimony; and (2) the coworkers' testimony appears to support plaintiff's position with regard to possible safety violations.

4. Workers' Compensation— permanent partial disability— failure to award error

The Industrial Commission erred in a workers' compensation case by failing to award plaintiff employee permanent partial disability for the loss of her fingers when the parties stipulated to a Form 25R signed by a doctor that found plaintiff had 75% disability to four fingers on her left hand.

Judge GREENE dissenting.

Appeal by plaintiff from opinion and award entered 6 July 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 January 2001.

On 17 May 1993, plaintiff was injured in a compensable industrial accident while employed as a machine press operator for defendant Easco Aluminum Corporation. Plaintiff apparently experienced a period of dizziness, or blacked out, and the fingers on her left hand were crushed in the press. Metal guards designed to protect workers' hands were not in position on the press at that time, but were installed immediately after plaintiff's accident.

Plaintiff was paid compensation for eleven months, then returned to work at Easco in April 1994 as a quality control inspector of metal parts. Prior to her return to work, plaintiff received a 75% permanent partial disability rating to each of the four fingers on her left hand from her attending physician. Plaintiff was the junior employee in the quality control department, and was the first to be laid off in

November 1996 during a work slowdown at the plant. Plaintiff requested a hearing before the Industrial Commission and was awarded temporary total disability from the date of the layoff, entitlement to prosthetic fingers at defendants' expense, and the right to collect a 10% penalty pursuant to N.C. Gen. Stat. § 97-12 for unsafe working conditions leading to her injury. Both parties appealed to the Full Commission, which reversed the award of the Deputy Commissioner and found that plaintiff was entitled to nothing except prosthetic fingers. Plaintiff appealed to this Court.

Law Offices of George W. Lennon, by George W. Lennon and Michael W. Ballance, for plaintiff appellant.

Cranfill, Sumner and Hartzog, L.L.P., by Brady W. Wells, for defendant appellees.

HORTON, Judge.

Plaintiff was totally disabled as the result of her injuries from 17 May 1993 to 10 April 1994, and was paid temporary total disability pursuant to a Form 21 agreement during that time. The Industrial Commission approved the Form 21 agreement, which provided that defendants would pay compensation of $216.54 per week to plaintiff for "necessary" weeks. As a result of the agreement, plaintiff was "cloaked in the presumption of disability, and the burden was on the employer to rebut that presumption." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997). The employer may rebut the presumption of continuing disability with medical evidence. Alternatively, the employer can "come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990). "A 'suitable' job is one the claimant is capable of performing considering his age, education, physical limitations, vocational skills, and experience." *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994).

The employer may not rebut the presumption of continuing disability by creating a position within the employer's company which is " 'not ordinarily available in the competitive job market,' because such positions do not accurately reflect the employee's *capacity to earn* wages." *Stamey v. N.C. Self-Insurance Guar. Ass'n*, 131 N.C. App. 662, 666, 507 S.E.2d 596, 599 (1998) (citation omitted) (quoting

Peoples v. Cone Mills Corp., 316 N.C. 426, 438, 342 S.E.2d 798, 806 (1986)).

Here, the defendant-employer sought to rebut the presumption of continuing disability by showing that plaintiff returned to work for Easco as a quality control inspector on 11 April 1994 at an hourly wage equal to, or higher than, her previous rate of pay. Plaintiff contends, however, that the Industrial Commission erred in finding that the quality control inspection job was suitable employment and was a competitive job in the local job market. Plaintiff argues that the inspector position was "make work" and was modified especially for her. As such, she argues, it was an unreliable indicator of her earning capacity and did not rebut the presumption that her disability continues.

Our Supreme Court has recently stated that "the fact that an employee is capable of performing employment tendered by the employer is not, as a matter of law, an indication of plaintiff's ability to earn wages." *Saums*, 346 N.C. at 764, 487 S.E.2d at 750 (citing *Peoples*, 316 N.C. at 434, 342 S.E.2d at 804.) The *Peoples* Court explained that

> [i]f the proffered employment does not accurately reflect the person's ability to compete with others for wages, it cannot be considered evidence of earning capacity. Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level. The same is true if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market. The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated.

Peoples, 316 N.C. at 438, 342 S.E.2d at 806.

[1] Thus, our task on review is to determine whether the defendant-employer has met its burden of showing that the quality control inspector job plaintiff performed at Easco was "suitable" employment; that is, that it accurately reflected plaintiff's ability to compete with others for wages in the marketplace.

Our review of an opinion and award of the Industrial Commission requires that we first determine whether there is any competent evi-

dence on record which supports the findings of fact made by the Commission, and then determine whether those findings of fact support the Commission's conclusions of law. *Saums*, 346 N.C. at 765, 487 S.E.2d at 750-51. In response to plaintiff's contentions that the inspector job was not "suitable" employment, the Commission made the following findings of fact:

> 7. Plaintiff returned to work at Easco on 11 April 1994, in Quality Control as an Inspector, at a pay rate of $9.37 an hour, which was equal to or higher than her prior rate of pay. This job has been in existence at Easco since the plant opened. There are three employees on each shift who perform this function of mainly measuring and checking the quality of metal pieces within the plant. The inspector positions were held by female employees and all of them would need help from time to time lifting heavy parts.
>
> 8. The inspector job at Easco was a competetive [sic] job in the local job market. This was illustrated by a research analysis done by Annette Ruth, a certified rehab counselor with American Rehabilitation, in which various industries in Hertford County were found to have similar positions with similar job duties. In addition to being called quality inspectors, they were also called grader testers, and assurance inspectors.
>
> 9. Dr. Joan Rose viewed eight available jobs on videotape and approved only the Saw Helper position for plaintiff. However, the inspector position was not included on the video for her consideration, since there was not an opening at the inspector position at that time. There was no doubt that the inspector position was suitable employment for the plaintiff, in that she satisfactorily performed this job for two and a half years.

Based on these findings of fact, the Commission then made the following conclusion of law:

> 3. The inspector position at Easco has no similarities with the job that was characterized as "make-work" in the case of *Peoples v. Cone Mills*, 316 N.C. 426, 342 S.E.2d 798 (1986). In *Peoples*, the job offered to the claimant had never before existed at Cone Mills and it was created especially for plaintiff. Furthermore, the claimant was not required to work "if he did not feel like doing so." At Easco, plaintiff filled a position that had been at the plant for over 20 years. She was one of three inspec-

tors working that specific position at Easco, and she worked a complete shift. The job was not created for her, and it was not modified especially for plaintiff. The only help plaintiff needed was with the heavier parts, and that was true with all three females who worked as inspectors.

Here, there was testimony from plaintiff that there had been an inspector's job at Easco during her entire 20 years' employment there, that there were a number of tasks for her to perform on the job, that she was in fact able to perform the inspector job, and that her duties were similar to those of the other inspectors. There was evidence that plaintiff needed special assistance lifting the heavier parts, that such assistance was required for some 15 to 30 minutes of each work day, and that other female inspectors also needed assistance with the heavier parts. Further, there was evidence that plaintiff occasionally needed help reading blueprints and differentiating between critical and non-critical dimensions, but those difficulties were not unique to her. Still further, rehabilitation counselor Annette Ruth testified that plaintiff's quality control inspector job was generally available in the economy, that there were similar positions at several other companies in Hertford County, and that the inspector job as performed by plaintiff was not "make work" or "sheltered work."

Plaintiff argues, however, that defendant Easco made special accommodations, or modifications, to her inspector job to allow her to perform the job, and that she would not be able to compete for the job in the competitive job market, considering her physical and vocational limitations. See *Kennedy*, 101 N.C. App. at 33, 398 S.E.2d at 682 (explaining what the employer must demonstrate to successfully rebut the presumption of continuing disability). Plaintiff testified that she could do the inspector job, but had to have help "most of the time." She further testified that she needed help on a daily basis with various aspects of her job, such as lifting heavy parts and reading blueprints, and stated that she "wasn't really good in quality control."

In *Saums*, the defendant-employer offered evidence that a job as quality control clerk was available to the employee and paid the same wages the employee was earning prior to her accident-related disability. *Saums*, 346 N.C. at 764, 487 S.E.2d at 750. However, the evidence further tended to show that the quality control clerk position was

> "a new position created for [plaintiff's] return to the work place." [sic] The job consisted of general office-type duties such as filing

> and answering the telephone, and counting linens. The evidence showed that no one else had been placed in the position, either before or after plaintiff held the job, and that ordinarily the duties were included in other jobs. Additionally, based on the job description stipulated into evidence by the parties, plaintiff was not qualified for the job. The "Position Summary" lists the job as requiring a high school education, while plaintiff had only a ninth-grade education.

Id. In *Peoples*, the job offered to the injured employee had never existed and was created especially for the employee. Further, the employee in *Peoples* was not required to report for work "if he [did] not feel like doing so." *Peoples*, 316 N.C. at 429, 342 S.E.2d at 801. Unlike *Saums* and *Peoples*, the Commission found in the case before us that the quality control position held by plaintiff had been in existence at Easco since the plant opened, that there were other employees performing the job, and that the other employees were female and needed assistance from time to time with heavy parts. The Commission also found that there were similar inspecting jobs at various industries located in the Hertford County area.

In response to the evidence offered by defendant, plaintiff offered the testimony of Dr. Sheldon Downes, a Professor of Rehabilitation Counseling and Director of the Rehabilitation Counseling Program at East Carolina University. Dr. Downes specializes in vocational analysis and teaches prospective vocational professionals how to analyze jobs. Dr. Downes is also a designated vocational expert for the Office of Hearings and Appeals of the Social Security Administration where he has been analyzing jobs and testifying for more than 30 years. Dr. Downes discussed quality control jobs, characterizing them as coveted jobs usually awarded to deserving company employees, not to applicants "off the street." Consequently, Dr. Downes said that quality control inspector jobs were internal hire positions, rather than competitive jobs in the marketplace.

Dr. Downes also testified that he performed manual dexterity tests on plaintiff, and that the tests demonstrated that plaintiff is incapable of performing any industrial production work requiring hand or finger dexterity. Significantly, Dr. Downes opined that, because of plaintiff's physical limitations and her limited educational background and experience, there are no competitive jobs she can perform. He felt that plaintiff would need "very highly specialized" job placement assistance to locate a unique job plaintiff could perform.

Further, defendant's vocational expert, Ms. Ruth, testified that she examined Dr. Downes' report and had no reason to doubt either the results of the dexterity tests performed by Dr. Downes, or his conclusions based on the results of those tests.

Plaintiff argues that the Commission erred in failing to consider the testimony of Dr. Downes. We agree with plaintiff that "[w]hile the Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony, . . . it nevertheless may not wholly disregard competent evidence[,]" *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980), "[a]lthough the Commission may choose not to believe the evidence after considering it . . . ." *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997).

In *Lineback*, plaintiff contended that the Industrial Commission erred in failing to consider the testimony of his orthopedic surgeon regarding the cause of plaintiff's injury to his left knee. *Id.* at 680, 486 S.E.2d at 253-54. The testimony of the orthopedist corroborated plaintiff Lineback's statement that his injury was caused by a twisting motion as he exited his work vehicle. *Id.* at 681, 486 S.E.2d at 254. In its opinion, however,

> the Commission made no definitive findings to indicate that it considered or weighed Dr. Comstock's testimony with respect to causation. Thus, we must conclude that the Industrial Commission impermissibly disregarded Dr. Comstock's testimony, and, in doing so, committed error.

Id.

Here, Dr. Downes' testimony was certainly relevant to the exact point in controversy, whether the quality inspector job performed by plaintiff was an adequate indicator of her ability to compete for similar jobs in the marketplace. There was, however, no mention at all of Dr. Downes' testimony in the opinion and award, nor any finding from which we can reasonably infer that the Commission gave proper consideration to his testimony. *Compare Pittman v. International Paper Co.*, 132 N.C. App. 151, 510 S.E.2d 705, *disc. review denied*, 350 N.C. 310, 534 S.E.2d 596, *affirmed*, 351 N.C. 42, 519 S.E.2d 524 (1999), where the plaintiff made a similar argument with regard to a Dr. Markworth's deposition testimony, but there were "various findings throughout the Opinion and Award of the

Commission indicat[ing] consideration of Dr. Markworth's opinion." *Id.* at 159, 510 S.E.2d at 710.

As we are bound by the reasoning of *Lineback*, we hold that the Commission erred in failing to indicate that it considered the testimony of Dr. Downes. Consequently, the opinion and award of the Industrial Commission must be vacated, and the proceeding "remanded to the Commission to consider all the evidence, make definitive findings and proper conclusions therefrom, and enter the appropriate order." *Lineback*, 126 N.C. App. at 683, 486 S.E.2d at 255.

[2] Plaintiff also contends that the Commission erred by failing to consider her motion to submit newly discovered evidence and by failing to rule on her objection to defendant's submission of new evidence at the hearing before the Full Commission. We agree. We have recently held that it is an abuse of discretion for the Commission to fail to rule on motions to admit evidence and objections to the admissibility of evidence. *Allen v. K-Mart*, 137 N.C. App. 298, 303, 528 S.E.2d 60, 64 (2000) ("The failure of the Commission to timely address defendants' pending requests, motions, and objections without a doubt prejudiced the defendants in that they had no reason to seek other means by which they could protect their interests."). On remand, the Commission is to rule on plaintiff's pending motion and objections.

[3] Plaintiff also argues that the Commission did not make sufficient findings of fact to support its conclusion that plaintiff was not entitled to a 10% increase in compensation for defendant's alleged violation of a statutory safety requirement. Again, we agree with plaintiff. North Carolina law punishes willful violations of safety standards by employers. N.C. Gen. Stat. § 97-12 (1999) states that "[w]hen the injury or death is caused by the willful failure of the employer to comply with any statutory requirement or any lawful order of the Commission, compensation shall be increased ten percent (10%). . . . The burden of proof shall be upon him who claims an exemption or forfeiture under this section." The 10% penalty imposed on employers for willful OSHA violations is added to a successful plaintiff's total award. As to the increase in compensation, the Commission concluded that:

> 5. The plaintiff has the burden of proof to show a willful failure of the employer to comply with any statutory requirement. Since the plaintiff has not met this burden, the request for a ten

percent (10%) increase in compensation is hereby DENIED. N.C. Gen. Stat. § 97-12.

In support of that conclusion, the Commission found that:

10. Billy Saulter was a paid expert, who testified on behalf of plaintiff. . . . According to Mr. Saulter, there is an exception within OSHA requirements pertaining to Press Brakes. CFR 1910.212 states that guards should be applied *where possible.*

11. Melvin Gurganus has worked at Easco for twenty-five years . . . . Melvin Gurganus testified that he is not familiar with the *North Carolina Occupational Safety and Health Standards for General Industry* and is not involved with the plant's safety-related concerns such as compliance with OSHA regulations. He was also uncertain as to the requirements regarding guarding and any exception that may be provided for with regard to the Press Brake.

These findings fail to support the Commission's conclusion. Moreover, the Commission inexplicably failed to make any findings based on the testimony of plaintiff's coworker, Ms. Linda Ealey, although the Deputy Commissioner who originally heard this case made at least three findings based on her testimony. The testimony of Ms. Ealey appears to support plaintiff's position with regard to possible safety violations and should have been considered by the Commission in its opinion and award. The Deputy Commissioner made findings from the evidence that the press brake machine operated by plaintiff was not "guarded," as defined by the North Carolina OSHA manual, and that the machine did not prevent entry of the hands and fingers into the point of operation, in violation of OSHA standards. Without comment, the Full Commission failed to bring forward any of those crucial findings by the Deputy Commissioner. On remand, the Commission is to weigh and consider all evidence bearing on the alleged safety violations, then make appropriate findings of fact and conclusions of law based thereon.

[4] Finally, plaintiff contends that the Commission erred by failing to award her permanent partial disability for the loss of her fingers. We note that the parties stipulated to the Form 25R signed by Dr. Robert Kahn, which found that plaintiff has 75% disability to each of the index, second, third and fourth fingers of her left hand. No award to plaintiff was made by the Commission in its opinion and award however. On remand, after the Commission decides the issues of plain-

tiff's continuing disability and eligibility for temporary total disability payments, it shall enter such award as may be appropriate for plaintiff's loss of her fingers.

Vacated and remanded.

Judge TYSON concurs.

Judge GREENE dissents in part.

Judge GREENE dissenting in part.

As I believe there is no evidence in this record that other employers would hire plaintiff in a job with a wage comparable to her pre-injury wages, the opinion and award of the Commission must be reversed and remanded for an award of appropriate compensation.[1] *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 765, 487 S.E.2d 746, 750 (1997) (there must be evidence "employers, other than defendant, would hire plaintiff to do a similar job at a comparable wage"). I would not, therefore, find it necessary to remand this case to the Commission for consideration of Dr. Downes' testimony, as required by the majority. I, therefore, respectfully dissent on this issue. I, however, agree with the majority with respect to the section 97-12 and the permanent partial disability (for loss of fingers) issues.

STATE OF NORTH CAROLINA v. SAMUEL B. DAVIS, JR.

No. COA99-1429

(Filed 6 February 2001)

1. Motor Vehicles— driving while impaired—testing of blood and urine—implied consent—search warrant after defendant's refusal

The trial court did not err in a driving while impaired case by concluding that defendant's due process rights were not violated under the implied consent statute of N.C.G.S. § 20-16.2 by the testing of his blood and urine pursuant to a search warrant after

1. Indeed, the Commission did not find as fact plaintiff was capable of obtaining a position as a quality inspector in the competitive job market, taking into account plaintiff's physical limitations.

defendant's refusal to be tested, because: (1) blood and urine tests are not testimonial or communicative evidence within the privilege against self-incrimination; (2) testing pursuant to a search warrant is a type of "other competent evidence" referred to in N.C.G.S. § 20-139.1; and (3) defendant's belief that his right to refuse to take the test was absolute is not relevant.

2. Motor Vehicles— driving while impaired—instruction on defendant's refusal to be tested—no prejudicial error

Even if it were error to instruct the jury in a driving while impaired case that it could consider defendant's refusal to be tested as evidence of defendant's guilt, it was not prejudicial error because three officers testified that defendant smelled of alcohol, defendant failed three sobriety tests, defendant slurred his words and had glassy eyes, defendant fell in and out of sleep while under arrest, and tests revealed the presence of alcohol and other impairing substances in defendant's blood and urine.

3. Motor Vehicles— blood alcohol concentration—extrapolation—Daubert—scientific foundation

The trial court did not abuse its discretion in a driving while impaired case by finding that the foundation for an expert's extrapolation testimony regarding defendant's blood alcohol concentration at the time of an accident was sufficient to meet the Daubert standard, because: (1) North Carolina courts have accepted extrapolation evidence since 1985; (2) other states have recognized the reliability of extrapolation evidence; (3) the expert stated his basis of understanding came from a large number of studies; and (4) defendant did not object to the expert's qualifications.

4. Motor Vehicles— driving while impaired—test refusal—use of other procedures—explanation to defendant

If a defendant refuses to be tested pursuant to N.C.G.S. § 20-16.2(a)(1) and the officer elects to pursue "testing pursuant to other applicable procedures of law," this should be explained to the defendant in order that he may make a final decision on whether to be tested, and only if he then refuses should he be reported as having willfully refused to be tested. (Concurring opinion of Judge Walker joined by Judge Hunter)

Judge WALKER concurring.

Judge HUNTER joins in concurring opinion.

Appeal by defendant from judgment entered 9 June 1999 by Judge Henry E. Frye, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 6 November 2000.

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

White and Crumpler, by Dudley A. Witt, for the defendant-appellant.

EAGLES, Chief Judge.

Defendant was indicted and tried on charges of driving while impaired, running a red light and assault with a deadly weapon inflicting serious injury. Defendant was convicted of driving while impaired and running a red light. Judge Frye sentenced defendant to an active sentence of twelve months incarceration and a $700.00 fine.

The evidence tended to show the following. On 15 October 1998 at approximately 11 a.m. defendant drove through a red light striking the victim's vehicle. Defendant continued through the intersection, stopped his vehicle and walked back to the victim's vehicle. Winston-Salem Police Officer David Walsh arrived on the scene and reported that defendant's eyes were "bloodshot and watery" and that defendant's speech was "slurred and slow." Officer Walsh further testified that defendant had a "moderate odor" of alcohol. Officer Walsh administered three field sobriety tests, all of which the defendant failed. The defendant confessed to Officer Walsh that the defendant had taken a drug called "Trilog." Officer Walsh determined that the defendant had consumed a sufficient amount of an impairing substance so as to appreciably impair his mental and physical capacities. Officer Walsh placed defendant under arrest and transported him to the Forsyth Medical Center for a blood test. At the hospital, Crime Scene Technician Frady advised the defendant of his rights under North Carolina's implied consent statute, and the defendant refused the blood test. Officer Frady testified that the defendant's speech was "slurred" and "labored," and that the defendant seemed sleepy. Officer Walsh then left defendant in the custody of Officer Hayes while he went to get a search warrant. Officer Hayes testified that while waiting for the warrant the defendant fell asleep and seemed to be appreciably impaired. The magistrate issued the search warrant based on probable cause and the defendant submitted to testing of his blood and urine. The blood and urine samples were collected approximately three and one-half hours after the collision.

Dr. Andrew Mason analyzed the samples and testified that defendant tested positive for a significant amount of Alprazolam, (brand name Xanax), and the presence of Diazepam (brand name Valium). The blood tests also revealed a blood alcohol concentration of 0.013. The urine tests confirmed the results. Dr. Mason testified that each of these three substances, Alprazolam, Diazepam and alcohol, increase impairment levels.

On 20 April 1999 the defendant moved to suppress the results from the blood and urine tests on the basis that he was told he had a right to refuse the test and that the test was given in spite of his refusal. The defendant argued that the compelled production of his bodily fluids was in violation of fundamental fairness and the Due Process Clause of the Fifth Amendment to the United States Constitution. On 20 August 1999, the trial court denied the motion to dismiss. The court held that North Carolina's implied consent statute permits a defendant the opportunity to submit voluntarily to testing or refuse, but that a refusal "does not preclude testing pursuant to other applicable procedures of law." N.C.G.S. § 20-16.2(c). The court held that testing blood and urine pursuant to a valid search warrant is an "applicable procedure of law." *Id.*

At trial defendant's blood and urine test results were admitted over his objections. Dr. Andrew Mason, over defendant's objections, extrapolated the blood alcohol concentration for the jury, testifying that the defendant's blood alcohol concentration at the time of the accident was in the range of 0.066-0.076. Further the trial court instructed the jury in accordance with N.C.G.S. § 20-139.1(f) that it could consider the evidence that the defendant refused to voluntarily submit to testing. Defendant appeals.

I. Right To Refuse

[1] Defendant first assigns as a violation of his due process rights the testing of his blood and urine. Defendant argues that the testing violated his due process rights for two reasons. First, since the officer represented that defendant had a right to refuse to be tested, and the defendant exercised that right, it is a violation of due process to test his blood after his refusal. Second, the General Assembly has outlined the procedures for testing blood and urine and in this case, the officers exceeded their statutory authority.

This court has held that misrepresentation by a police officer resulting in detrimental reliance by the defendant is a due process

violation which is cured by the suppression of the resulting statements. *State v. Sturgill*, 121 N.C. App. 629, 469 S.E.2d 557 (1996). Defendant argues that because he relied on the misrepresentation that he had an absolute right to refuse, for the State to take his blood and urine violated his due process rights. However, *Sturgill* is not relevant here. *Sturgill* addresses whether incriminatory statements made by the defendant pursuant to an officer's promise were made knowingly and voluntarily. In *Sturgill*, the defendant made self-incriminating **statements** regarding details of five separate break-ins as a result of the officer's promise not to prosecute him as a habitual felon. *Id.* The U.S. Supreme Court has held that blood and urine tests are not testimonial or communicative evidence within the privilege against self-incrimination. *South Dakota v. Neville*, 459 U.S. 553, 74 L. Ed. 2d 748 (1983). Accordingly, we hold that reliance on *Sturgill* is misplaced.

Our General Assembly enacted two statutes in North Carolina which are dispositive here. The first is the implied consent to chemical analysis statute. N.C.G.S. § 20-16.2 (effective until July 1, 2000). Relevant portions are as follows:

> Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. The charging officer shall designate the type of chemical analysis to be administered, and it may be administered when the officer has reasonable grounds to believe that the person charged has committed the implied-consent offense.

Id. The second involves the procedures governing the chemical analysis:

> (a) Chemical Analysis Admissible.—In any implied-consent offense under G.S. § 20-16.2, a person's alcohol concentration or the presence of any other impairing substance in the person's body as shown by a chemical analysis is admissible in evidence. This section does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests.

N.C.G.S. § 20-139.1 (emphasis added). Here the defendant was given the opportunity to voluntarily submit to the testing. He refused, and the officer obtained a search warrant based on probable cause. We

hold that testing pursuant to a search warrant is a type of "other competent evidence" referred to in N.C.G.S. § 20-139.1. In a similar case our Supreme Court approved the use of a subpoena to obtain "other competent evidence." *State v. Drdak*, 330 N.C. 587, 411 S.E.2d 604 (1992). In *Drdak*, blood was taken from the defendant in order to render medical assistance. *Id.* Later, the prosecution obtained the results under subpoena. The court held:

> Basically, the defendant's constitutional arguments must fail because of defendant's flawed contention that the State is limited to evidence of blood alcohol concentration which was procured in accordance with the procedures of N.C.G.S. § 20-16.2. This defective argument results from the failure of the defendant to recognize the "other competent evidence" clause provided in N.C.G.S. § 20-139.1(a). We hold that none of the constitutional rights of the defendant have been violated.
>
> . . . .
>
> In conclusion, it is the holding of this Court that the hospital's evidence of the defendant's blood alcohol concentration was admissible in this case. This evidence was admissible under the "other competent evidence" exception contained in N.C.G.S. § 20-139.1, and it is not necessary for the admission of such "other competent evidence" that it be obtained in accordance with N.C.G.S. § 20-16.2.

Drdak, 330 N.C. at 594-95, 411 S.E.2d at 608-09 (1992). Here, the evidence obtained complied with both N.C.G.S. § 20-16.2 and *Drdak*. The defendant was first given an opportunity to consent. The defendant was advised of his rights orally and in writing. The defendant called a witness pursuant to N.C.G.S. § 20-16.2. Then the defendant refused to take the test. At that point, Officer Walsh took steps to obtain the evidence by other lawful methods. Based on probable cause, Officer Walsh went before a judicial official and obtained a search warrant, served it on the defendant and was then able to have the defendant tested. Our Supreme Court has held that blood tests obtained through other lawful means are admissible under N.C.G.S. § 20-139.1.

That the defendant believed that his right to refuse to take the test was absolute is not relevant. The United States Supreme Court held that it is lawful to obtain blood tests from unconscious defendants without their express consent. *Breithaupt v. Abram*, 352 U.S. 432, 1 L. Ed. 2d 448 (1957). Further, the court noted that alcohol and

other drugs are eliminated from the blood stream in a constant rate, creating an exigency with regard to obtaining samples thereby relieving the officers of the need to obtain search warrants. *Schmerber v. California*, 384 U.S. 757, 770, 16 L. Ed. 2d 908, 920 (1966). The Fourth Circuit, in *U.S. vs. Reid*, 929 F.2d 990 (4th Cir. 1991), held:

> Time is of the essence when testing for alcohol in the bloodstream. The combination of these factors sets out exigent circumstances which are sufficient to require that the police be allowed to test drunk drivers without first having to obtain a warrant.

Id. at 994. In *Reid*, the court was determining whether two women convicted of DUI in Virginia based on their breathalyzer results, were subject to an improper search since no warrant was obtained. The court relied on *Schmerber* in holding that the rapid destruction of evidence due to bodily processes creates an exigency excusing the warrant requirement. *Id.*

In a similar DUI case, the U.S. Supreme Court held that there was no violation of due process to test the blood of someone reasonably believed to be appreciably impaired. *Breithaupt*, 352 U.S. at 436, 1 L. Ed. 2d at 451. The U.S. Supreme Court held:

> Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of "decency and fairness" that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.

Id. Here, the officers obtained a valid search warrant prior to obtaining blood and urine samples from defendant.

The defendant's rights under N.C.G.S. § 20-16.2 were not violated because the General Assembly does not limit the admissibility of competent evidence lawfully obtained. Law enforcement officers acted pursuant to § 20-16.2 and § 20-139(f) and were within their authority.

II. Refusal as Evidence of Guilt

Defendant's second assignment of error is that since defendant had no meaningful right to refuse to be tested, the evidence of his refusal should not be admitted at trial. We disagree. N.C.G.S. § 20-16.2 clearly requires that a defendant be offered the right to refuse and if he refuses, evidence of the refusal is admissible against him. The statute does not require notice to the defendant that testing may be sought via search warrant. *Id.* On occasion refusal may end the inquiry. An officer must have probable cause to obtain a search warrant for testing without consent.

The U.S. Supreme Court in *South Dakota v. Neville* held that there is no violation of fundamental fairness in using the defendant's refusal to be tested as evidence of guilt, even though he was not warned that the refusal was admissible against him. *Id.* at 566, 74 L. Ed. 2d at 759. In *Neville* the defendant was arrested by officers for driving while intoxicated and asked to submit to a blood-alcohol test. Pursuant to South Dakota statute (S.D.Comp.Laws Ann. § 32-12-111) defendant was warned that he could lose his licence to drive if he refused to be tested. *Id.* The officers failed to warn him that in addition to losing his license, the evidence of the defendant's refusal to be tested could be admitted against him pursuant to S.D.Comp.Laws Ann. § 33-23-10.1. *Id.* at 565-66, 74 L. Ed. 2d at 760. The court held:

> While the State did not actually warn respondent that the test results could be used against him we hold that such a failure to warn was not the sort of implicit promise to forego use of evidence that would unfairly "trick" respondent if the evidence were later offered against him at trial. We therefore conclude that the use of evidence of refusal after these warnings comported with the fundamental fairness required by Due Process.

Id. at 566, 74 L. Ed. 2d at 760. Our Supreme Court has held that although deceptive methods and false statements made by police officers are not commendable practices, standing alone they do not render a confession inadmissible. *State v. Jackson*, 308 N.C. 549, 574, 304 S. Ed. 2d 134, 148 (1983). In the instant case, whether the police officer intended to seek a search warrant even if the defendant refused the test is not relevant. The officer's conduct was permitted by statute; the officer warned the defendant that he could lose his license and that his refusal could be used as evidence of guilt. Although deception by police officers is not favored by this Court, on

this record the failure to warn the defendant that the officer could seek alternate methods of testing does not render defendant's refusal inadmissible.

[2] Even if it were error to instruct the jury that it could consider the refusal as evidence of the defendant's guilt, on this record it would not be prejudicial. Here three officers testified that the defendant smelled of alcohol, failed three field sobriety tests, slurred his words, had glassy eyes, and while under arrest fell in and out of sleep. Tests revealed the presence of alcohol and other impairing substances in his blood and urine. Clearly there was sufficient evidence for a jury to find that the defendant was appreciably impaired and thus guilty of driving under the influence. In *State v. Livingston*, 22 N.C. App. 346, 206 S.E.2d 376 (1974), we held that evidence that the defendant smelled of alcohol, his face was "real red," his eyes were "bloodshot," and when he walked the defendant tended to sway, combined with faulty driving is sufficient prima facie to show a violation of N.C.G.S. § 20-138.1. *Id.* at 348, 206 S.E.2d at 377. In *Livingston*, the court held that evidence was sufficient for a jury to find that the defendant was appreciably impaired. *Id.*

"Prejudicial error is shown when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (1988); *State v. Harris*, 136 N.C. App. 611, 614, 525 S.E. 2d 208, 210 (2000). We hold that on this record, there is no reasonable probability that a different result would have been reached.

III. Extrapolation by Expert

The defendant objected to the expert testimony of toxicologist Dr. Andrew Mason on two grounds: (1) that the underlying basis of his opinion was derived from analyzing evidence obtained in violation of the defendant's constitutional rights thereby rendering any opinion testimony based on this evidence incompetent; and (2) that the State failed to provide an appropriate foundation for this testimony. Since we have held that there was no violation of the defendant's constitutional rights in obtaining the evidence analyzed, we need not further address defendant's first argument.

[3] Defendant's second basis for objection is that the foundation for Dr. Mason's testimony was not sufficient to meet the standard of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137,

143 L. Ed. 2d 238 (1999). The defendant argues that only one *Daubert* factor was addressed by the State in laying the foundation for the expert's testimony and that the court abused its discretion in admitting the testimony relying on an insufficient foundation. Both *Daubert* and *Kumho* discuss the need for the "reliability" factors to be flexible. The court noted that without discretionary authority trial courts would be unable to avoid "reliability proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises." *Kumho*, 526 U.S. at 152, 143 L. Ed. 2d at 253. We have accepted the reliability of extrapolation evidence since 1985. *State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691 (1985). The court noted that other states have recognized the reliability of extrapolation evidence. *Id.* Dr. Mason testified that his basis of understanding came from a "large number of studies." Defendant did not object to Dr. Mason's qualifications. There being no abuse of discretion on this record, this assignment of error is overruled.

In conclusion, we hold that the law enforcement officers acted properly when informing the defendant of his rights under our implied consent statute. We hold that the officers acted properly by obtaining a valid search warrant to take blood and urine samples after the defendant exercised his right to refuse under the implied consent statute. We further hold that on this record, it was not error to instruct the jury that they could consider the defendant's refusal to submit to testing. Finally we hold that the expert extrapolation testimony is admissible.

No error.

Judge WALKER concurs with separate concurring opinion.

Judge HUNTER concurs and joins in Judge WALKER'S concurring opinion.

Judge WALKER concurring.

[4] On the issue of defendant's refusal to be tested, I agree with the majority opinion where it concludes:

> Even if it were error to instruct the jury that it could consider the refusal as evidence of the defendant's guilt, on this record it

would not be prejudicial. Here three officers testified that the defendant smelled of alcohol, failed three field sobriety tests, slurred his words, had glassy eyes, and while under arrest fell in and out of sleep. Tests revealed the presence of alcohol and other impairing substances in his blood and urine. Clearly there was sufficient evidence for a jury to find that the defendant was appreciably impaired and thus guilty of driving under the influence.

However, I write separately to express my concern about the procedures followed here. A defendant may decline to be tested pursuant to N.C. Gen. Stat. § 20-16.2(a)(1). If he refuses and the officer elects to pursue "testing pursuant to other applicable procedures of law," this should be explained to the defendant in order that he may make a final decision on whether to submit to being tested. Only if he then refuses should he be reported as having "willfully refused" to be tested.

In any event, in my opinion, N.C. Gen. Stat. § 20-16.2 and § 20-139.1 need remedial legislative action to clarify under what circumstance a defendant is deemed to have "willfully refused" to be tested such that he is subjected to the additional penalties of N.C. Gen. Stat. § 20-16.2(d).

W. HARVEY KNOTTS & LULA KNOTTS-THOMAS, PLAINTIFFS v. CITY OF SANFORD, DEFENDANT

No. COA99-1577

(Filed 6 February 2001)

1. Injunction— temporary restraining order—properly dissolved

The trial court did not err by dissolving plaintiffs' temporary restraining order (TRO) under N.C.G.S. § 1A-1, Rule 65(b), because: (1) a TRO is a temporary measure that is in place only until a hearing can be held on a preliminary injunction and is properly dissolved if the preliminary injunction is not granted; and (2) the trial court refused to grant plaintiffs' request for a preliminary injunction.

2. Cities and Towns— motion to dismiss complaint—demolition proceedings—taking of property without just compensation—alternate grounds remain

The trial court did not err by granting defendant city's motion to dismiss plaintiffs' claim under N.C.G.S. § 1A-1, Rule 12(b)(6) for compensation based on an alleged unlawful taking of property arising out of the city beginning demolition proceedings when plaintiffs failed to comply with a consent order requiring them to repair or demolish a structure with substantial building code violations on the pertinent property, because: (1) the trial court granted the city's motion based on N.C.G.S. § 1A-1, Rule 12(b)(6), res judicata, and lack of subject matter jurisdiction, and plaintiffs have failed to assign error to the trial court's grant of the city's motion on the grounds of either res judicata or lack of subject matter jurisdiction; and (2) even if it were error to dismiss based upon Rule 12(b)(6), the trial court's order dismissing plaintiffs' complaint would still stand on the alternative grounds.

3. Civil Procedure— hearing on motion to dismiss—demolition proceedings—taking of property without just compensation—waiver of notice

The trial court did not err by hearing defendant city's motion to dismiss plaintiffs' complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) for compensation based on an alleged unlawful taking of property arising out of the city beginning demolition proceedings when plaintiffs failed to comply with a consent order requiring them to repair or demolish a structure with substantial building code violations on the pertinent property even though plaintiffs contend they did not have proper notice under N.C.G.S. § 1A-1, Rule 6(d), because: (1) plaintiffs have waived notice in this matter by participating in the hearing on the city's motion; (2) plaintiffs' counsel never objected to the lack of notice, nor did counsel request a continuance on the hearing; and (3) the finding of the trial court that a different period was fixed for the hearing by order of the court is conclusive on appeal since it was not challenged.

Judge HUDSON concurring in part and dissenting in part.

Appeal by plaintiffs from order entered 23 October 1999 by Judge James F. Ammons, Jr., in Lee County Superior Court. Heard in the Court of Appeals 8 January 2001.

Law Office of Fred D. Webb, Jr., by Fred D. Webb, Jr., for plaintiff-appellants.

City Attorney Susan C. Patterson for defendant-appellee.

SMITH, Judge.

This appeal arises from the trial court's order dissolving a Temporary Restraining Order and allowing defendant City of Sanford's (the City) motion to dismiss. We affirm.

In August 1997, the City's Code Enforcement Officer received a complaint of substantial building code violations at an apartment house located at 400/402 South Steele Street (the property), which is owned by, among others, plaintiff W. Harvey Knotts, Sr. (Mr. Knotts). After investigating the complaint, the City ordered the residents to vacate the property and scheduled a hearing regarding the violations. The hearing was held on 25 August 1997 and was attended by Mr. Knotts. Following the hearing, an order was issued finding the property to be

> in such a dilapidated and substandard state of disrepair that it constitutes a fire or safety hazard and is dangerous to life, health, and other property in the immediate vicinity, and is in such a condition as to constitute a public nuisance . . . .

Mr. Knotts was ordered to repair or demolish the structure within ninety days, establishing a deadline of 25 November 1997. Mr. Knotts failed to comply, and on 10 December 1997, the City notified Mr. Knotts that, because of noncompliance, the City was "refer[ring] this matter to the City Council, requesting [] an order to proceed with the demolition of this property." On 16 December 1997, the City passed "An Ordinance Directing the Building Inspector/Code Enforcement Officer to Repair or Demolish the Property Herein Described as Unfit for Human Habitation."

On or around 15 January 1998, in an action numbered 98 CVS 00046, Mr. Knotts sought a Temporary Restraining Order (TRO), Preliminary Injunction, and additional time to repair the building. The trial court granted the TRO, and on 29 January 1998, the City filed a motion to dissolve the TRO and to dismiss the complaint. The motion was heard on 2 February 1998, at which time the parties entered a Consent Order, which required the following:

1. That plaintiff shall present to defendant a complete set of sealed plans to correct all minimum housing code violations in accordance with the North Carolina State Building Code from an architect or engineer and a signed contract with a construction time table from a licensed general contractor on or before March 4, 1998;

2. That plaintiff shall have all repair work or demolition completed in accordance with the North Carolina State Building Code and a certificate of occupancy issued on the said property by June 30, 1998;

3. That defendant shall award completed bids for demolition of the said property and proceed to have the property demolished if plaintiff fails to meet the requirements of "1" or "2" of this Order hereinabove and plaintiff shall file a voluntary dismissal with prejudice in this matter.

4. That defendant shall issue a licensed contractor employed by plaintiff a building permit in accordance with City of Sanford permit application process upon plaintiff providing defendant with a complete set of sealed plans and a signed construction contract from a licensed general contractor with construction timetables as provided in paragraph one (1) of this Order.

Mr. Knotts failed to comply with the Consent Order, and the City again proceeded with demolition.

On 23 March 1998, Mr. Knotts filed a Motion for Relief from the Consent Order based on mistake, inadvertence, and excusable neglect. The matter was heard on 30 November 1998, and on 3 December 1998, the trial court denied Mr. Knotts' motion and ordered the City to proceed with demolition. Mr. Knotts appealed to this Court, but after first filing an unsettled record and then tardily filing a corrected record, this Court allowed the City's Motion to Dismiss Mr. Knotts' appeal.

Because the bids to demolish the property had expired, on 20 July 1999, the City Council awarded a re-bid to Kitts Grading. After sending notice to Mr. Knotts and allowing him the opportunity to demolish the structure, a contract was signed to begin demolition on 3 August 1999.

On 26 July 1999, Mr. Knotts and his daughter, plaintiff Lula Knotts-Thomas (Ms. Thomas), filed a complaint in the instant action

seeking a TRO, preliminary injunction, and compensation for the alleged taking of the property. On 2 August 1999 (filed 3 August), the trial court granted the TRO and scheduled a hearing on the request for preliminary injunction for 3 August 1999. On 3 August, the City filed a motion to dismiss on the grounds of lack of subject matter jurisdiction, *res judicata*, improper purpose in filing the action, failure to join necessary parties, failure to state a claim upon which relief can be granted, and irreparable harm to the citizens of the City. On 21 October 1999, the trial court dissolved the TRO, allowed the City's motion to dismiss, and stayed the demolition of the property pending appeal to this Court. From the order of dismissal, plaintiffs appeal.

Initially, we note that plaintiffs have failed to comply with the Rules of Appellate Procedure in several respects. First, the assignments of error in the record on appeal fail to make reference to the record page numbers where we may find the alleged error. *See* N.C. R. App. P. 10(c)(1) (Assignments of error must contain "clear and specific record or transcript references."). Second, the majority of the facts set forth in plaintiffs' brief are unaccompanied by references to the record and/or transcript in violation of N.C. R. App. P. 28(b)(4) (The statement of facts should be "supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be."). Finally, plaintiffs' arguments in the body of their brief are not followed by references to the assignments of error in violation of N.C. R. App. P. 28(b)(5) ("Immediately following each question [presented] shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal.").

Our rules of appellate procedure are mandatory, and failure to comply therewith subjects an appeal to dismissal. *See Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999) (per curiam) (dismissing appeal for appellate rules violations). Nonetheless, pursuant to N.C. R. App. P. 2, we have exercised our discretionary power and reached the merits of plaintiffs' appeal.

I.

[1] Plaintiffs first contend "[t]he [trial] [c]ourt erred in dismissing Plaintiff's [sic] Temporary Restraining Order." Their argument on appeal, however, focuses solely on the trial court's refusal to award

plaintiffs a preliminary injunction. As plaintiffs failed to assign error to the trial court's refusal to grant plaintiffs' request for preliminary injunction, we will not entertain this argument on appeal.

Under N.C. Gen. Stat. § 1A-1, Rule 65(b) (1999), a TRO is a temporary measure that is in place only until a hearing can be held on a preliminary injunction and is properly dissolved if the preliminary injunction is not granted. Accordingly, plaintiffs' argument is without merit, and this assignment of error is overruled.

II.

[2] Plaintiffs next contend the trial court erred in granting the City's motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1999) (failure to state a claim upon which relief may be granted). Plaintiffs contend this was error because "the complaint affirmatively alleges a taking in violation of the Plaintiff's [sic] constitutional rights without just compensation." However, the trial court granted the City's motion based on *res judicata*, lack of subject matter jurisdiction, and Rule 12(b)(6), and plaintiffs have failed to assign error to the trial court's grant of the City's motion on the grounds of either *res judicata* or lack of subject matter jurisdiction. Accordingly, even if we were to find error in the trial court's dismissal based upon Rule 12(b)(6), which we expressly decline to do, *see Harrell v. City of Winston-Salem*, 22 N.C. App. 386, 392, 206 S.E.2d 802, 806 (1974) (stating that the city's police power, which has been delegated by the State, permits the prohibition of use of private property that may threaten the public health, safety, or morals or the general welfare and, when so exercised, the owner need not be compensated, even though the property is thereby rendered substantially worthless), the trial court's order dismissing plaintiffs' complaint would still stand on the alternative grounds.

For instance, "[u]nder the doctrine of res judicata, 'a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them' if all relevant and material matters, in the exercise of reasonable diligence of the parties, could and should have been brought forward." *McGowan v. Argo Travel, Inc.*, 131 N.C. App. 694, 695, 507 S.E.2d 601, 601 (1998) (citations omitted). Because this case presents the same issues (or those that could have been raised) between the same parties or their privies as were finally decided in the previous case, the trial court properly dismissed plaintiffs' com-

plaint on *res judicata* grounds. Accordingly, this assignment of error is overruled.

III.

[3] Finally, plaintiffs assign error to "[t]he [c]ourt's hearing of defendant's motion to [d]ismiss the Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure without proper [n]otice under Rule 6(d) of the North Carolina Rules of Civil Procedure." They thus argue that the trial court's decision to dismiss their complaint was reversible error. We disagree.

Initially, we note that plaintiffs' argument in their brief relates *not* to N.C. Gen. Stat. § 1A-1, Rule 6(d) (1999), as is specifically set forth in plaintiffs' assignments of error, but to N.C. Gen. Stat. § 1A-1, Rule 56 (1999). The time limitations in the two rules are substantially different. As notice pursuant to Rule 56 was not made the basis of an assignment of error, this argument is not properly presented for review.

Nonetheless, plaintiffs have waived notice in this matter. In *Raintree Corp. v. Rowe*, this Court faced a similar situation and stated:

> At the hearing on the motions to dismiss, plaintiff stipulated to the use of documents outside the pleadings, participated in oral arguments, entered into a stipulation of facts, and responded in writing. Plaintiff did not make a timely objection to the hearing on 15 September 1977. Plaintiff did not request a continuance. Plaintiff did not request additional time to produce evidence pursuant to Rule 56(f). On the contrary, plaintiff participated in the hearing through counsel. The 10-day notice required by Rule 56 can be waived by a party. *Story v. Story*, 27 N.C. App. 349, 219 S.E.2d 245 (1975). The notice required by this rule is procedural notice as distinguished from constitutional notice required by the law of the land and due process of law. By attending the hearing of the motion on 15 September 1977 and participating in it and failing to request a continuance or additional time to produce evidence, plaintiff waived any procedural notice required.

38 N.C. App. 664, 667-68, 248 S.E.2d 904, 907 (1978); *see also Richland Run Homeowners Assn. v. CHC Durham Corp.*, 123 N.C. App. 345, 347, 473 S.E.2d 649, 651 (1996) ("[B]y attending and participating in the hearing without objection or without requesting a continuance, plaintiff waived any right to object to the summary judgment hearing

on the ground of lack of notice."), *rev'd per curiam on other grounds*, 346 N.C. 170, 484 S.E.2d 527 (1997).

In the case at bar, contrary to the assertion made by the dissent, plaintiffs participated in the hearing on the City's motion. First, their counsel argued that they need not have exhausted any administrative remedies. Next, they argued that the present case was distinguishable from the prior filing, thus precluding application of *res judicata*. They also argued the merits of their case.

Likewise, plaintiffs' counsel never objected to the lack of notice, nor did counsel request a continuance on the hearing. The extent of the discussion regarding lack of notice is as follows:

> [PLAINTIFFS' COUNSEL:] And you cannot dismiss a complaint whenever we haven't gone through discovery. We haven't done anything, prepared, no answer's been filed, res judicata, collateral estoppel, all those are matters that have to be pled, not put in motion when you get them today and you hear them tomorrow. And so basically what—the matter pending and the answer not being filed, and I think it certainly would be inadvertent to dismiss anything as it relates to the—particularly to the complaint itself.
>
> [THE COURT:] Well, you're not saying that she has to file an answer before I can consider either summary judgment or 12(b)(6), are you?
>
> [PLAINTIFFS' COUNSEL:] No, but she has to put us on proper notice for summary judgment and 12(b)(6).
>
> . . . .
>
> . . . I got the motion this morning, Judge. I mean, I got the motion this morning.

While there was discussion of lack of notice, counsel for plaintiffs neither objected, moved for a continuance, nor requested additional time to produce evidence. Accordingly, we hold that plaintiffs have waived the notice requirement.

Notwithstanding plaintiffs' waiver of notice, N.C. Gen. Stat. § 1A-1, Rule 6(d) (1999) provides in pertinent part that "A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the

time specified for the hearing, *unless a different period is fixed by these rules or by order of the court.*" (Emphasis added.) In the trial court's order dismissing plaintiffs' complaint, it stated in its findings of fact:

> [T]his is an action upon Plaintiffs [sic] request for a Temporary Restraining Order and Preliminary Injunction, and a Complaint for an alleged taking without compensation; and Defendants [sic] Motion to Dismiss.
>
> . . . .
>
> 17. *A hearing was scheduled for August 4, 1999, at 2:00 p.m., for Plaintiffs Temporary Restraining Order and an Injunction hearing, and Defendant's Motion to Dismiss.*

(Emphasis added.) As finding 17 was not challenged on appeal, it is conclusive. *See Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 22, 411 S.E.2d 645, 650 (1992). As this finding indicates that "a different period [was] fixed . . . by order of the court," N.C. Gen. Stat. § 1A-1, Rule 6(d), there can be no violation of the Rule 6(d) notice requirements.

For the reasons stated hereinabove, we affirm the trial court's order.

Affirmed.

Chief Judge EAGLES concurs.

Judge HUDSON concurs in part and dissents in part.

HUDSON, Judge, concurring in part and dissenting in part.

I concur with the majority's analysis of issues I and II. However, I believe that plaintiffs were entitled to notice of the hearing on the motion to dismiss, pursuant to Rules 12(b) and 6(d). *See* N.C.R. Civ. P. 12(b) and 6(d). Accordingly, I would reverse the trial court's order and remand for a hearing on the motion to dismiss.

Defendant's motion to dismiss was filed on 3 August 1999, and served on plaintiffs' counsel by hand on 4 August 1999, the day on which a hearing had been scheduled to address plaintiffs' request for a preliminary injunction. At the appointed time, the parties

appeared for the scheduled hearing. Plaintiffs' counsel participated in the hearing and discussed the issues of *res judicata* and exhaustion of administrative remedies, but such participation and discussion occurred only within the context of addressing the preliminary injunction.

After hearing from the parties on the request for injunction, the court shifted the discussion to defendant's motion to dismiss. At that time, plaintiffs' counsel immediately pointed out that notice had not been properly given for a motion to dismiss or for a motion for summary judgment, pursuant to Rule 12(b). The comments of plaintiffs' counsel quoted by the majority were, in my view, sufficient to communicate an objection to the lack of notice. Despite counsel's contention that notice had not been properly given, the court proceeded to enter two orders: one denying the request for preliminary injunction, and one allowing the motion to dismiss. Unlike the plaintiff in *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E.2d 904 (1978), a case cited by the majority, plaintiffs in the instant case did not stipulate to any documents, and were not given an opportunity to argue the merits of the motion to dismiss.

In my view, the circumstances in the case at bar constitute a violation of the specific terms of Rules 12(b) and 6(d), both of which are cited in plaintiffs' third assignment of error, and in Argument III of plaintiffs' brief. First, Rule 12(b) states, in pertinent part:

> If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C.R. Civ. P. 12(b). The motion in the instant case was filed with numerous attachments, including affidavits and other documents which were outside of the pleading and which were not excluded by the court. Rule 12(b) requires that such a motion be treated as a motion for summary judgment. *See, e.g., Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979).

This Court has consistently held that "Rule 12(b) clearly contemplates the case where a party is 'surprised' by the treatment of a Rule 12(b)(6) motion as one for summary judgment," and that, in such

cases, Rule 12(b) "affords such a party a reasonable opportunity to oppose the motion with . . . materials made pertinent to such a motion." *Locus v. Fayetteville State University*, 102 N.C. App. 522, 528, 402 S.E.2d 862, 866 (1991); *see also Raintree Homeowners Assoc. v. Raintree Corp.*, 62 N.C. App. 668, 673, 303 S.E.2d 579, 582, *disc. review denied*, 309 N.C. 462, 307 S.E.2d 366 (1983) ("It is significant that the rule provides a 'reasonable opportunity' rather than requiring that the presentation of materials be in accordance with Rule 56."). Plaintiffs were essentially deprived of an opportunity to address the merits of defendant's motion. Therefore, I believe we should remand so that plaintiffs have a "reasonable opportunity to present all material made pertinent" to the motion.

Furthermore, even if it were not necessary to treat the motion to dismiss as a motion for summary judgment pursuant to Rule 12(b), the lack of notice in the instant case would still violate Rule 6(d), which requires that "[a] written motion . . . and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court." N.C.R. Civ. P. 6(d). Here, the motion to dismiss was served on the same day as the hearing to address the motion, and there is nothing in the record to indicate that a different notice period was "fixed . . . by order of the court." Rather, it appears from the transcript that plaintiffs' counsel had no notice that the motion to dismiss would be addressed on that day. The majority states that the Order, which was entered 21 October 1999—more than two months *after* the date of the hearing—"fixed" a different notice period. I do not believe that the Rule contemplates that the notice period may be shortened by an order entered after the fact. Such an interpretation would conflict with the very definition of the word "notice" by allowing a dismissal on the merits where the non-moving party has, in fact, no meaningful notice at all.

By conducting a hearing on defendant's motion to dismiss on the same day that the motion was served on plaintiffs' counsel, the court deprived plaintiffs of the opportunity to produce materials relevant to the motion, and to defend against the motion. The notice requirements in Rules 12(b) and 6(d) are mandatory and should not be ignored, especially where, as in the instance case, the impact of ignoring the requirements is dispositive. I would reverse and remand to allow plaintiffs an opportunity to respond to defendant's motion to dismiss.

JEFFREY DONALDSON, PLAINTIFF v. JAMES LARRY SHEARIN AND FRANCES B. SHEARIN, DEFENDANTS

No. COA00-276

(Filed 6 February 2001)

1. Deeds— restrictive covenants—number of buildings per lot limited—lots re-divided

The trial court erred by ordering that defendants not be permanently enjoined from placing one double wide mobile home on each of defendants' lots where the two lots had originally been one and where restrictive covenants from that time imposed a limit of one dwelling per lot. The language of the covenants suggest that the intent of the developer was to restrict the number of structures on each of the lots as originally platted and to place a restriction on the number of single family dwellings constructed in any one area of the subdivision. This purpose cannot be achieved under defendants' interpretation of the covenants, which would not limit the number of dwellings on the original lots so long as the landowner re-divided the lots.

2. Injunctions— enforcement of restrictive covenants—remedy

In an action for a permanent injunction to enforce restrictive covenants remanded on other grounds, the trial court must fashion an appropriate remedy for any violation of the covenants. The appropriateness of the remedy is clearly within the province of the trial court.

Judge TYSON dissenting.

Appeal by plaintiff from judgment filed 21 December 1999 by Judge Robert A. Evans in Nash County District Court. Heard in the Court of Appeals 23 January 2001.

Massengill & Bricio, P.L.L.C., by Clint E. Massengill, for plaintiff-appellant.

Dill, Fountain, Hoyle, Pridgen & Stroud, L.L.P., by William S. Hoyle, for defendant-appellees.

GREENE, Judge.

Jeffrey Donaldson (Plaintiff) appeals a judgment filed 21 December 1999, in favor of James Larry Shearin and Frances B. Shearin (collectively, Defendants).

The record shows that on 13 July 1989, Floyd B. Braswell, Rosie V. Braswell, O.B. Parker, and Shirley V. Parker (collectively, the Developer) recorded a map entitled "Final Plat of Parker Towne, Oak Level Township, Nash County, North Carolina" (the plat) in Map Book 18, Page 92 of the Nash County Registry. The plat subdivided a 27.40 acre tract of land (the Parker Towne Subdivision) into seven tracts of land. The seven tracts, numbered on the plat as lots 1 through 7, ranged in size from 2.31 acres to 5.7 acres.

On 28 July 1989, the Developer filed with the Nash County Registry a document entitled "DECLARATION OF PROTECTIVE COVENANTS[:] PARKER TOWNE SUBDIVISION" (the Restrictive Covenants). The Restrictive Covenants state, in pertinent part:

> [The Developer] do[es] hereby covenant and agree with all persons, firms and corporations hereafter acquiring any of the real estate hereinafter described that said real estate is subjected to the restrictions hereinafter set forth as the use and occupancy thereof.
>
> The real estate to which these Restrictive Covenants shall apply is Lots 1 through 7 inclusive as shown on Final Plat of Parker Towne, Oak Level Township, Nash County, North Carolina by Joyner, Keeny & Associates, which plat is recorded in Map Book 18, Page 92 of the Nash County Registry.
>
> The above described property is hereby subjected to the following restrictions as to the use and occupancy thereof.
>
> 1. No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot, other than one detached single family dwelling not to exceed two and one-half stories in height and a private garage and/or workshop for personal use, and other out buildings incidental to residential use of the lot.
>
> . . . .
>
> 8. On Lots 1, 2, 3 and 4 there shall only be permitted double wide mobile homes of good quality with brick underpinning or conventionally constructed homes containing at least 1,200 square feet of heated area.

On 28 July 1989, Plaintiff recorded at the Nash County Registry a deed conveying "Lot 3" of the Parker Towne Subdivision from the Developer to Plaintiff. The deed stated, "THIS CONVEYANCE is made

subject to those Restrictive Covenants recorded in Book 1283, Page 203, Nash County Registry."

On 31 August 1989, the Developer and Defendants entered into a "CONTRACT TO PURCHASE REAL ESTATE." In the contract, Defendants agreed to purchase from the Developer "Lot 4" of the Parker Towne Subdivision. The contract stated Lot 4 was subject to "Restrictive Covenants recorded in Book 1283, Page 203, Nash County Registry." The contract was filed with the Nash County Registry on 5 September 1989. On 25 May 1990, Defendants recorded a plat with the Nash County Registry that subdivided Lot 4 into two lots: Lot 4(1), consisting of .69 acres, and Lot 4(2), consisting of 4.84 acres.[1] Then, on 12 April 1999, Defendants recorded a deed with the Nash County Registry conveying "Lot 4" of the Parker Towne Subdivision from the Developer to Defendants.

On 26 May 1999, Plaintiff filed a complaint in the Nash County District Court, alleging Defendants intended to violate the Restrictive Covenants "by placing two family dwellings on Lot 4 of the Plat." Plaintiff alleged:

> [T]he evidence of Defendants' intent is as follows: (1) Defendants and other parties aligned with . . . Defendants have repeatedly requested that Plaintiff waive his rights under the Restrictive Covenants and permit two family dwellings on Lot 4 of the Plat; (2) Defendants have applied for two permits from Nash County to place septic tanks on Lot 4 of the Plat; (3) Defendants have staked out the ground and prepared the Lot to receive two dwellings . . . ; and (4) Defendant James Shearin stated to an acquaintance on Sunday, May 23, 1999, that he intended to move a single wide and a double wide mobile home onto Lot 4 of the Plat during the week of May 24, 1999.

Plaintiff's complaint requested "Defendants be perpetually enjoined from violating the Restrictive Covenants by an injunction ordering and requiring Defendants to comply with the restrictions," as well as a "temporary restraining order . . . followed by a preliminary injunction requiring Defendants to cease and desist from violating the restrictions of the Restrictive Covenant[s]."

On 26 May 1999, the Nash County District Court issued a temporary restraining order that "restrained and enjoined [Defendants]

1. Although the 25 May 1990 plat refers to the two subdivided lots as lot "1" and lot "2," we refer to these lots as lot "4(1)" and lot "4(2)."

from placing two family dwellings on Lot 4 of [the] Parker Towne Subdivision" until "further hearing on this matter or the expiration of this Temporary Restraining Order." In an amended complaint filed 21 June 1999, Plaintiff alleged Defendants had violated the Restrictive Covenants by "placing two family dwellings on Lot 4." Defendants, in an answer filed 21 July 1999, "admitted that Plaintiff's Lot and Defendants' Lots are subject to restrictive covenants recorded in Book 1283, Page 203, Nash County Registry." Defendants, however, denied having placed two dwellings on a single lot; rather, Defendants stated they had placed one dwelling on Lot 4(1) and one dwelling on Lot 4(2).

On 3 August 1999, the Nash County District Court granted a preliminary injunction in favor of Plaintiff. The preliminary injunction enjoined Defendants from "altering the present status concerning the establishment or set up of two dwellings on Lot 4 as it is depicted at Map Book 18, Page 92, Nash County Registry." On 19 October 1999, the trial court held a hearing on Plaintiff's complaint. In an order filed 21 December 1999, the trial court made the following pertinent findings of fact:

> 10. Lot 4 originally consisted of 5.53 acres.
>
> . . . .
>
> 12. Defendants re-subdivided Lot 4 into two lots, shown as Lots 1 and 2 on a map recorded in Plat Book 19, Page 105 of the Nash County Registry . . . .
>
> 13. Defendants placed one (1) double wide mobile home on each of Defendants' Lots.
>
> . . . .
>
> 16. The [Restrictive Covenants] contain no minimum lot size restrictions, and no side, front or rear setback restrictions.
>
> 17. The Nash County Zoning Ordinance does not prohibit the re-subdivision of lots in Parker Towne Subdivision.
>
> 18. Plaintiff conceded at trial that the [Restrictive Covenants] do not prohibit re-subdivision of Defendants' Lot 4, but contends that the [Restrictive Covenants] prohibit more than one dwelling on Lot 4 as originally platted.

The trial court then made the following pertinent conclusions of law:

> 2. Defendants are not prohibited by the [Restrictive Covenants] or the Nash County Zoning Ordinance from re-subdividing Lot 4 as show[n] in Plat Book 18, Page 92.
>
> 3. Defendants have not placed two (2) [dwellings] on one (1) lot of Parker Towne Subdivision.
>
> 4. Defendants[']' placement of one (1) double-wide mobile home on each of Defendants' Lots is not a violation of the [Restrictive Covenants] or the Nash County Zoning Ordinance.

The trial court, therefore, dissolved the preliminary injunction and ordered that "Defendants shall not be permanently enjoined from placing one double wide mobile home on each [of] Defendants' Lots."

The issues are whether: (I) the Restrictive Covenants were intended to restrict the number of single family dwellings on the lots in the Parker Towne Subdivision as originally platted or as re-subdivided; and (II) this Court may determine the appropriate equitable remedy for the violation of a restrictive covenant when the trial court has not made findings on the appropriate equitable remedy.

I

[1] Plaintiff argues the Restrictive Covenants prohibit the construction of more than one single family dwelling on any of the lots as originally platted and as recorded in Map Book 18, Page 92 of the Nash County Registry. In contrast, Defendants argue the restrictions placed on the lots in the Restrictive Covenants apply to the lots as they existed subsequent to their re-subdivision rather than as originally platted.

"In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967). Because restrictive covenants "limit the free use of property," they are strictly construed. *Robinson v. Pacemaker Investment Co.*, 19 N.C. App. 590, 594, 200 S.E.2d 59, 61 (1973), *cert. denied*, 284 N.C. 617, 201 S.E.2d 689 (1974). Nevertheless, restrictive covenants should not be so strictly construed "as to defeat the purpose of the restriction." *Id.*

In this case, the Restrictive Covenants limit the construction on each "lot" to "one detached single family dwelling." The Restrictive Covenants describe the lots subject to the restrictions as "[l]ots 1 through 7 inclusive as shown on Final Plat of Parker Towne [subdivision] . . . recorded in Map Book 18, Page 92 of the Nash County Registry." This language suggests the intent of the Developer was to restrict the number of structures constructed on each of the seven lots as originally platted. *See id.* at 594-96, 200 S.E.2d at 62 (language of restrictive covenants is one factor to consider when determining the intention of the parties). Additionally, the purpose of Paragraph 1 of the Restrictive Covenants is to place a restriction on the number of single family dwellings constructed in any one area of the Parker Towne Subdivision. This purpose cannot be achieved by Defendants' proposed interpretation of the Restrictive Covenants. Under Defendants' proposed interpretation, a landowner in the Parker Towne Subdivision would not be limited in any way as to the number of single family dwellings constructed on his or her lot as originally platted, so long as the landowner re-subdivided the lot into additional lots. Such interpretation, which would place no limit on the number of single family dwellings constructed in any one area of the Parker Towne Subdivision, defeats the purpose of the restriction set forth in the Restrictive Covenants. *See id.* (purpose of restrictive covenants is one factor to consider when determining the intent of the parties). We therefore hold, based on the language and purpose of the Restrictive Covenants, that the Restrictive Covenants restrict the number of single family dwellings permitted on the lots as originally platted. It follows the placement by Defendants of more than one single family dwelling on Lot 4 violates the Restrictive Covenants. Accordingly, we reverse the trial court's 21 December 1999 order in favor of Defendants.

Defendants argue in their brief to this Court, pursuant to *Callaham v. Arenson*, 239 N.C. 619, 80 S.E.2d 619 (1954), and *Robinson*, that the lots in the Parker Towne Subdivision "could be subdivided without violating the applicable restrictive covenants." We first note that the issue in the case *sub judice* is not whether the Restrictive Covenants prohibit re-subdivision of the lots in the Parker Towne Subdivision; rather, the issue is whether the dwelling-restrictions in the Restrictive Covenants apply to the lots as originally platted or as re-subdivided. Although we agree with Defendants that the teachings of *Callaham* and *Robinson* govern the interpretation of the Restrictive Covenants in this case, we do not agree with Defendants' reading of these cases. In both *Callaham* and *Robinson*, the restric-

tive covenants at issue were interpreted based on the intent of the parties. In those cases, the restrictive covenants contained restrictions on the minimum area of the lots in the subdivisions. *Callaham*, 239 N.C. at 626, 80 S.E.2d at 624; *Robinson*, 19 N.C. App. at 596, 200 S.E.2d at 62. As those minimum areas were less than the areas of the lots as originally platted, the *Callaham* and *Robinson* courts held the parties must have intended the restrictions in the restrictive covenants to apply to the lots as re-subdivided. *Callaham*, 239 N.C. at 626, 80 S.E.2d at 624; *Robinson*, 19 N.C. App. at 596, 200 S.E.2d at 62. Otherwise, the minimum area requirements in the restrictive covenants would be meaningless. *Callaham*, 239 N.C. at 626, 80 S.E.2d at 624; *Robinson*, 19 N.C. App. at 596, 200 S.E.2d at 62. In contrast, in the case *sub judice*, the Restrictive Covenants do not contain any restrictions on the minimum area of the lots. When ascertaining the intent of the Developer, this factual distinction results in a different outcome in the case *sub judice* than the outcomes in *Callaham* and *Robinson*.

II

[2] Plaintiff argues the trial court erred by failing to grant a mandatory injunction ordering Defendants to remove from Lot 4 any dwelling home that was placed on that lot in violation of the Restrictive Covenants.

"A mandatory injunction may be an appropriate remedy to compel the removal or modification of a building erected in violation of a restrictive covenant." *Crabtree v. Jones*, 112 N.C. App. 530, 534, 435 S.E.2d 823, 825 (1993), *disc. review denied*, 335 N.C. 769, 442 S.E.2d 514 (1994). Because a mandatory injunction is based on the equities between the parties, the appropriateness of the remedy is "clearly within the province of the trial court." *Id.* (remanding case to trial court for determination of appropriate equitable remedy).

In this case, because the trial court concluded Defendants did not violate the Restrictive Covenants, the trial court did not make any findings regarding an appropriate remedy for any violation. We, therefore, remand this case to the trial court for entry of judgment in Plaintiff's favor. On remand, the trial court must fashion an appropriate remedy for any violation of the Restrictive Covenants.

Reversed and remanded.

Judge HORTON concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

I would affirm the trial court's dissolution of the preliminary injunction and denial of the permanent injunction. "[R]estrictive servitudes are in derogation of the free and unfettered use of land." *Callaham v. Arenson*, 239 N.C. 619, 625, 80 S.E.2d 619, 624 (1954); *see also, Ingle v. Stubbins*, 240 N.C. 382, 82 S.E. 2d 388 (1954); 1 Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 18-6, at 840 (5th ed. 1999).

The covenants and agreements which impose such restrictions must be "strictly construed against limitation on use." *Callaham* at 625, 80 S.E.2d at 624. In *Callaham*, our Supreme Court noted that "restrictive covenants clearly expressed may not be enlarged by implication or extended by construction. They must be given effect and enforced as written." *Id.* In *Long v. Branham*, 271 N.C. 264, 156 S.E.2d 235 (1967), our Supreme Court summarized the rules of construction applicable to restrictive covenants:

> 'Covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. *Doubt will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.*'

Id. at 268, 156 S.E.2d at 239 (quoting 20 Am.Jur.2d, *Covenants, Conditions and Restrictions*, s. 187 (1965)) (emphasis supplied).

"The key to interpreting restrictive covenants is the intention of the parties." *Robinson v. Pacemaker Investment Co.*, 19 N.C. App. 590, 595, 200 S.E.2d 59, 61 (1973), *cert. denied*, 284 N.C. 617, 201 S.E.2d 689 (1974) (citations omitted). The majority believes that the language in the covenants as a whole suggests that the developer intended to restrict the number of structures on the lots as originally platted, and that any other construction would defeat the purpose of the covenants.

However, the evidence showed that defendants recorded a plat on 25 May 1990 which showed re-subdivision of lot 4. Defendants recorded a deed with the Nash County Registry conveying Lot 4 from the developer to defendants on 12 April 1999. The plat showing defendants' subdivision of the lot was of record nearly nine years prior to conveyance of the deed. At no time did plaintiff or the developer object to defendants' re-subdivision of the lot, or raise any issue about the number of dwellings permitted on the re-subdivided lot.

The words the developer used in the covenant itself are the most indicative of intent: "[n]o building shall be erected, altered, placed or permitted to remain on any lot, other than one detached single family dwelling. . . ." The plain meaning of the words in the covenants convey *only* an intent that a single dwelling be placed on a single lot. The covenants do not prohibit re-subdivision of the lots, or address re-subdivision in any respect.

The effect of the majority's decision is to enlarge by implication and extend by construction the plain meaning of the words in the covenants. This we cannot do. As the Supreme Court noted in *Callaham*, the plaintiffs' proposed plan to subdivide "when interpreted in the light of the applicable rules of law comes within the terms of the restrictive covenants under review. As parties bind themselves so must the courts leave them bound." *Callaham* at 626, 80 S.E.2d at 625.

The plain meaning of the words do not prohibit defendants from placing "one detached single family dwelling" on "any lot" when enforced as written and strictly construed against limitation on use. *Callaham* at 625, 80 S.E.2d at 624; *Long* at 268, 156 S.E.2d at 239. Accordingly, I respectfully dissent.

JESSICA ELAINE EDWARDS, A MINOR CHILD BY AND THROUGH SUSAN F. EDWARDS, HER GUARDIAN AD LITEM, AND SUSAN F. EDWARDS, INDIVIDUALLY, PLAINTIFF-APPELLANTS V. STEPHEN WALL, LUCY DOWNEY, AND HAYWOOD PEDIATRIC AND ADOLESCENT MEDICINE GROUP, P.A., DEFENDANT-APPELLEES

No. COA99-1490

(Filed 6 February 2001)

1. Witnesses— expert—qualification—review

Although the question of whether a witness qualifies as an expert is exclusively within the discretion of the trial court, review of whether a pediatric gastroenterologist should have been allowed to testify against general practice pediatricians involved interpretation of N.C.G.S. § 8C-1, Rule 702(b)(2) and review was de novo.

2. Medical Malpractice— expert witness—same field of specialization

The trial court erred in a medical malpractice action by ruling that plaintiff's expert witness was not qualified under N.C.G.S. § 8C-1, Rule 702 where defendants were general practice pediatricians and the witness was certified in the subspecialty of pediatric gastroenterology and a professor at UCLA. Defendants are alleged to have failed to make a proper diagnosis of abdominal complaints and, as required by N.C.G.S. § 8C-1, Rule 702(b)(2), the witness spends the majority of his time practicing and teaching pediatrics and pediatric gastroenterology, which includes the treatment of the stomach.

Appeal by plaintiffs from order entered 22 July 1999 by Judge Zoro J. Guice, Jr. in Haywood County Superior Court. Heard in the Court of Appeals 19 October 2000.

Melrose, Seago & Lay, P.A., by Mark R. Melrose, for plaintiff-appellants.

Northup & McConnell, P.L.L.C., by Isaac N. Northup, Jr., for defendant-appellees.

Kennedy Covington Lobdell & Hickman, L.L.P., by James P. Cooney III, for the North Carolina Association of Defense Attorneys, amicus curiae.

Jones Martin Parris & Tessener, PLLC, by Tamara R. Nance and John Alan Jones, for the North Carolina Academy of Trial Lawyers, amicus curiae.

McGEE, Judge.

Plaintiffs appeal from the trial court's directed verdict entered pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. The trial court determined defendants were entitled to judgment as a matter of law because of plaintiffs' failure to offer any competent evidence that defendants had violated the standard of care. We disagree.

Defendants Stephen Wall and Lucy Downey are physicians practicing as pediatricians at Haywood Pediatric and Adolescent Medicine Group, P.A., in Haywood County, North Carolina (hereinafter defendants). Jessica Elaine Edwards (Jessica), a minor child, was a regular patient of defendants since her birth on 8 June 1991. Plaintiffs allege in their complaint that on 13 July 1997 Jessica suffered from stomach pain, vomiting and fever. The next day, Susan F. Edwards (Jessica's mother), telephoned defendants about Jessica's symptoms. Jessica was examined at defendants' office on 16 July 1997, and after an examination which included taking a blood sample, defendants told Jessica's mother to go directly to the hospital for Jessica to be admitted.

Defendants' admitting diagnosis for Jessica was dehydration and gastroenteritis. Defendants discharged Jessica from the hospital on 17 July 1997, despite her continued abdominal pain and her mother's request to determine if Jessica had appendicitis. On 18 July 1997, Jessica again returned to defendants' office with stomach pains. Jessica and her mother were told by defendants to go immediately to the hospital emergency room. Upon Jessica's admission to the hospital, it was determined that her appendix had ruptured and emergency surgery was performed by a non-defendant doctor to repair the damage caused by the ruptured appendix. Jessica's mother testified that Jessica required additional surgery and medical treatments for problems caused by the ruptured appendix.

Plaintiffs filed a complaint on 2 January 1998 alleging defendants failed to diagnose and treat Jessica's acute appendicitis prior to the rupture of the appendix. Defendants answered and denied plaintiffs' allegations of negligence on 30 January 1998. Prior to trial, pursuant to N.C. Gen. Stat. § 1A-1, Rule 26(4), plaintiffs designated Dr. Marvin

E. Ament (Dr. Ament) as an expert witness in pediatrics, who would testify as to defendants' breaches of the standard of medical care that caused Jessica's continuing injuries. Defendants designated three experts who, upon review of the medical records and pleadings, were to testify that the care rendered by defendants was in accordance to the standard of practice required by law.

Plaintiffs called Dr. Ament as a witness at trial and following direct examination of Dr. Ament as to his medical qualifications, plaintiffs tendered him as an expert in pediatrics and pediatric gastroenterology. Defendants requested a *voir dire* examination of Dr. Ament concerning his qualifications as an expert witness. After both parties questioned Dr. Ament and following extensive discussion with the trial court, the trial court ruled that plaintiffs' expert witness, Dr. Ament, was not qualified to testify as an expert under Rule 702 of the North Carolina Rules of Evidence. Defendants moved for and were granted a directed verdict by the trial court. Plaintiffs appeal.

Plaintiffs argue that the trial court erred in its interpretation of the language of N.C. Gen. Stat. § 8C-1, Rule 702(b)(2), relating to the admissibility of expert testimony, when it determined that Dr. Ament did not qualify as an expert witness. The General Assembly amended Rule 702 in 1995, with the amendment effective 1 January 1996. The amended rule added several provisions relating specifically to the qualifications of an expert witness testifying to the appropriate standard of care in medical malpractice actions. *See Andrews v. Carr*, 135 N.C. App. 463, 469, 521 S.E.2d 269, 273 (1999), *disc. review denied*, 351 N.C. 471, 543 S.E.2d 483 (2000). "Rule 702(b)(1) governs expert testimony on the 'appropriate standard of health care' offered against or on behalf of a 'specialist[.]' " *Formyduval v. Bunn*, 138 N.C. App. 381, 383, 530 S.E.2d 96, 98 (2000).

In a medical malpractice action, as defined in N.C. Gen. Stat. § 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in N.C. Gen. Stat. § 90-21.12 unless that person is a licensed health care provider in this State or another state who meets the following criteria:

> (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
>
> (a) Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or

(b) Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

(a) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar speciality which includes within its speciality the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or

(b) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C. Gen. Stat. § 8C-1, Rule 702(b)(1)(2) (1999). Therefore, in order to qualify as an expert to testify as to defendants' applicable standard of care as specialists, plaintiffs' expert must be "in the same specialty" as defendant pediatricians or "specialize in a similar specialty which includes . . . the performance of the procedure that is the subject of the complaint." *Id.* In addition, plaintiffs' expert must, during the year preceding July 1997, have: (1) devoted a majority of "professional time" (2) to "active clinical practice" of "the same or similar specialty" or (3) to "the instruction of students . . . in the same specialty." *Id.* All the statutory requirements must be met in order for the witness to be qualified as an expert witness and be allowed to testify.

[1] Plaintiffs contend that our Court's standard of review on appeal is *de novo* but defendants argue the standard of review is abuse of discretion by the trial court. This issue involves an interpretation of N.C.G.S. § 8C-1, Rule 702 by the trial court. "Ordinarily, whether a wit-

ness qualifies as an expert is exclusively within the discretion of the trial judge[.]" *State v. Underwood*, 134 N.C. App. 533, 541, 518 S.E.2d 231, 238 (1999), *cert. improvidently allowed*, 352 N.C. 669, 535 S.E.2d 33 (2000). However, "[w]here an appeal presents questions of statutory interpretation, full review is appropriate, and [a trial court's] 'conclusions of law are reviewable *de novo.*' " *Mark IV Beverage, Inc. v. Molson Breweries USA*, 129 N.C. App. 476, 480, 500 S.E.2d 439, 442 (quoting *N.C. Reinsurance Facility v. N.C. Insurance Guaranty Assn.*, 67 N.C. App. 359, 362, 313 S.E.2d 253, 256 (1984)), *disc. review denied*, 349 N.C. 360, 515 S.E.2d 705 (1998); *see also Brooks v. Ansco & Assocs.*, 114 N.C. App. 711, 716, 443 S.E.2d 89, 92 (1994) (allegation that agency decision is based upon an error of law requires *de novo* review); *Brooks, Comm'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 345 (1988) (allegation of error in interpreting statute is an allegation of an error of law).

De novo review is appropriate as plaintiffs contend that the trial court's decision was based on an incorrect interpretation of Rule 702(b)(2), specifically as to the trial court's interpretation of the terms "specialty" and/or "similar practice" and "active clinical practice." See *Formyduval*, 138 N.C. App. at 385, 530 S.E.2d. at 99-100. In addition, plaintiffs assert that the trial court misinterpreted the term "either or both" in subsection 2, inserted the word "and" between subsection 2a and 2b, and erred in interpreting the term "health profession" and the term "either or both." We must determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by sufficient evidence. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

[2] By its terms, Rule 702(b) applies to all medical malpractice actions against any "health care provider." *See* N.C.G.S. § 90-21.11 (1999). Section (b)(2)(a) of Rule 702 requires expert witnesses to have engaged in "active clinical practice of the same health profession" as the defendant, or, if the defendant is a specialist, in "active clinical practice of the same specialty" as the defendant. Thus, section (b) of Rule 702 applies to defendants in the case before us, who are physicians specializing in pediatrics. " 'Specialist' is defined as a 'physician whose practice is limited to a particular branch of medicine or surgery, [especially] one certified by a board of physicians.' " *Formyduval*, 138 N.C. App. at 387, 530 S.E.2d at 101 (citation omitted); *see also* 5 J.E. Schmidt, Attorney's Dictionary of Medicine S-219

(1999) (defining specialist as a "medical practitioner who limits his practice to certain diseases . . .; a person who is a diplomate of one of the specialty boards"). It is uncontested that defendants are specialists in the field of pediatric medicine.

Plaintiffs argue that Dr. Ament is qualified as an expert in pediatric medicine under Rule 702(b)(2) in four different ways: he spends a majority of his time (1) in the active clinical practice of the same specialty as defendants, (2) in a similar specialty which includes within its specialty the procedure that is the subject matter of plaintiffs' complaint, (3) in instructing medical students in a clinical setting, and (4) in combination of active clinical practice of pediatrics and in the instruction of medical students.

Dr. Ament is certified by the American Board of Pediatrics and is therefore certified in the same specialty as defendants. Having the same certification meets the first prong of Rule 702(b)(1) requiring that the expert "specialize in the same specialty" as defendants. Dr. Ament is also certified in the subspecialty of pediatric gastroenterology. It is Dr. Ament's certification in, and practice of, the subspecialty pediatric gastroenterology, that the trial court and defendants contend results in Dr. Ament not being qualified to testify in this case.

The trial court's findings of fact included that defendants' medical practice is in "the general practice of pediatrics" and that Dr. Ament, as a professor at the UCLA Medical School, "is a specialist specializing in the field of pediatric gastroenterology[.]" Therefore, the trial court concluded that plaintiffs' expert "is not a practitioner of general pediatrics as are the defendants[.]" The trial court determined that Dr. Ament failed the first prong of Rule 702(b)(1). Dr. Ament testified that he is "a distinguished professor of pediatrics in the Department of Pediatrics at the University of California." Dr. Ament's testimony and his curriculum vitae show that he has been certified as a pediatrician since 1968. Hence, we conclude that plaintiffs' expert is a specialist in pediatrics and as such is qualified to testify in this case.

The trial court next determined that although Dr. Ament was a board certified pediatrician, the majority of his practice was in pediatric gastroenterology, which did not "include the [active clinical] practice of the type of medicine engaged in by the defendants[.]" Under the trial court's interpretation of active clinical practice, Dr. Ament fails the "active clinical practice of the same specialty" requirement of Rule 702(b)(2)(a). First, we note that Rule

702(b)(2)(a) also includes the language that the expert can be in the active clinical practice of the same specialty "*or* a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients[.]" N.C.G.S. § 8C-1, 702(b)(2)(a) (emphasis added). The trial court did not address this language of Rule 702 and did not allow plaintiffs to make an offer of proof as to Dr. Ament's familiarity with the procedure of diagnosing appendicitis in children and his experience in treating similar patients. This evidence is admissible under Rule 702(b)(2)(a). Plaintiffs' expert, Dr. Ament, a pediatrician who practices the subspecialty of pediatric gastroenterology, clearly may have practiced a similar specialty that included the procedure of diagnosing appendicitis in a child and have prior experience in this diagnosis. It appears that Dr. Ament is the type of expert that the language of Rule 702(b)(2)(a) meant to include in the definition of active clinical practice.

As to the trial court's finding that plaintiffs' expert did not have an active clinical practice in the same specialty, a close examination of the record verifies that Dr. Ament testified that he actively saw pediatric patients three times per week at the university hospital's clinic. Twenty-five to fifty of those patients were return visits, with six to ten patients being new. "Clinical is defined as 'based on or pertaining to actual experience in the observation and treatment of patients.' " *Formyduval*, 138 N.C. App. at 391, 530 S.E.2d at 103 (quoting 2 J.E. Schmidt, Attorney's Dictionary of Medicine C-310 (1999)). Considering the volume of patients that Dr. Ament sees at the UCLA Medical Center and in additional clinics in the Los Angeles area where he treats patients, we hold he is involved in an active clinical practice.

Dr. Ament was asked on *voir dire* if he spent the majority of his time as a physician in the same clinical practice as the defendants and Dr. Ament replied "No." However, Dr. Ament later stated in his testimony that although his practice emphasized gastroenterology in children, "it's all pediatrics . . . I deal with general pediatric problems in my chronic patients" and he agreed that the majority of his clinical practice was in pediatrics. Dr. Ament then clarified that although he works at a medical center and defendants work in a medical office, both he and defendants have an active clinical practice in the specialty of pediatrics.

We have found no case law in this state holding that Rule 702 requires that the physician expert and the physician defendant work

in exactly the same practice setting, as contended by defendants. Similarly, Rule 702 does not require that a physician, who specializes in pediatrics, be prepared to prove the percentages of each type of ailment that he treats within his practice. In the present case, Dr. Ament is a pediatrician who diagnoses "general pediatric problems" in his gastroenterology patients in addition to treating children "with pure problems unrelated to the GI tract." Dr. Ament is a pediatrician with a subspecialty in pediatric gastroenterology who has an active clinical practice at a medical center. Defendants are pediatricians with no subspecialty who have an active clinical practice in a medical office. We agree with plaintiffs that Dr. Ament qualifies as an expert under Rule 702(b)(2)(a) in that he has an "active clinical practice of the same specialty [pediatrics] or a similar specialty [subspecialty of pediatric gastroenterology] which includes within its specialty the performance that is the subject of the complaint [diagnosing pediatric appendicitis] and ha[s] prior experience treating similar patients [children]."

Dr. Ament is not a private physician but works exclusively as a professor of pediatrics at the UCLA Medical School. As a teaching physician in the UCLA Medical Clinic, Dr. Ament treats children with gastroentological problems who are referred to him by clinic pediatricians. In addition, Dr. Ament also testified that for a third of the patients he is their "primary pediatrician as well as being the gastroenterologist." As a pediatrician, Dr. Ament also diagnoses the basic childhood diseases of his gastroenterology patients. We agree with plaintiffs that the fact Dr. Ament treats gastroenterologic problems does not mean that his clinical time is not in the field of pediatrics. The trial court found that because Dr. Ament's active clinical practice included a subspecialty of pediatrics that he could not be qualified to testify regarding defendants who did not have an active practice in the same subspecialty. We hold that although plaintiffs' expert has an active subspecialty practice in pediatric gastroenterology, this does not disqualify him as a pediatrician who would know the standard of care for diagnosing appendicitis.

Further, the trial court concluded that plaintiffs' expert did "not spend the majority of his time teaching," causing him to fail the third prong of Rule 702(b), that allows "the instruction of students in an accredited health professional school . . . in the same specialty," as evidence of the expert's qualifications to testify.

Dr. Ament became an assistant professor of pediatrics in 1973 and since 1989 has been a distinguished professor of pediatrics at the

UCLA Medical School. Dr. Ament testified that UCLA Medical Center is an accredited health professional school. It appears from the record that Dr. Ament understood that the definition of "teaching medical students" meant "the formal part [of] giving lectures, which you think of as schooling" and testified he gave a formal lecture about once a month. This testimony, taken alone, disqualified Dr. Ament under the third prong of Rule 702(b)(2)(b). However, Dr. Ament clarified that while treating patients at the UCLA Medical Center, he was attended by residents, fellows and students. Dr. Ament therefore concurred that he spends the "majority of [his] professional working hours . . . in the active clinical and/or teaching roles . . . in pediatric medicine[.]" This evidence clearly supports plaintiffs' qualification of Dr. Ament as an expert under the requirements of Rule 702(b)(2).

We note that Rule 702(c), regarding expert testimony and a general practitioner defendant, allows only general practitioners to testify against general practitioners. Specialists, such as pediatricians, may only testify against other pediatrician specialists. Thus, if defendants held themselves out to be general practitioners, then Dr. Ament as a pediatrician with a subspecialty in pediatric gastroenterology would not qualify as an expert to testify. "As stated by another court, this rule 'is designed to protect the defendant [a general practitioner] from being compared with the higher standard of care required from one who holds himself out as an expert in the field.' " *Formyduval,* 138 N.C. App. at 390, 530 S.E.2d at 102 (quoting *Moore v. Foster,* 292 N.W. 2d 535, 538 (Mich. Ct. App. 1980)).

Defendants in this case practice in the specialty of pediatrics. The evidence of record supports that plaintiffs' expert, Dr. Ament, was qualified as an expert witness by a combination of his clinical practice and teaching in the same or similar specialty as practiced by defendants. Defendants are alleged to have failed a proper diagnosis of abdominal complaints. As required by Rule 702(b)(2), Dr. Ament spends the majority of his time practicing and teaching pediatrics and pediatric gastroenterology, which includes the treatment of the stomach. Dr. Ament is therefore qualified to testify as to the standard of care applicable to defendants and their alleged mistaken diagnosis of gastroenteritis.

We need not discuss plaintiffs' other assignments of error as we reverse the trial court's decision disqualifying Dr. Ament to testify under Rule 702. Accordingly, we reverse the directed verdict of the trial court and remand for trial.

Reversed and remanded.

Judges WALKER and HORTON concur.

MITCHELL TEW, EMPLOYEE, PLAINTIFF v. E.B. DAVIS ELECTRIC COMPANY, EMPLOYER v. SELF/COMPTRUST AGC, BRENTWOOD SERVICES, ADMINISTRATOR, DEFENDANTS, AND/OR BRADFORD S. HANCOX, ADMINISTRATOR OF THE ESTATE OF JUNIUS L. BURNEY, DECEASED, EMPLOYER, NON-INSURED, DEFENDANT

No. COA00-438

(Filed 6 February 2001)

1. Workers' Compensation— opinion—only two signatures—validity

The opinion and award of the Industrial Commission in a workers' compensation case is not invalid based on the fact that it was only signed and filed by two commissioners voting in the majority, because a third commissioner participated in the review of the case but retired before the decision was filed. N.C.G.S. § 97-85.

2. Workers' Compensation— "coming and going" rule—injury while commuting between work and home—not compensable—employer-provided transportation exception not met

The Industrial Commission erred in finding that plaintiff's injuries are compensable under the Workers' Compensation Act when plaintiff was injured while commuting between work and home, because: (1) an injury must arise out of and in the course of employment in order to be compensable under the Act; (2) the "coming and going" rule reveals that hazards of traffic are not incident to the employment and are common to the general public; and (3) plaintiff's accident does not fall within an exception to the "coming and going" rule since there is no evidence in the record to support the finding that the employer provided transportation pursuant to the terms of any employment contract.

Judge GREENE dissenting.

Appeal by defendant from opinion and award entered by the North Carolina Industrial Commission on 3 February 2000. Heard in the Court of Appeals 9 January 2001.

Lore & McClearen, by R. Edwin McClearen, for Plaintiff-Appellee.

Bailey & Dixon, L.L.P., by Alan J. Miles, for Defendant-Appellant.

TYSON, Judge.

Defendant, E.B. Davis Electric Company ("Davis Electric"), contracted with Pembroke State University to serve as electrical contractor for construction of a new building. Davis Electric hired Mr. Junius Burney ("Burney") as a subcontractor for this project. Davis Electric failed to secure a certificate of compliance or written waiver regarding workers' compensation coverage from Burney.

Plaintiff, Mitchell Tew ("Tew"), had worked with Burney doing side jobs on four or five occasions in the previous nine or ten years. Burney asked Tew on 10 February 1995 to work with him on the Pembroke State University project. Tew agreed.

Tew went to Burney's home on the morning of 11 February 1995. Burney drove Tew to the work site in Burney's truck. Burney and Tew worked at the site for about eight hours, and left the job site together late that afternoon. Burney made a U-turn on the way home. A collision occurred as a result of the U-turn, killing Burney, and injuring Tew.

Tew filed a worker's compensation claim for the injuries he sustained from the accident. Hearing was held on 28 January 1998. Deputy Commissioner Teresa B. Stephenson awarded benefits to Tew on 26 June 1998. On 3 February 2000, the Full Industrial Commission ("Commission") affirmed. The award was filed with the signatures of only two commissioners. Chairman J. Howard Bunn participated in the review of the case, but retired before the decision was filed.

The Commission awarded Tew disability benefits at the rate of "$400.00 per week from 11 February 1995 for the remainder of plaintiff's life, barring change in condition." Davis Electric appeals.

The issues presented by this appeal are: (1) whether the opinion and award is valid when signed by two commissioners, and (2) whether any competent evidence exists to support the Commission's finding that Tew's injuries arose out of and in the course of his employment.

I.

[1] Davis Electric contends that the opinion and award of the Commission is invalid as it was only signed and filed by two commissioners voting in the majority. We disagree.

Commissioner Bernadine S. Ballance authored the opinion, and Commissioner Laura K. Mavretic concurred. Former Commissioner J. Howard Bunn, Jr. participated in the review of the case but retired before the decision was filed.

This Court was faced with similar facts in *Pearson v. Buckner Steel*, 139 N.C. App. 394, 533 S.E.2d 532 (2000). In *Pearson*, only two commissioners signed the opinion and award. It was noted that the third commissioner had participated in the review of the case, but was unavailable at the time of filing because of illness. *Id.* Appellant in *Pearson* argued that the commission lacked jurisdiction because "two commissioners cannot constitute a panel." *Id.* This Court upheld the opinion and award because the case had been reviewed by three commissioners and rendered by a majority of the members of that panel, as required by N.C.G.S. § 97-85. *Id.*

II.

[2] Next, we consider whether competent evidence exists to support the Commission's finding that Tew's injuries are compensable under the Workers' Compensation Act ("the Act"). Davis Electric contends that Tew's claim is not compensable under the Act because Tew was injured while commuting between work and home. We agree and reverse the ruling of the Commission.

An injury must arise out of and in the course of employment in order to be compensable under the Act. *Hardy v. Small*, 246 N.C. 581, 99 S.E.2d 862 (1957); *Royster v. Culp, Inc.*, 343 N.C. 279, 470 S.E.2d 30 (1996). The general rule is that an accidental injury occurring while an employee travels to and from work is not one that arises out of and in the course of employment. *Powers v. Lady's Funeral Home*, 306 N.C. 728, 295 S.E.2d 473 (1982). The "hazards of traffic are not incident to the employment and are common to the general public," and not covered by the Act. Leonard T. Jernigan, Jr., *North Carolina Worker's Compensation Law and Practice* § 6-3 (3d ed. 1999), citing *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E.2d 47 (1968). This is known as the "coming and going" rule. *Id.*

Tew claims that the facts here indicate that his injuries are compensable because the accident falls within an exception to the "coming and going" rule. We disagree.

Our courts recognize an exception to the "coming and going" rule where "the employer, as an incident to the contract of employment, provides the means of transportation to and from the place where the work of employment is performed." *Harris v. Farrell, Inc.*, 31 N.C. App. 204, 208, 229 S.E.2d 45, 47 (1976) (quoting *Hardy v. Small*, 246 N.C. 581, 585, 99 S.E.2d 862, 866 (1957).

"The salient factor is whether provision for transportation is a real incident to the contract of employment." *Insurance Co. v. Curry*, 28 N.C. App. 286, 289, 221 S.E.2d 75, 78, *disc. rev. denied*, 289 N.C. 615, 223 S.E.2d 396 (1976) (citing *Lassiter v. Telephone Co.*, 215 N.C. 227, 1 S.E.2d 542 (1939)). This exception is "manifested as something more than mere permission; it approaches employee transportation as a matter of right." *Id.* Within this exception, the employee is in the course of employment only if he has a contractual right to the transportation, but not if it is "gratuitous, or a mere accommodation." *Jackson v. Bobbitt*, 253 N.C. 670, 676-77, 117 S.E.2d 806, 810 (1961) (quoting *Lassiter*, supra).

In *Jackson*, our Supreme Court, stated:

> Courtesy rides given by an employer do not, generally, give rise to liability under compensation statutes. The transportation must be furnished as a real incident of the employment to come within the rule. . . .
>
> An employee who has completed his day's work and . . . is riding on a conveyance of the employer upon a public street, pursuant to permission, but not to any obligation on the part of the employer by contract, express or implied, to furnish such transportation, is not engaged in performing any services for his employer.
>
> Where an employer merely permits or authorizes the use of his facilities by an employee to return home, it is not considered as being in the course of employment, but as a convenience to the employee. An injury happening under such circumstances does not bring the employee within the compensation act.

Id. at 677, 117 S.E.2d at 810.

The standard of review on appeal is whether the findings of fact are supported by competent evidence in the record, and whether the conclusions of law are supported by the findings. *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). "The determination of whether an accident arises out of and in the course of employment is a mixed question of law and fact, and this Court may review the record to determine if the Industrial Commission's findings are supported by sufficient evidence." *Royster* at 281, 470 S.E.2d at 31 (citing *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977)).

The Commission concluded that Tew was injured by an accident arising out of and in the course of his employment. The Commission made the following finding of fact:

> 7. Between 6:30 a.m. and 7:00 a.m., the plaintiff went to defendant Burney's home in Fayetteville and rode with defendant Burney to the work site in Pembroke pursuant to the terms of Mr. Burney's employment contract with the plaintiff. Defendant Burney had always provided transportation to the work sites because the equipment was located in defendant Burney's truck and it allowed the two men to arrive at the work site at the same time. Defendant Junius Burney drove his vehicle, a white 1987 GMC pickup truck. The plaintiff only took his hard hat and gloves when he got into defendant Burney's truck.

Davis Electric argues that there is no evidence in the record to support the finding that the employer-provided transportation was pursuant to the terms of any employment contract. We agree.

It does not appear from the record that an express or implied obligation on the part of Burney to provide transportation for Tew to and from work existed. The undisputed evidence shows that Burney called Tew on 10 February 1995, asking him to work with him the next day. They decided to meet at Burney's house to ride together to the work site.

As evidence that a contractual right to employer-provided transportation existed, Tew cites his own testimony that Burney agreed to drive because all the tools were in his truck. However, this shows that Burney drove because it was convenient to do so, not because Tew had a contractual right to such transportation. Tew refers to his testimony that Burney drove so they could arrive at the work site at the same time. This also shows that the transportation was a mere

accommodation, not evidence of a contractual right to employer-provided transportation.

Evidence was presented that Burney's home was between Tew's home and the work site in Pembroke. Tew had never worked at this site before. Burney had been working there for a while. Meeting at Burney's house and riding together was convenient for both men. The undisputed evidence shows that Tew worked for Burney "only four or five times in the past nine or ten years." There is no consistent pattern upon which to infer a contractual right to employer-provided transportation.

Tew offered no evidence to support the conclusion that he had a contractual right to demand employer-provided transportation. It appears from the record that the transportation furnished was gratuitous or merely an accommodation. The absence of any competent evidence to support a finding that Burney provided Tew transportation as an incident to his contract of employment precludes recovery. As a result, Tew's injuries did not arise out of and in the course of his employment.

The opinion and award of the Commission in favor of plaintiff is reversed.

Reversed.

Judge Horton concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

I read the majority as holding that an opinion and award (opinion) of the full Commission is valid if two of the commissioners, who are authorized to act (i.e. have not retired), indicate their written concurrence to the opinion at the time of its filing. I disagree with this holding and I, therefore, dissent.

In my opinion, there must be three commissioners authorized to act at the time the opinion is signed and at the time the opinion is filed.[1] This is so because the opinion is merely tentative until it is

1. An opinion of the Commission is valid if concurred in by two of the three commissioners. *Estes v. N.C. State University*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994).

signed and filed and, in order for the opinion to reflect the *final* judgment of the full Commission, all three commissioners must be authorized to act not only at the time of its signing but also at the time of its filing. In other words, the opinion is not finalized until it is *entered* and it is not entered until it is in writing, signed by the three commissioners, and filed with the Industrial Commission.[2]

In this case, only two commissioners signed the opinion prior to the time the opinion was filed. Thus, the opinion is void and I would remand the matter to the Commission for rehearing before a duly constituted Commission.[3]

I do not believe *Estes* or *Pearson v. C.P. Buckner Steel Erection*, 139 N.C. App. 394, 533 S.E.2d 532 (2000), requires a different result, as neither of these cases squarely address the issue presented in the case *sub judice*. In *Estes*, the opinion of the full Commission was vacated on the ground the term of one of the three commissioners had expired at the time he *signed* the opinion. *Estes*, 117 N.C. App. at 128, 449 S.E.2d at 764. Thus, this Court did not address in *Estes* the issue of whether an opinion of the full Commission must be vacated when the opinion is properly *signed* by all three commissioners but is not *filed* until after one of the signing commissioners is no longer serving as a commissioner. Likewise, in *Pearson*, the intervenor argued the opinion of the full Commission was invalid because the panel of commissioners, who reviewed the case, consisted of only

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2. Although the Rules of Civil Procedure "are not strictly applicable to proceedings under the Worker's Compensation Act," *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985), a Rule of Civil Procedure may be applied when there is no counterpart to that Rule under the Rules of the Industrial Commission, *see* N.C.G.S. § 1A-1, Rule 1 (1999). In my opinion, it is appropriate to apply Rule 58 of the North Carolina Rules of Civil Procedure in this context. Pursuant to Rule 58, a judgment or order is not enforceable, or final, until it is entered. *See West v. Marko*, 130 N.C. App. 751, 755, 504 S.E.2d 571, 573 (1998). Rule 58 provides that "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C.G.S. § 1A-1, Rule 58 (1999).

Additionally, I acknowledge this Court often files opinions indicating a concurrence by a judge who was no longer serving on this Court at the time the opinion was filed. Such opinions indicate the judge concurred in the opinion while he or she was still serving on this Court. As this Court is not bound by the Rules of Civil Procedure, my holding in the case *sub judice* would not affect this Court's filing of opinions in the manner described above.

3. The problem created by the retirement of a commissioner can easily be resolved by the Industrial Commission. In the event a commissioner is, for any reason, unable to participate in the review of the award, section 97-85 gives authority to the chairman of the Industrial Commission to "designate a deputy commissioner to take the place of a commissioner on the review of any case." N.C.G.S. § 97-85 (1999).

two commissioners. *Pearson*, 139 N.C. App. at 400, 533 S.E.2d at 535. Because "the opinion clearly state[d] that there was a third Commissioner on the panel," the Pearson court rejected the intervenor's argument. The intervenor did not argue the opinion was in invalid because is was signed by only two commissioners at the time it was filed; thus, the issue in the case sub judice was not addressed in *Pearson*.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; GAS RESEARCH INSTITUTE (MOVANT); PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC. (INTERVENOR); PIEDMONT NATURAL GAS COMPANY (INTERVENOR); NORTH CAROLINA NATURAL GAS CORPORATION (INTERVENOR); NUI NORTH CAROLINA GAS (INTERVENOR); FRONTIER ENERGY LLC (INTERVENOR); PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION (INTERVENOR); AND MICHAEL F. EASLEY, ATTORNEY GENERAL (INTERVENOR), APPELLEES v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC. (INTERVENOR), APPELLANT

No. COA00-8

(Filed 6 February 2001)

1. Appeal and Error— briefs—page limit—footnotes

Footnotes are not to be used as a means to avoid the page limitations specified in the appellate rules.

2. Utilities— appeal from Commission—standing—party aggrieved

The Carolina Utility Customers Association (CUCA) was without standing to appeal from a Utilities Commission order because it was not a party aggrieved where the order arose from a change by the Federal Energy Regulatory Commission which reduced the level of funding of the Gas Research Institute (GRI) by local distribution company (LDC) surcharges passed through to customers; GRI filed a motion that LDCs be authorized to make voluntary contributions and to recover those contributions in their annual rate adjustments; and the Commission concluded that LDCs would be allowed to record the contributions in a deferred charges account until the next rate case, at which the deferred charges balance would be amortized if the charges were found reasonable and prudent. This order only purports to establish a mechanism by which rates may be increased in the future;

the speculative recoupment by LDCs is recognized and, if an LDC opts not to voluntarily contribute to GRI, the issues presented by CUCA will not arise.

Appeal by Intervenor Carolina Utility Customers Association, Inc. from order entered 17 August 1999 by the North Carolina Utilities Commission. Heard in the Court of Appeals 8 January 2001.

Chief Counsel Antoinette R. Wike, by Staff Attorney Vickie L. Moir, for intervenor-appellee Public Staff.

Attorney General Michael F. Easley, by Assistant Attorney General Margaret F. Force, for intervenor-appellee Office of Attorney General.

West Law Offices, P.C., by James P. West, for intervenor-appellant Carolina Utility Customers Association, Inc.

SMITH, Judge.

Movant Gas Research Institute (GRI) is a non-profit organization that manages cooperative research and development programs in the natural gas industry. Prior to 1999, GRI was funded primarily by surcharges collected by interstate pipelines from natural gas local distribution companies (LDCs) pursuant to tariffs approved by the Federal Energy Regulatory Commission (FERC). The surcharges were, in turn, passed through to retail customers as part of the LDC's gas costs, pursuant to N.C. Gen. Stat. § 62-133.4 (1999).

In 1998, the FERC approved an agreement, which gradually reduced the level of GRI funding collected through surcharges and called for a complete elimination of funding through surcharges by 31 December 2004. In an effort to maintain its funding at the 1998 level, GRI proposed that LDCs around the country voluntarily contribute the difference between the 1998 equivalent funding level and the reduced surcharge level. In return for these voluntary contributions, the LDCs could designate the types of research they would support.

On 6 January 1999, GRI filed a motion with the North Carolina Utilities Commission (the Commission) "request[ing] the entry of an order authorizing LDCs in the state to make voluntary contributions to GRI for research and to recover such contributions in their annual Rate Adjustments pursuant to G.S. 62-133.4." GRI's proposal was presented to the Commission at its Regular Staff Conference on 25

January 1999. At the Conference, the Public Staff indicated that the proposal raised several important legal and policy issues, including "whether *voluntary* contributions to research (as opposed to mandatory contributions through interstate pipeline tariffs) are Gas Costs as provided in G.S. 62-133.4 and whether dollar for dollar rate recovery (as opposed to recovery as an O&M expense in basic rates) is warranted." Because of these concerns, "[t]he Public Staff recommended that the Commission issue an order requesting comments on GRI's proposal from interested parties and requesting GRI to describe in further detail how other state commissions have addressed the GRI funding issue." Accordingly, on 27 January 1999, the Commission issued an order requesting comments from any interested party and requesting GRI to detail how other states have broached the funding issue.

GRI responded as requested and proposed allowing LDCs to recover their voluntary contributions in their annual gas cost adjustment proceeding rather than as an O&M expense. Filing comments were intervenor-appellant Carolina Utility Customers Association, Inc. (CUCA); intervenor-LDCs Public Service Company of North Carolina, Inc. (PSNC), Piedmont Natural Gas Company (Piedmont), North Carolina Natural Gas Corporation (NCNG), NUI North Carolina Gas (NUI), and Frontier Energy LLC (Frontier); the Public Staff of the Commission; and the Office of Attorney General. In addition to the proposal suggested by GRI, other proposals submitted to the Commission were:

1. Adopting a surcharge mechanism to enable the LDCs to recover voluntary GRI contributions.

2. Denying GRI's motion and making no provision for LDC recovery of voluntary GRI contributions.

3. Approving a transitional accounting mechanism that would allow each LDC to record its voluntary GRI contributions in a deferred account until its next general rate case, at which time the Commission would examine the prudence and reasonableness of the contributions and take these contributions into account when calculating rates for consumers.

After considering the comments and reply comments of all interested parties, the Commission, on 17 August 1999, issued an order wherein it concluded in pertinent part:

GRI is not a supplier of gas, and voluntary contributions to GRI are not costs "related to the purchase and transportation of natural gas to the [LDC's] system." Therefore, such contributions do not come within the scope of gas cost adjustment proceedings now, and G.S. 62-133.4(e) cannot be used to expand the definition of gas costs to cover such contributions. The Commission concludes that voluntary contributions made by the LDCs to GRI cannot be considered gas costs recoverable under G.S. 62-133.4.

. . . .

The Commission agrees that it has the authority to change rates in a rulemaking proceeding in certain limited circumstances. The question is whether such an approach is appropriate here. The Commission is not persuaded that it is appropriate to establish a surcharge or flow-through mechanism for GRI contributions in a rulemaking proceeding. . . . Given that customer mixes are not uniform and that different LDCs are on record as wanting to invest their GRI research dollars in different ways, the Commission cannot conclude that a generic solution is appropriate herein. Moreover, . . . all cost and revenue changes should be considered together in the context of a general rate case . . . . The Commission concludes that it must exercise its authority to change rates in a rulemaking proceeding only in limited circumstances and that such an approach is not appropriate here.

CUCA, the Attorney General and the Public Staff all state that any voluntary GRI contributions should properly be classified as O&M expenses and recovered through general rate case proceedings. However, given the unique circumstances of the situation, the Public Staff proposes that the Commission approve a special accounting treatment as a transitional recovery mechanism to bridge the change from FERC-approved gas costs to normal O&M expenses. The Public Staff proposes to allow each LDC to record voluntary contributions made to GRI through December 31, 2004 or the next rate case, whichever is earlier, in a deferred charges account. At the time of each LDC's next rate case, GRI costs would be recoverable to the extent they are found to be reasonable and prudently incurred. The balance in the deferred charges account would be amortized. As a condition of recovery, each LDC should be required to maintain adequate documentation that supports the prudence of its overall contributions. The documentation should include specifics regarding benefits received as the

result of participating in GRI research. The Public Staff contends that, with deferred accounting treatment, the LDCs would be allowed "a reasonable opportunity to collect amounts paid to GRI."

. . . .

The Commission's interpretation of the Public Staff's proposal is as follows: As FERC-approved surcharges decrease, we assume that each LDC will make some level of voluntary contributions to GRI. The LDC will be allowed to record the voluntary contributions made until December 31, 2004 or until the time of the LDC's next rate case in a deferred charges account; such deferrals will end on December 31, 2004 or at the time of the LDC's next rate case, whichever is earlier. In the LDC's next rate case, whenever it occurs, a reasonable ongoing level of GRI funding—whether through FERC-approved surcharges being recovered as gas costs or voluntary contributions of the LDC—will be treated as O&M expenses in the rate case and reflected in rates. The deferred charges account balance, if found reasonable and prudent, will be amortized in this rate case. The Commission recognizes that if these procedures require that FERC-approved surcharges collected under the interstate pipelines' tariffs be reclassified as O&M expenses in the rate case, an appropriate adjustment would have to be made in the LDC's gas cost accounts to prevent the double-collection of the surcharges in the gas cost adjustment proceedings. The Commission also recognizes that it has no authority to rule that a surcharge approved by the FERC is unreasonable or imprudently incurred and, therefore, surcharges collected through FERC-approved tariffs but reclassified from gas costs to O&M expenses in the rate case would not be subject to Commission prudency review. The Commission believes that these procedures will allow recovery of an LDC's reasonable and prudent funding of GRI and will protect the LDC from a shortfall in recovery during the transition as FERC-approved surcharges decrease and voluntary contributions increase. Furthermore, allowance of carrying charges on the amount in the deferred charges account will make the LDC whole for the delay in recovery. The Commission concludes that the ratemaking procedures described above should be followed in each LDC's next general rate case in order to effect the transition from FERC-approved funding of GRI to funding by voluntary contributions of the LDCs.

. . . .

> After carefully considering all of the filings in this docket, the Commission concludes that the Public Staff's proposal as described above is reasonable and should be adopted. The Commission further concludes that the facts and arguments in this docket do not warrant either treatment of voluntary contributions to GRI through gas cost adjustment proceedings or the establishment of a surcharge for GRI funding through a rulemaking proceeding.

(Alteration in original.)

On 15 September 1999, Piedmont filed a motion for reconsideration and/or clarification, contending that the August order "place[d] significant risks on the LDCs" in that "the Commission could upon a hindsight review determine that some or all of GRI's expenditures are imprudent and that the contributions by the LDCs should not be recovered." Accordingly, Piedmont

> request[ed] the Commission to reconsider its August 17, 1999 Order and to approve a continuation of GRI contributions at the current levels pending each LDC's next general rate case, with all such contribution to be deferred in the manner set forth in the Commission's order but without the risk of disallowance upon an after-the-fact review.

Also on 15 September, CUCA filed a notice of appeal and exceptions from the August order.

On 6 October 1999, NCNG filed a motion for reconsideration and/or clarification stating in pertinent part:

> NCNG does not object to a procedure in which the Commission approves a level of GRI contributions for each LDC in a general rate case, although NCNG believes that the preferable way to fund GRI contributions is through a surcharge. Also, NCNG does not object to a procedure in which the Commission reserves the right to require NCNG to discontinue future contributions to GRI if the Commission determines that future contributions would not be prudent. In neither case, however, should NCNG be subject to the risk of retroactive disallowance of its contributions based on hindsight review of the utilization of the contributions to GRI.

Accordingly, NCNG

> request[ed] that the Commission reconsider its August 17, 1999 Order and approve a continuation of GRI contributions at the current levels pending each LDC's next general rate case, with all such contributions to be deferred in the manner set forth in the Commission's Order but without the risk of subsequent disallowance.

On 7 October 1999, PSNC filed a statement in support of Piedmont's motion, stating that "PSNC should not be asked to incur the risk that some portion of its voluntary contributions to GRI will be disallowed in a subsequent general rate case. If PSNC is subject to a potential disallowance in a subsequent general rate case, PSNC probably will not make any voluntary contributions to GRI."

On 14 October 1999, the Commission issued an Order on Motions for Reconsideration and on Exceptions. In this subsequent order, the Commission concluded in pertinent part:

> G.S. 62-90(c) provides that when a party files notice of appeal and exceptions as to a Commission order, the Commission may set the exceptions upon which the appeal is based for further hearing. Further, G.S. 62-80 provides that the Commission may reconsider any prior order. While these statutes provide some basis upon which the Commission could consider either the motions for reconsideration or the exceptions filed herein, the Commission concludes that (except as noted hereinafter) the Commission will take no action on CUCA's exceptions and that the Commission will not reconsider the August 17 Order.
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> . . . .
>
> As to the exceptions filed by CUCA, one exception notes that the August 17 Order uses the phrase "there is much evidence that . . ." and correctly points out that the Commission did not hold an evidentiary hearing. It is clear from the complete sentence being quoted, in context, that the phrase was inadvertent and should have instead read "there were written comments that . . ." [sic] The Commission will take no action on CUCA's exceptions and its appeal may proceed.

On 5 November 1999, the Public Staff filed a motion for reconsideration stating in pertinent part:

> Throughout this proceeding, the Public Staff has sought to support reasonable and prudent LDC expenditures for gas research

> in a way that is consistent with the Commission's statutory authority and traditional ratemaking principles. We continue to believe that the deferral mechanism adopted by the Commission is theoretically the most appropriate way of providing support until the LDC's next general rate cases. We recognize, however, that . . . LDCs in general are unwilling to put any material sums at risk for contributions to GRI. Thus, it appears that the deferral mechanism may prove unworkable in practice.
>
> [] After studying the matter further, the Public Staff believes there is merit to the suggestion of some of the LDCs that the Commission establish a procedure for prior approval of their voluntary contributions to GRI, so that they do not face the possibility of hindsight review and disallowance of deferrals in their next general rate cases. The burden of justifying these expenditures would remain with the LDCs, but they would have the benefit of certainty as to the ultimate ratemaking treatment of approved amounts. . . .
>
> Therefore, the Public Staff requests the Commission to reconsider its prior Orders in this matter and seek further comments on whether a prior approval procedure would satisfy the LDCs' concerns about using the deferral mechanism for voluntary contributions to GRI and, if so, how such a procedure should be implemented. If the LDCs are unwilling to use the deferral mechanism even with the assurance of prior approval, then the Public Staff requests the Commission to consider rescinding its August 17, 1999, Order.

Following responses by CUCA and NCNG to Public Staff's motion, the Commission again issued an order, on 20 December 1999, stating that while the Commission "continue[d] to believe that the August 17 Order [was] well-reasoned and fair and should stand as issued[,]" it would "respond to certain concerns expressed by the LDCs by way of clarification, not reconsideration." The Commission stated that "[n]othing in [its] August 17 Order, including the provisions for documentation of overall GRI contributions, should be interpreted as allowing for hindsight analysis of the prudence of GRI contributions." Rather, the Commission will use a reasonableness standard to determine the prudence of GRI contributions. The Commission stated further, "The Commission-approved procedures are based on the ratemaking principles established by the General Statutes. The General Statutes do not provide for 'pre-approval' of rate case

expenses and the LDCs make expenditures every day without the Commission's 'pre-approval.' " Accordingly, the Commission refused to reconsider or rescind its prior 17 August 1999 order.

[1] On 3 January 2000, CUCA filed the record on appeal with this Court and thereafter filed its brief as appellant in this appeal. We are compelled to note CUCA's apparent attempt to circumvent the page limitations set forth in our Rules of Appellate Procedure. *See* N.C. R. App. P. 28(j) (setting 35-page limitations on principal briefs and 15-page limitations on reply briefs). While the text itself extends only to thirty-four pages, CUCA's abundant use of footnotes, the text of which contains much of the analysis necessary to sustain its arguments and consists of extraordinarily small type and single-spaced lines, demonstrates its noncompliance with our rules. If the text of the footnotes complied with the mandates of our rules and was added to the length of the brief, CUCA's appellate brief would have substantially exceeded the thirty-five page limit. *See, e.g., In re MacIntyre*, 181 B.R. 420, 421 (B.A.P. 9th Cir. 1995) ("Had [appellant] used the correct type size for the footnotes . . . , he would have undoubtedly exceeded the thirty page limit by several pages. It is also worth noting that [appellant's] use of footnotes is excessive and attempts to squeeze additional argument into his brief by utilizing the single spacing found in footnotes."); *In re Estate of Marks*, 595 N.E.2d 717, 721 (Ill. App. Ct. 1992) ("[T]he 'footnote' approach to getting around the page limitations is a violation of the spirit, and probably of the letter, of the law and is not favored . . . ."). Similarly, CUCA's reply brief, which spans better than fourteen pages, is strewn with approximately fifty lines of reduced-type text, thus adding additional pages to its brief. This is unacceptable and subjects CUCA's appeal to dismissal. *See Howell v. Morton*, 131 N.C. App. 626, 629, 508 S.E.2d 804, 806 (1998). Nevertheless, we elect pursuant to N.C. R. App. P. 2 to consider this appeal. However, we caution counsel that footnotes are not to be used as a means to avoid the page limitations specified in the appellate rules. *See* N.C. R. App. P. 28(j).

[2] While CUCA raises several issues for our consideration on appeal, we need not reach those issues because we hold that CUCA is not a party aggrieved by the order currently before us and, thus, has no standing to appeal from this order. To appeal from an order of the Commission, "the *party aggrieved* by such decision or order shall file with the Commission notice of appeal and exceptions" within thirty days after entry. N.C. Gen. Stat. § 62-90 (1999) (emphasis added).

We find guidance in this Court's decision in *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 104 N.C. App. 216, 408 S.E.2d 876 (1991). In that case, the Utilities Commission had amended a ratemaking formula previously considered and approved by the Commission in a general rate case. The amendment allowed Piedmont to reduce its rates *provided* that it could "remove the cost reduction if and when its gas costs later increased." *Id.* at 217, 408 S.E.2d at 876. CUCA contended it was an aggrieved party "because the order would allow Piedmont to increase its rates in the future to the extent necessary to offset previous reductions under this order." *Id.* at 218, 408 S.E.2d at 877. We disagreed, stating that "[w]hile under this order Piedmont may file, and in fact has filed to make subsequent increases, those proposed increases are not before us." *Id.* at 218, 408 S.E.2d 877-78.

Similarly, in the case *sub judice*, the Commission has authorized no change (increase or decrease) in rates. In fact, it specifically held that, while it "agree[d] that it ha[d] [the] authority to change rates in a rulemaking proceeding in certain limited circumstances[,] . . . [it] [was] not persuaded that it [was] appropriate to establish a surcharge or flow-through mechanism for GRI contributions in a rulemaking proceeding." The Commission specifically accepted the Attorney General's argument "that all cost and revenue changes should be considered together in the context of a general rate case" and concluded that the "exercise [of] its authority to change rates in a rulemaking proceeding . . . [was] not appropriate."

All the August 1999 order purports to do is establish a mechanism by which rates *may be* increased in the future. This speculative recoupment by the LDCs was recognized, as is unequivocally stated in a post-order statement made by PSNC: "If PSNC is subject to a potential disallowance in a subsequent general rate case, PSNC probably will not make any voluntary contributions to GRI." If an LDC opts not to voluntarily contribute to GRI, this transitional funding mechanism will be of no consequence and the issues now presented by CUCA will not arise. Accordingly, because the Commission's order did not impact rates and because any rate increases will be effectuated at subsequent rate cases, CUCA is not an "aggrieved party" and, thus, lacks standing to appeal.

Appeal dismissed.

Chief Judge EAGLES and Judge HUDSON concur.

MANN MEDIA, INC., DOING BUSINESS AS OUR STATE NORTH CAROLINA; AND BERNARD MANN, PETITIONER-APPELLEES v. RANDOLPH COUNTY PLANNING BOARD, RESPONDENT-APPELLANT

No. COA99-1478

(Filed 6 February 2001)

1. **Zoning— special use permit—broadcast tower—proposed use in harmony with area—failure to present competent, material, and substantial evidence**

The trial court did not err by granting petitioners' application for a special use permit to locate a broadcast tower based on its conclusion of law that petitioners' proposed use is in harmony with the area in which it is to be located as a matter of law since it is a permitted use within the zoning district in which it is to be located, because: (1) the record fails to show competent, material, and substantial evidence to overcome petitioners' prima facie showing of harmony; and (2) a county planning board cannot deny applicants a permit solely based on its view that it would adversely affect the public interest.

2. **Zoning— special use permit—broadcast tower—adverse effects—speculative opinions—failure to present competent, material, and substantial evidence**

The trial court did not err by granting petitioners' application for a special use permit to locate a broadcast tower based on its finding of fact that petitioners' proposed tower would have no substantial adverse effect on the value of adjoining or abutting properties and its conclusions of law that opponents' testimony of adverse effect on value was incompetent since it did not relate to property adjoining or abutting petitioners' proposed site, because: (1) no opponents owning property adjoining or abutting petitioners' proposed tower site offered more than speculative opinions that their property values would be affected; (2) the opponents failed to present competent, material, and substantial evidence of adverse effects on the value of adjoining or abutting properties; and (3) petitioners' appraiser formed an expert opinion that met the requirement for competent, material, and substantial evidence that their proposed tower would have no substantial adverse effect on the value of adjoining or abutting properties even though his data failed to include adjoining or abutting comparables.

Judge WALKER dissenting.

Appeal by respondent from judgment entered 17 August 1999 by Judge W. Erwin Spainhour in Randolph County Superior Court. Heard in the Court of Appeals 12 October 2000.

Keziah, Gates & Samet, L.L.P., by Andrew S. Lasine, for petitioner-appellees.

Gavin Cox Pugh Etheridge and Wilhoit, LLP, by Alan V. Pugh and Robert E. Wilhoit, for respondent-appellant.

McGEE, Judge.

Petitioners applied for a special use permit to locate a broadcast tower on certain land located in Randolph County. Following proceedings held on 10 November 1998, respondent denied petitioners' application. Pursuant to a writ of certiorari, the Randolph County Superior Court vacated and remanded the matter for a hearing *de novo*, because respondent had not specified its reason for the denial in the minutes of the meeting at which the action was taken.

Petitioners' application for a special use permit was heard on 10 June 1999 and was again denied by respondent in an order dated 24 June 1999. Petitioners' request for a writ of certiorari from the Randolph County Superior Court was granted, and a hearing was held on 2 August 1999. On 17 August 1999, the trial court vacated respondent's 24 June 1999 order denying petitioners' application for a special use permit and remanded the matter to respondent for entry of an order allowing petitioners' application. Respondent appeals.

The scope of the trial court's judicial review of respondent's denial of petitioners' application includes "[i]nsuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and . . . that decisions are not arbitrary and capricious." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980). Respondent contends that the trial court improperly reversed respondent's conclusions that petitioners' "proposed use will substantially injure the value of adjoining or abutting property" and that "[t]he location and character of the use . . . will not be in harmony with the area in which it is to be located." As in *Concrete Co.*, the question on appeal before this Court "is not whether the evidence before the superior court supported that court's order but whether the evidence before the [county planning] board was supportive of its action." *Id.*

I.

[1] Respondent assigns error to the trial court's conclusion of law that "[b]ecause Petitioners' proposed use is a permitted use within the zoning district in which it is proposed to be located, it is in harmony with the area in which it is to be located as a matter of law." As our Court has stated with respect to special and conditional use permits:

> The inclusion of a use as a conditional use in a particular zoning district establishes a prima facie case that the permitted use is in harmony with the general zoning plan. If, however, competent, material, and substantial evidence reveals that the use contemplated is not in fact in "harmony with the area in which it is to be located" the Board may so find.

Vulcan Materials Co. v. Guilford County Bd. of County Comrs., 115 N.C. App. 319, 324, 444 S.E.2d 639, 643 (1994) (citations omitted). The trial court must assess whether competent, material and substantial evidence supported respondent's conclusion that petitioners' proposed use was not in harmony with the area in which it was to be located.

"In civil cases, '[t]he burden is on the appellant not only to show error but to enable the court to see that he was prejudiced[.]' " *Hajmm Co. v. House of Raeford Farms*, 328 N.C. 578, 589, 403 S.E.2d 483, 490 (1991) (citation omitted). In order to overcome petitioners' *prima facie* showing of harmony, respondent must show that its conclusion of lack of harmony is supported by competent, material and substantial evidence. In *Vulcan*, we found competent, material and substantial evidence of lack of harmony in a proposed quarry where (1) the area surrounding the proposed quarry was entirely residential and agricultural; (2) the nearest non-residential use to the proposed quarry was a *commercial* facility over two miles away; and (3) the Guilford County Comprehensive Plan adopted in 1986 reserved the area of the site for residential use. *See Vulcan*, 115 N.C. App. at 323-24, 444 S.E.2d at 642.

In the present case, no evidence of a comprehensive plan for the county was presented before respondent. The record shows a feed and supply store abuts petitioners' proposed site, and three more commercial establishments appear to be located some 3,500 feet from the proposed tower. A broadcast tower owned by WFMY, even taller than petitioners' proposed 1,500-foot tower, stands 1.35 miles away,

and apparently there is a third tower within five miles of petitioners' proposed site.

Respondent based its conclusion of lack of harmony specifically on the "substantially greater" population density around the site of petitioners' proposed tower than around "sites for towers which have been previously approved by [respondent] for Special Use Permits." However, comparative evidence of population density in the record is limited to a map of the area surrounding the WFMY broadcast tower. While it is true that the WFMY map shows there to be only half as many houses within 1,500 feet of that taller tower than within 1,500 feet of petitioners' proposed tower, the relevance of a 1,500-foot circle is never explained. No evidence of population densities around any other towers approved by respondent appears in the record, nor any suitable explanation of the relationship between population density and a broadcast tower's harmony with an area.

"A board of commissioners 'cannot deny applicants a permit in their unguided discretion or, stated differently, refuse it solely because, in their view, [it] would "adversely affect the public interest." ' " *Woodhouse v. Board of Commissioners*, 299 N.C. 211, 217, 261 S.E.2d 882, 886 (1980) (citations omitted). We conclude that the record fails to show competent, material and substantial evidence to overcome petitioners' *prima facie* showing of harmony under *Vulcan*.

II.

[2] Respondent also assigns error to the trial court's finding of fact that petitioners' "proposed tower would have no substantial adverse effect on the value of adjoining or abutting properties" and conclusions of law that opponents' testimony of adverse effect on value was incompetent because it did not relate to property adjoining or abutting petitioners' proposed site. Respondent argues that, if the testimony of adverse property value effects by opponents was incompetent, then petitioners' evidence of *lack* of adverse property value effect was similarly incompetent, because neither petitioners nor opponents introduced any evidence of actual adjoining or abutting property values. If petitioners' evidence was incompetent, then they failed to meet their burden of showing no adverse property value effects, *see Refining Co. v. Board of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974), and their application was properly denied.

In *Sun Suites Holdings, L.L.C. v. Board of Aldermen of Garner*, 139 N.C. App. 269, 533 S.E.2d 525, *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000), two opponents to a conditional use permit testified concerning adverse property effects. The first, a resident of the neighborhood, testified that he would not have bought his house had he known of the petitioner's planned development and assumed the same would hold true for anyone buying his house, thus lowering its value. The second opponent, a real estate agent with clients in the neighborhood, testified that he felt that property values would go down in the neighborhood. Our Court has stated that "speculative opinions such as the foregoing fail to constitute substantial evidence." *Id.* at 278, 533 S.E.2d at 531 (citation omitted). Neither witness "presented any 'factual data or background,' such as certified appraisals or market studies, supporting their naked opinions." *Id.* (citation omitted). Neither owned property adjoining or abutting the proposed site, and neither testified specifically to the effect of the planned development on property adjoining or abutting the proposed site. We held that neither had provided substantial evidence of adverse effects to property values. *See id.*

In the present case, no opponents owning property adjoining or abutting petitioners' proposed tower site offered more than speculative opinions that their property values would be affected. A realtor opined that property values would be affected but was unable to provide any examples of affected sales of property adjoining or abutting other towers and acknowledged that she had taken no formal courses in real property appraisal. A builder testified that he was in the process of purchasing some seven lots in a subdivision abutting the proposed site and would walk away from the purchase if the tower was approved because of its adverse effect on property values, but for business reasons refused to specify which lots he was interested in and, thus, whether any of them were actually adjoining or abutting the proposed site. We conclude that, under *Sun Suites*, the opponents to petitioners' tower failed to present competent, material and substantial evidence of substantial adverse effects on the value of adjoining or abutting properties.

Respondent argues that, by the same logic, petitioners failed to present competent, material and substantial evidence as well. Petitioners' appraiser specifically opined that the tower would not have a substantial effect on adjoining or abutting property values, but acknowledged that the slow turnover in housing around other towers in Randolph County meant he did not have any actual before-and-

after comparables for such properties. The appraiser instead based his opinion on property farther away from the tower and compensated for the distance in his calculations. Under *Sun Suites*, respondent argues, the appraiser's opinion should be as incompetent as that of the tower's opponents.

However, because petitioners' appraiser is a professional appraiser whose skill was acknowledged even by the opponent realtor described above, we hold that his expert opinion will satisfy the requirement for competent, material and substantial evidence despite our holding in *Sun Suites*. We do not believe that Randolph County, in enacting an ordinance covering special use permits, intended to preclude approval of such permits whenever market data in the area failed to include adjoining or abutting comparables. We therefore hold that petitioners presented competent, material and substantial evidence that their proposed tower would have no substantial adverse effect on the value of adjoining or abutting properties.

Because we find that petitioners met their burden for approval of their special use permit application, and because we find that respondent's order denying the special use permit was not supported by competent, material and substantial evidence, we affirm the trial court's judgment vacating respondent's order and remanding the matter to respondent for entry of an order allowing petitioners' special use permit application.

Affirmed.

Judge HORTON concurs.

Judge WALKER dissents.

WALKER, Judge, dissenting.

The Randolph County Planning Board unanimously voted to deny petitioners' application for a special use permit based on the following findings in part:

> 2. The applicant does not own the land for which the permit is requested.
>
> 3. The proposed tower is to be constructed for speculative purposes, there being no contracts or leases for the use of the proposed tower, all in direct contravention of the applicant's tes-

timony at the first public hearing. The Board therefore finds that the proposed use is not a public necessity nor required to provide broadcast service for the Piedmont-Triad area.

4. The proposed tower is located within 1500 feet of 21 established residences and there are numerous other residences located in proximity to the proposed tower.

5. Conflicting evidence was presented concerning the probability of ice forming on and falling from the proposed tower, but the Board finds that ice has formed and fallen from the other towers within the county's zoning jurisdiction causing damage and is likely to do so from the proposed tower, and would therefore materially endanger the public safety where located because of the number and density of adjoining residences.

6. Evidence was presented showing that the site for the proposed tower was approved by the Federal Aviation Agency, but opposed by the Aviation Division of the North Carolina Department of Transportation. The Board finds that the construction of this tower could therefore constitute a hazard to general aviation operating from Johnson Air Field, and thus endangers the public safety.

7. The population density of the area immediately adjacent to and in the proximity of the site for the proposed tower is substantially greater than that of areas surrounding sites for towers which have been previously approved by this Board for Special Use Permits.

8. The population density of the Residential Agricultural zoning district within Randolph County varies widely in general, but is of lower density in areas adjacent to tall telecommunication towers constructed after the adoption of the Unified Development Ordinance, and therefore this proposed site being in a high density RA district because of its size, visual impact and lighting and further because the required conditions and specifications set out in the ordinance are insufficient to harmonize this particular site (emphasis added) with the area, it is therefore not in harmony with the area.

9. Conflicting testimony was presented as to whether the issuance of the permit and the construction of the tower would substantially diminish the value of adjacent properties. The Board finds that the value of adjacent properties to the proposed

site would substantially diminish and would be injured if the special use permit were issued.

Based on the Board's findings, it concluded:

1. The purposed [sic] use will material [sic] endanger the public safety if located where proposed, and developed according to the plan as submitted and approved. (F.F. No. 4,5, and 6)

2. The proposed use will substantially injure the value of adjoining or abutting property, and the use is not a public necessity. (F.F. No. 3 and 9)

3. The location and character of the use if developed according to the plan as submitted and approved will not be in harmony with the area in which it is to be located. (F.F. No. 7 and 8)

In its order, the trial court found: "Petitioners' proposed use will be in harmony with the area in which it is to be located and in general conformity with the land development plan for Randolph County and the Randolph County Zoning Ordinance." However, the majority opinion states "In the present case, no evidence of a comprehensive plan for the county was presented before respondent." There was plenary evidence before the Board that this tower would be located adjacent to an existing mixed suburban/agricultural area and would not be in harmony with this area.

In *Vulcan Materials Co. v. Guilford County Bd. of Comrs.*, 115 N.C. App. 319, 324, 444 S.E.2d 639, 643 (1994), this Court held:

> [2] A decision denying a special use permit is arbitrary and capricious 'if it clearly evinces a lack of fair and careful consideration or want of impartial, reasoned decisionmaking.' *Joyce v. Winston-Salem State Univ.*, 91 N.C. App. 153, 156, 370 S.E.2d 866, 868, *cert. denied*, 323 N.C. 476, 373 S.E.2d 862 (1988).

From a review of the record and the findings of the Board, I conclude there was competent material and substantial evidence to support the denial of the special use permit and I would reverse the order of the trial court and remand the case for entry of an order affirming the decision of the Board.

STATE OF NORTH CAROLINA v. STEVEN DEWAINE CAMPBELL

No. COA00-83

(Filed 6 February 2001)

1. **Criminal Law— reinstructing jury on reasonable doubt— no error**

The trial court did not err in a first-degree sexual offense case by its reinstruction to the jury on reasonable doubt after the jury's request, because: (1) the second definition of reasonable doubt essentially tracks the language approved by our Supreme Court; and (2) defendant refers to no evidence in the record to support his contention that the second instruction confused the jury, nor does he cite any authority in support of his position.

2. **Evidence— rights waiver executed by defendant—waiver of right to be present**

The trial court did not err in a first-degree sexual offense case by admitting into evidence a rights waiver allegedly executed by defendant after the trial court conducted an unrecorded bench conference outside of defendant's presence, because: (1) defendant waived his right to be present by failing to request to be present at the conference or to object to his absence therefrom; and (2) at the request of defendant, the trial court held a hearing and redacted damaging portions of defendant's statements to the officers.

3. **Sexual Offenses— testimony of prior sexual abuse—no error**

The trial court did not err in a first-degree sexual offense case by allowing testimony of the alleged victim describing defendant's sexual abuse of her two years prior to the charges for which defendant was on trial in this case even though the State voluntarily dismissed the prior charges, because: (1) the reason for the State's dismissal does not appear in the record and will not be speculated; and (2) a voluntary dismissal of a criminal charge does not prevent the State from obtaining a new indictment based on the same acts.

4. **Witnesses— child—intimate sexual matters—district attorney's inquiry of whether jurors heard victim's response**

The trial court did not abuse its discretion in a first-degree sexual offense case by failing to take some corrective action fol-

lowing the district attorney's inquiry of the jury concerning whether they heard the victim's response to a question about intimate sexual matters with defendant, because: (1) defendant did not object to the district attorney's comment at trial, nor did he request a curative reinstruction; (2) the witness was a ten-year-old child testifying about intimate sexual matters involving abuse by a family member; and (3) the record reveals that the district attorney was merely ensuring that the jury could hear the answers of the child witness.

5. Evidence— exclusion of statements from interview with detective—speculation of relevance

The trial court did not err in a first-degree sexual offense case by admitting some of the statements from defendant's interview with a detective while excluding other statements including the child victim's observations of sexual activity around her home, because: (1) it is purely speculation to conclude that any observations of sexual activity by the child victim would have some relevance to the acts that defendant purportedly committed on the child; and (2) the record indicates the trial court properly performed the balancing test under N.C.G.S. § 8C-1, Rule 403.

6. Constitutional Law— effective assistance of counsel—failure to recall witnesses—reasoned strategy decision

A defendant did not receive ineffective assistance of counsel in a first-degree sexual offense case when his counsel failed to recall three witnesses and examine them further, because: (1) defense counsel indicated to the trial court that he did not believe that recalling the three witnesses would be helpful to defendant; (2) defense counsel was making a reasoned strategy decision; and (3) nothing in the record indicates that a reexamination of the witnesses by defense counsel would have resulted in a different outcome.

Judge GREENE concurring.

Appeal by defendant from judgment entered 13 July 1999 by Judge Melzer A. Morgan, Jr., in Davidson County Superior Court. Heard in the Court of Appeals 9 January 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General Ellen B. Scouten, for the State.

Jon W. Myers for defendant appellant.

HORTON, Judge.

In August 1996, a Davidson County grand jury indicted defendant Steven Dewaine Campbell on three counts of first-degree sexual offense and one count of first-degree rape involving his niece, Alicia Dawn Everhart. Following a jury trial in July 1999, defendant appealed to this Court from a lengthy sentence of imprisonment imposed after his conviction of one count of first-degree sexual offense. The jury was unable to reach a unanimous verdict on the remaining charges. After careful consideration, we find no error in the judgment of the trial court.

A.

[1] Defendant first contends that the trial court erred in its re-instruction to the jury on reasonable doubt. In its original charge to the jury, the trial court instructed the jury as follows:

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

On the second day of deliberations, the jurors sent a note to the trial court asking that the court again define reasonable doubt. The trial court informed counsel that it would read the jury the instruction on reasonable doubt contained in *State v. Lambert*, 341 N.C. 36, 52, 460 S.E.2d 123, 132-33 (1995). Counsel for defendant objected, asking that the trial court repeat its original instruction on reasonable doubt to the jury. The trial court overruled defendant's objection and instructed the jury as follows:

> Now, I'm going to give you an instruction with respect to reasonable doubt, that is in somewhat different words, but it is still an approved definition of reasonable doubt. A reasonable doubt means exactly what it says. It is not a mere possible or an academic or a forced doubt because there are few things in human experience which are beyond a shadow of a doubt or which are beyond all doubt. Nor is it a doubt suggested by the ingenuity of counsel or even by the ingenuity of your own mind not legitimately warranted by the evidence or the lack of evidence and the testimony here in these individual cases. Of course, your reason and your common sense would tell you that a doubt would not be

> reasonable if it was founded by or suggested by any of these types of considerations. A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt of a particular offense.

The second definition of reasonable doubt essentially tracks the language approved by our Supreme Court in *Lambert*, 341 N.C. at 52, 460 S.E.2d at 132-33.

Defendant contends that the second instruction confused the jury, but refers to no evidence in the record to support his argument, nor does he cite any authority in support of his position. We overrule this assignment of error.

B.

[2] Defendant next argues that the trial court erred by admitting into evidence a rights waiver allegedly executed by defendant. During the direct examination of Detective Roberson, a witness for the State, the rights waiver was marked for identification as a State's Exhibit. The trial court then instructed counsel for defendant and the State to approach the bench and a "discussion off the record at the bench" transpired. Detective Roberson then continued with his testimony, following which the State moved to introduce the rights waiver. The trial court stated that "[p]ursuant to the bench conference, State's Exhibit 1 [the rights waiver] is received." Defendant then requested a *voir dire* outside the presence of the jury to determine when the rights waiver form was signed by defendant, and the trial court allowed his request. Defendant did not object to the admission of the rights waiver into evidence.

Defendant argues that the trial court erred in conducting an unrecorded bench conference outside his presence, and then allowing the rights waiver into evidence pursuant to terms of that conference. We disagree. Our Supreme Court has held that the right of the defendant to be present at a bench or chambers conference may be waived in a non-capital case. See *State v. Pittman*, 332 N.C. 244, 253, 420 S.E.2d 437, 442 (1992). In *Pittman*, the State did not try defendant for his life, and the Supreme Court held that "defendant's case lost its capital nature and defendant's right to be present at every stage of his trial was a personal right which could be waived, either expressly,

or by his failure to assert it." *Id.* at 253, 420 S.E.2d at 442. Defendant Pittman having "failed to request to be present at either of the conferences or to object to his absence therefrom, defendant waived his right to be present and cannot, on appeal, assign as error the trial court's denial of that right." *Id.* Likewise, we find no error in the actions of the trial court in the case before us. Indeed, at the request of defendant, the trial court held a hearing and redacted damaging portions of defendant's statements to the officers, including those portions referring to his Tennessee murder conviction and to his sexual relationship with his half-sister. We overrule this assignment of error.

C.

[3] Next, defendant contends that the trial court erred in allowing testimony by the alleged victim describing defendant's sexual abuse of her two years prior to the charges for which defendant was here on trial. Defendant does not contend that the events were too remote in time, but argues that the State previously voluntarily dismissed the criminal charges based on the acts about which the child witness testified.

Although the record is not complete, there is some evidence that the prior charges were voluntarily dismissed by the State. Defendant argues that the dismissals indicate the State's awareness of the unreliability of the child's evidence with regard to those earlier events. Defendant does not cite authority to support this position and we have located none. We take notice that there may be many reasons for the entry of voluntary dismissals in criminal charges by the State. The reasons for the State's action in this case do not appear in the record, and we decline to speculate on them. We do note, however, that a voluntary dismissal of a criminal charge does not prevent the State from obtaining a new indictment based on the same acts. *State v. Lamb*, 321 N.C. 633, 641, 365 S.E.2d 600, 604 (1988). *See also State v. Coffer*, 54 N.C. App. 78, 80-81, 282 S.E.2d 492, 494 (1981) (voluntary dismissal taken prior to probable cause hearing does not prevent the State from subsequently prosecuting the offense). This assignment of error is overruled.

D.

[4] During the direct examination of the prosecuting witness, the following colloquy took place:

Q: . . . If you can tell the ladies and gentlemen of the jury after Steve took his pants off what happened next?

A: He got on top of me.

Q: Okay.

MR. TAYLOR [District Attorney]: Did everyone hear that? (All jurors respond "Yes.")

Defendant argues that the trial court should have corrected this attempt to prejudice the case against him by at least giving a curative instruction to the jury. Defendant did not object to the district attorney's comment at trial, nor did he request a curative re-instruction, and thus he cannot now protest the trial court's failure to do so. *State v. Williamson*, 333 N.C. 128, 139, 423 S.E.2d 766, 772 (1992). Further, we take note that the witness was a ten-year-old child, not an adult, testifying about intimate sexual matters involving abuse by a family member. Shortly after the statement about which defendant complains, defendant's counsel stated that he did not understand the child's answer to a question, and the answer was repeated. We believe that it is reasonably apparent from the record that the district attorney was merely ensuring that the jury could hear the answers of the child witness. We find no evidence that the trial court abused its discretion in failing to take some corrective action following the district attorney's inquiry of the jury. We therefore overrule defendant's assignment of error.

E.

[5] Defendant argues that the trial court erred by admitting some of the statements from his interview with a detective while excluding others. Specifically, defendant objected to the trial court's allowing the following statement to remain in the redacted version of his statements to the detective:

Mr. Campbell stated that he has been molested by his psychiatrist, his biological father, and his grandfather. He stated that his grandfather killed himself after committing the acts.

Defendant contends that the trial court erred by allowing that comment to remain in the redacted version of his statement while excluding the following excerpts:

Mr. Campbell made several statements about his half-sister's sexual activity and preferences.

> Mr. Campbell stated that Jerry Mick had a lot of pornographic movies. Mr. Campbell stated that on one occasion Alisha [sic] [the child victim] asked him why Jesse and Mick bite Mama there and if it hurts. Mr. Campbell replied "No, not really." Mr. Campbell also stated Alisha [sic] also asked him why Mama bites Jesse and Mick and if it hurts. Mr. Campbell replied to her that it's something grown-ups do.

After a lengthy *voir dire*, the trial court made a Rule 403 analysis of the statements and ruled as follows:

> The next portion that will be kept out is the sentence based upon an analysis of Rule 403, Mr. Campbell made several statements about his half sister's sexual activity and preferences, also those are in the nature of self-serving declarations. . . . The Court under Rule 403 will determine that the probative value of that information is substantially outweighed by the danger of the confusion of the issues and unfair prejudice.

Defendant argues that the statements made to him by Alicia contain the child's observations about sexual activity around her home and might have been relevant in determining why she made certain statements involving him. It is purely speculative, however, to conjecture that any observations of consensual sexual activity by the child witness would have some relevance to the acts that defendant purportedly committed on the child. We also note that the trial court carefully excluded from the jury's consideration statements by defendant regarding his murder conviction in the State of Tennessee and his sexual relationship with his half-sister. The record indicates that the trial court made a meticulous effort to perform the balancing test pursuant to Rule 403 and did not abuse his discretion in doing so. This assignment of error is also overruled.

F.

[6] Finally, defendant contends that he received ineffective assistance of counsel. At the end of his trial, the trial court addressed defendant and asked him if he had additional witnesses he wished to call and if he wished to testify himself. Defendant stated that he wished to recall three witnesses for further examination, but did not wish to testify himself. Defendant's counsel stated that he did not think further examination of the witnesses would be beneficial, and the following exchange then took place:

THE COURT: Have you in your opinion, in your professional opinion, covered the topics that you think and to the degree that you think is appropriate?

MR. LEA: No, but I have done my best, your Honor. I don't think you ever do that.

Defendant contends that the failure of his counsel to recall the witnesses and examine them further is constitutionally ineffective assistance of counsel and requires a new trial. We cannot agree.

In order to prevail on an ineffective assistance of counsel claim, defendant must satisfy a two-pronged test: first, he must show that his counsel's performance fell below an objective standard of reasonableness, *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985), and must demonstrate, second, that any error by counsel was so serious that there is a reasonable probability that the result of the trial would have been different absent the error. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984). Here, defendant can satisfy neither prong.

Immediately prior to the statement quoted above, counsel indicated to the trial court that he did not believe that recalling the three witnesses would be helpful to defendant. He commented that his "opinion is that it would underline things and just make things worse if I give somebody a hard time on the stand, anything I would get to the untruths." It is obvious that defendant's counsel was making a reasoned strategy decision. Where the strategy of trial counsel is "well within the range of professionally reasonable judgments," the action of counsel is not constitutionally ineffective. *Strickland*, 466 U.S. at 699, 80 L. Ed. 2d at 701. *See also State v. Swann*, 322 N.C. 666, 687, 370 S.E.2d 533, 545 (1988). The record shows that counsel for defendant ably cross-examined the child witness, and that she was already in tears on the witness stand. As is often the case in sexual abuse cases, defense counsel made the decision that further questions to the tearful witness would not yield a gain equal to the damage done if the jury were made more sympathetic to the alleged victim of sexual abuse. Further, we hold that nothing in this record indicates that a reexamination of the witnesses by trial counsel would have resulted in any different outcome.

In summary, it appears from this record that defendant was defended by able, conscientious, prepared counsel; that defendant's

counsel professionally and thoroughly examined the witnesses and vigorously resisted the admission of all evidence damaging to defendant. The effectiveness of the defense effort is demonstrated by the inability of the jury to reach a unanimous decision in three of the four charges against defendant.

Defendant had a fair trial before an able trial court and a jury of his peers. In that trial we find

No error.

Judge TYSON concurs.

Judge GREENE concurs with a separate opinion.

GREENE, Judge, concurring.

I agree with the majority that the trial court did not err by admitting evidence defendant abused the victim on two occasions other than the occasion for which defendant was charged, pursuant to Rule 404(b) of the North Carolina Rules of Evidence. I write separately to address defendant's argument in his brief to this Court that evidence of these "other crimes, wrongs, or acts" was inadmissable based on its "unreliability."

Evidence offered for a proper purpose pursuant to Rule 404(b) is admissible only if it is relevant. *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992); N.C.G.S. § 8C-1, Rule 402 (1999) ("[e]vidence which is not relevant is not admissible"). Evidence of "other crimes, wrongs, or acts" is relevant "only if the jury can conclude by a preponderance of the evidence that the extrinsic act occurred and that the defendant was the actor." *Haskins*, 104 N.C. App. at 679, 411 S.E.2d at 380. Upon a request by the opponent of the evidence, the trial court must, therefore, determine on *voir dire* "whether there is sufficient evidence that the defendant in fact committed the extrinsic act."[1] *Id.* at 679-80, 411 S.E.2d at 380. Evidence the defendant committed the extrinsic act

1. We note the defendant may request the trial court conduct the *voir dire* outside the presence of the jury when the interests of justice so require. N.C.G.S. § 8C-1, Rule 104(c) (1999). When the *voir dire* is conducted in the jury's presence, however, and the trial court subsequently determines the evidence the defendant committed the extrinsic act is not substantial, the trial court must "instruct the jury to disregard the evidence." *Haskins*, 104 N.C. App. at 680, 411 S.E.2d at 380-81.

is sufficient to present the evidence to the jury if the evidence is "substantial." *Id.* at 680, 411 S.E.2d at 380; *see also State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990) ("[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

In this case, defendant argues in his brief to this Court that evidence of defendant's "other crimes, wrongs, or acts" was unreliable because the State charged defendant with crimes based on these acts and subsequently dismissed those charges. Defendant essentially contends the evidence of defendant's extrinsic acts was inadmissible because the State did not present sufficient evidence the extrinsic acts occurred. To preserve this issue for appeal, defendant was required to object at trial to the admission of the evidence on the ground evidence defendant committed the extrinsic acts was not substantial. As defendant failed to raise this objection before the trial court, this issue is not properly before this Court. *See* N.C.R. App. P. 10(b)(1).

BENNY SIMS, PLAINTIFF-EMPLOYEE v. CHARMES/ARBY'S ROAST BEEF, DEFENDANT-EMPLOYER, AND/OR NORTH CAROLINA SELF-INSURERS FUND, DEFENDANT-CARRIER

No. COA99-1402

(Filed 6 February 2001)

1. Workers' Compensation— Industrial Commission—authority to sit en banc

N.C.G.S. § 97-85 does not provide the Industrial Commission with the express authority to sit en banc to hear cases nor does it evince any intent by the legislature that the Commission do so. The Industrial Commission is an administrative agency of the State and has only the limited power and jurisdiction either expressly or impliedly granted by the legislature to enable it to administer the Workers' Compensation Act.

2. Workers' Compensation— Form 60—no presumption of disability

The Industrial Commission correctly determined that filing a Form 60 admitting compensability and liability for plaintiff's

injury did not entitle plaintiff to a presumption of disability, as would have been the case had the parties filed a Form 21.

3. Workers' Compensation— disability—operation of independent businesses

The Industrial Commission correctly found that plaintiff failed to sustain his burden of proving temporary total disability where plaintiff continued to operate three businesses following his injury and that gross profits from those businesses expanded following the injury.

4. Workers' Compensation— average weekly wage—calculation—use of actual wages

The Industrial Commission did not err in its calculation of plaintiff's average weekly wage pursuant to N.C.G.S. § 97-2(5) where plaintiff's weekly wages were undisputed and the Commission was justified in using plaintiff's actual wages.

Appeal by plaintiff from opinion and award entered 18 December 1997 and order entered 7 October 1998 by the North Carolina Industrial Commission; appeal by defendants from order of the North Carolina Industrial Commission entered 22 June 1999. Heard in the Court of Appeals 14 August 2000.

David P. Stewart for plaintiff.

Teague, Campbell, Dennis & Gorham, L.L.P., by George W. Dennis, III, Linda Stephens, George Pender, and Tracey L. Jones, for defendants.

Lore & McClearen, by R. James Lore; Patterson, Harkavy & Lawrence, L.L.P., by Henry N. Patterson, Jr., and Martha A. Geer, amicus curiae, for the North Carolina Academy of Trial Lawyers.

Lewis & Roberts, by Richard M. Lewis, Timothy S. Riordan and Devin F. Thomas, amicus curiae, for the North Carolina Association of Defense Attorneys.

MARTIN, Judge.

Benny Sims ("plaintiff") injured his back lifting a case of beef while working for Charmes/Arby's Roast Beef (along with North Carolina Self-Insurers Fund, "defendants") on 25 October 1994. Defendants immediately filed Industrial Commission Form 19 and

began making temporary disability payments effective the day of plaintiff's injury; thereafter, defendants filed a Form 60 admitting liability and plaintiff's right to compensation. Dr. Richard O'Keeffe, Jr., diagnosed plaintiff with multiple bulging discs. On 15 June 1995, plaintiff was given a ten percent permanent disability rating to his back.

Meanwhile, defendants obtained evidence that plaintiff was working on a self-employed basis and promptly filed a Form 24 Application to Terminate Payment of Compensation. On 25 July 1995, a deputy commissioner approved defendants' Form 24 and terminated plaintiff's benefits effective 20 March 1995, finding that plaintiff was self-employed and earning income. Plaintiff requested a hearing. At the hearing, held on 10 September 1996, plaintiff testified that he owned a number of business enterprises, including a photography studio and tax preparation service, and that he owned and operated these businesses before, during, and after his employment with defendant. The evidence also showed that plaintiff began working at a K-Mart store on 29 July 1996.

The deputy commissioner awarded plaintiff compensation for temporary total disability from 1 November 1995 through 1 December 1995 because of a re-injury to plaintiff's back which occurred 31 October 1995, as well as 30 weeks of permanent partial disability; defendants were awarded a credit for 38 weeks of compensation payments made between 25 October 1994 and 25 July 1995. The credit awarded to defendants offset the award to plaintiff, who received no further compensation.

Plaintiff appealed to the Full Commission. On 18 December 1997, the Commission entered an opinion and award in which it concluded plaintiff was not entitled to a presumption of continuing temporary total disability because the parties had never entered into a Form 21 agreement; further, the Commission upheld the award of the deputy commissioner, finding that plaintiff failed to meet his burden of proving temporary total disability, in part because he earned income during the period in which he collected disability payments from defendants.

Plaintiff's Motion for Reconsideration, in which he contended defendants' execution of the Form 60 entitled him to a presumption of continuing temporary total disability, was denied. Plaintiff then moved for an *en banc* hearing before the entire Industrial Commission. Plaintiff's motion was granted and the Full Commission,

sitting *en banc*, heard oral arguments on 7 January 1999. On 22 June 1999, the Commission filed an order in which it declined to rule *en banc*, and provided that the time for filing an appeal from its opinion and award of 8 May 1997 "shall lie from the date of the filing of this Order." Plaintiff and defendants appeal.

Plaintiff assigns error to the Full Commission's opinion and award filed 18 December 1997, and its subsequent order filed 7 October 1998, which concluded that plaintiff was not entitled to a presumption of continuing temporary total disability based on defendants' filing of the Industrial Commission Form 60. Further, plaintiff contends the Commission erred when it determined plaintiff had failed to prove his temporary total disability because he had earned income from self-employment businesses during the time period in which he collected payments from defendants. Finally, plaintiff assigns as error the Commission's method for calculating plaintiff's average weekly wage based on G.S. § 97-2(5).

In their separate appeal from the 22 June 1999 order, defendants assert the Industrial Commission erred when it granted plaintiff's request to reconsider the matter sitting *en banc*, and assign error to the provisions of the *en banc* order purporting to extend the deadline for filing an appeal from the Commission's earlier orders.

[1] We begin by addressing defendants' assignment of error regarding the Industrial Commission's authority to sit *en banc*. The Industrial Commission is an administrative agency of the State and has only the limited power and jurisdiction either expressly or impliedly granted by the legislature to enable it to administer the Workers' Compensation Act. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985). The procedure for the Full Commission to hear cases is established by G.S. § 97-85. The statute provides:

> If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award: Provided, however, when application is made for review of an award, and such an award has been heard and determined by a commissioner of the North Carolina Industrial Commission, the commissioner who heard and determined the dispute in the first instance, as specified by G.S. 97-84, shall be

> disqualified from sitting with the full Commission on the review of such award, and the chairman of the Industrial Commission shall designate a deputy commissioner to take such commissioner's place in the review of the particular award. The deputy commissioner so designated, along with the two other commissioners, shall compose the full Commission upon review. Provided further, the chairman of the Industrial Commission shall have the authority to designate a deputy commissioner to take the place of a commissioner on the review of any case, in which event the deputy commissioner so designated shall have the same authority and duty as does the commissioner whose place he occupies on such review.

The statute does not provide the Commission with the express authority to sit *en banc* to hear cases nor does it evince any intent by the legislature that the Commission do so. Indeed, the statute is explicit in setting forth that, for the purposes of reviewing awards, the Full Commission shall be composed of three member panels, appeals from which are taken to the Court of Appeals.

Because the Commission is without authority to sit *en banc*, it follows that its 22 June 1999 order, including the provisions extending the time for filing an appeal from the earlier orders, is a nullity and must be vacated. Nevertheless, in the exercise of the discretion granted us by N.C.R. App. P. 2, we treat plaintiff's purported appeal as a petition for writ of certiorari, allow the petition, and proceed to consider plaintiff's appeal on the merits.

[2] Plaintiff argues the Commission erred when it concluded that plaintiff was not entitled to a presumption of continuing temporary total disability based on defendants' filing of the Industrial Commission Form 60, entitled "Employer's Admission of Employee's Right To Compensation Pursuant to N.C. Gen. Stat. 97-18(b)." Form 60, plaintiff argues, carries with it the same presumption of continuing disability as the Form 21. Although this question has never been addressed directly by our courts, a careful reading of G.S. § 97-18(d) and recent case law requires that we decide the issue adversely to plaintiff's contentions.

As a general rule, an employee is entitled to compensation if he is disabled as a result of an injury by accident occurring in the course of employment. *Rhinehart v. Market*, 271 N.C. 586, 157 S.E.2d 1 (1967). The employee has the burden of proving a disability as a result of a work-related injury. One method for establishing disability

is the use of the Industrial Commission Form 21; written agreements between employers and employees using Form 21 and approved by the Commission qualify as awards of the Commission and entitle employees to a presumption of disability. *Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 476 S.E.2d 434 (1996).

The General Assembly has also provided more direct methods for employers to compensate injured employees without admitting liability. G.S. § 97-18(b) permits an employer to admit that the injury suffered by the employee is compensable, that the employer is liable for compensation, and to notify the Commission of such action by use of the Form 60, "Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat. § 97-18(b)." By contrast, G.S. § 97-18(d) provides the employer with the option of making payments to an injured employee for a period of 90 days without admitting the compensability of or the liability for the injury. After the 90-day period, however, if the employer does not contest liability or compensability, "it waives its right to do so and the entitlement to compensation becomes an award of the Commission pursuant to G.S. § 97-82(b)." *Higgins v. Michael Powell Builders*, 132 N.C. App. 720, 724, 515 S.E.2d 17, 20 (1999).

In *Olivares-Juarez v. Showell Farms*, 138 N.C. App. 663, 532 S.E.2d 198 (2000), the employer made direct payments to the injured employee pursuant to G.S. § 97-18(d), using the Industrial Commission Form 63, Payment of Compensation Without Prejudice. The employer, however, made these payments beyond the 90-day statutory period, from 14 August 1995 until 2 January 1996. Thus, this Court held, according to the statute, the employer had waived its right to contest the compensability of or its liability for the employee's injury. The status of the employer who pays compensation without prejudice beyond the statutory period is therefore the same as the employer who files Form 60 pursuant to G.S. § 97-18(b). That is, in both circumstances the employers will be deemed to have admitted liability and compensability. In *Olivares-Juarez*, the Court held that because a Form 21 agreement was not approved by the Commission, "a presumption of disability in favor of plaintiff did not arise." 138 N.C. App. at 667, 532 S.E.2d at 202. The employer in *Olivares-Juarez*, therefore, was held to have admitted compensability and liability, but not the employee's disability. Accordingly, admitting compensability and liability, whether through notification of the Commission by the use of a Form 60 or through paying benefits beyond the statutory period provided for in G.S. § 97-18(d), does not

create a presumption of continuing disability as does a Form 21 agreement entered into between the employer and the employee.

In the present case, defendants filed a Form 60 admitting compensability and liability for plaintiff's injury. The Commission, in its order filed 7 October 1998, determined that use of the Form 60 did not entitle plaintiff to a presumption of continuing temporary disability as would have been the case had the parties filed the Form 21 agreement. Based on our reading of both the statute and the decision in *Olivares-Juarez*, this Court must agree. The burden of proving disability, therefore, remains with plaintiff.

[3] Plaintiff next contends the Commission erred when it determined plaintiff had failed to prove his temporary total disability because he had earned income from self-employment businesses during the period in which he collected workers' compensation payments. Specifically, plaintiff asserts that since he conducted these businesses before his injury, the businesses represented concurrent employment and could not be considered when determining whether his earning capacity had diminished as a result of his injury.

Under the Workers' Compensation Act, a disability is defined as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9). Thus, an employee who cannot command wages in the competitive job market because of injury will be classified as disabled under the statute. An employee's earning capacity "is based on his ability to command a regular income in the labor market." *McGee v. Estes Express Lines*, 125 N.C. App. 298, 300, 480 S.E.2d 416, 418 (1997). In *McGee*, this Court held that an employee's ownership of a business could support a finding of earning capacity if the employee is actively engaged in the business, but only if the work involves skills marketable in the labor market. *Id.* Thus, the relevant inquiry, even in circumstances involving an employee's on-going business operations, is whether the injury has diminished the employee's earning capacity.

In the present case, the Full Commission found that plaintiff operated three businesses following his injury on 25 October 1994, and that gross profits from these businesses expanded considerably in 1995 compared to 1994 figures. According to the Commission, plaintiff's photography and Race Fan businesses increased gross profits from $14,360.00 in 1994 to $23,580.00 in 1995. Based in part on these findings, the Commission concluded this increase in gross prof-

its reflected plaintiff's ability to earn wages. Further, the Commission found plaintiff made no attempt to find employment between 25 October 1994 and 25 July 1995; in fact, he did not accept a new job until 29 July 1996, when he was hired as a manager-trainee at K-Mart. Plaintiff has the burden of proving " . . . not only that he had obtained no other employment but that he was *unable* to obtain other employment." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982) (emphasis in original). Here, the Commission found that plaintiff failed to prove he was unable to earn income as a result of his on-the-job injury; indeed, the evidence shows that plaintiff earned income throughout the time he received temporary disability payments from defendants. The Commission's finding that plaintiff failed to sustain his burden of proving temporary total disability between 25 October 1994 and 25 July 1995 is supported by competent evidence. Plaintiff's assignment of error is therefore overruled.

[4] Finally, plaintiff assigns as error the Commission's method of calculating his average weekly wage pursuant to G.S. § 97-2(5). Because of his brief period of employment, plaintiff contends his wage should have been calculated using a comparable employee's 52-week wage. We disagree.

G.S. § 97-2(5) establishes several methods for calculating wages under the Workers' Compensation Act. As pertinent to this appeal, the statute provides:

> 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. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

Thus, in circumstances where determining the weekly wage is too uncertain, the statute provides an alternative: using the wage of a comparable employee.

In this case, the Commission had ample evidence to permit the weekly wage to be calculated based on plaintiff's actual wages during his employment. Plaintiff earned $240.00 a week in a probationary period as a manager-trainee. Although some dispute arose concerning the test administered to plaintiff during this training period, it appears undisputed that some trainees fail to advance to permanent employment. If the Commission were to determine plaintiff's weekly wage by using the wages earned by a permanent employee, it would have had to make the assumption that plaintiff would one day move into a permanent position. The statutory language of G.S. § 97-2(5) permits the use of a comparable employee's wages when it is impractical to use the injured employee's weekly wages. Here, plaintiff's weekly wages were undisputed and the Commission was justified in calculating plaintiff's wage using his actual wages. This assignment of error is overruled.

For the foregoing reasons, we affirm both the Full Commission's opinion and award filed 18 December 1997 and its subsequent order filed 7 October 1998.

Affirmed.

Chief Judge EAGLES and Judge HORTON concur.

BEN JOHNSON HOMES, INC., A GEORGIA CORPORATION, AND C. BENJAMIN JOHNSON, JR., INDIVIDUALLY, PLAINTIFFS v. CAROL FREES WATKINS, DEFENDANT

No. COA00-406

(Filed 6 February 2001)

1. Corporations— foreign—certificate of authority—suspension—effect on contract

The trial court did not err by granting defendant's motion for summary judgment on a contract claim for disputed amounts arising from work on defendant's property, and did not err by denying defendant's motion for summary judgment on a quantum meruit claim, where the corporate plaintiff entered into and performed the contract at a time when its certificate of authority to transact business in the state had been suspended. Any act performed by a foreign corporation during the period of suspension

is invalid and of no effect. Since the services rendered by the individual plaintiff were rendered on behalf of the corporation, the individual plaintiff is also not entitled to seek recovery on the invalid contract or under quantum meruit.

2. Appeal and Error— constitutional issue—not raised at trial

The question of whether N.C.G.S. § 105-230 is unconstitutional because it does not require prior notice of suspension of a certificate of authority to do business in North Carolina was not considered where the record did not reflect assertion of the constitutional issue at trial.

Judge TYSON dissenting.

Appeal by plaintiffs from order filed 1 February 2000 by Judge Beverly T. Beal in Transylvania County Superior Court. Heard in the Court of Appeals 9 January 2001.

Coward, Hicks & Siler, P.A., by William H. Coward, for plaintiff-appellants.

Cloninger, Lindsay, Hensley, Searson & Arcuri, P.L.L.C., by John C. Cloninger, for defendant-appellee.

GREENE, Judge.

Ben Johnson Homes, Inc. (Johnson, Inc.) and C. Benjamin Johnson, Jr. (Johnson), (collectively, Plaintiffs) appeal from a 1 February 2000 order (the order) granting a motion for summary judgment in favor of Carol Frees Watkins (Defendant) dismissing Plaintiffs' breach of contract claim.[1]

Johnson is the president and sole shareholder of Johnson, Inc. Johnson, Inc., a Georgia Corporation, obtained a certificate of authority to transact business in North Carolina (the certificate) on 1 November 1993. Johnson, Inc. is in the business of developing and improving residential property. On 13 October 1995, the certificate was suspended by the State of North Carolina and was revoked by the North Carolina Secretary of State on 26 April 1996 as a result of Johnson, Inc.'s failure to file a report required by the revenue statutes. After the certificate was revoked, Johnson, Inc. entered into

1. We note Defendant asserted counterclaims against Plaintiffs and those were not adjudicated by the trial court.

a construction contract (the contract) on 15 November 1996 to improve Defendant's property in Transylvania County. The certificate remained in a state of revocation during the time Johnson, Inc. entered into the contract with Defendant and at the time Johnson, Inc. performed work on Defendant's property.

Once Johnson, Inc. began performing work on Defendant's property, numerous changes were made to the contract by the agreement of both parties. After the changes were made, disputes arose between the parties concerning the amount Defendant owed to Johnson, Inc. and its completion of construction on Defendant's property. On 11 March 1998, Johnson, Inc. received a letter from Defendant terminating the contract. On 25 January 1999, the certificate was reinstated.

On 9 December 1999, Plaintiffs filed a complaint alleging Defendant breached the contract Defendant had entered into with Johnson, Inc. and pursuant to which the construction had occurred. Plaintiffs also alleged a claim for *quantum meruit* against Defendant based on Plaintiffs' allegations that Johnson, Inc. rendered services that were accepted by Defendant under circumstances which notified Defendant that Johnson, Inc. expected payment. In response, Defendant alleged Johnson, Inc. was not lawfully entitled to sue Defendant on the contract in question and filed a Rule 12(b)(6) motion to dismiss Plaintiffs' claims.

At the hearing on Defendant's motion to dismiss, various affidavits and Johnson's deposition were presented into evidence. All the affidavits related to the question of whether Johnson, Inc. had received notice of the corporate certificate suspension. In Johnson's deposition, Johnson testified he was the president and sole stockholder of Johnson, Inc. and any construction work done on any project in North Carolina was done by Johnson, Inc., not by "Ben Johnson individually." Johnson's role was to "review and critique the work" of Johnson, Inc. and he was paid for those services by Johnson, Inc. The trial court treated Defendant's motion to dismiss as a motion for summary judgment and granted summary judgment in favor of Defendant on Plaintiffs' breach of contract claim but it denied Defendant's motion with respect to Plaintiffs' *quantum meruit* claim.

The issues are whether: (I) a foreign corporation can maintain a claim to enforce a contract entered into during a period of revenue suspension; (II) an individual, as president and sole shareholder of a

foreign corporation, can enforce a contract entered into during a period of revenue suspension; and (III) Plaintiffs can contest the constitutionality of N.C. Gen. Stat. § 105-230 before this Court when they did not do so before the trial court.

I

[1] A foreign corporation, wishing to do business in the State of North Carolina, must request a "certificate of authority to transact business" (certificate of authority) in this State.[2] N.C.G.S. § 55-15-03(a) (1999); N.C.G.S. § 55-15-01(a) (1999). The North Carolina Secretary of State, after determining the corporation has complied with sections 55-15-03(a)-(b), shall issue the certificate of authority. N.C.G.S. § 55-15-03(c) (1999). Once issued a certificate of authority, the foreign corporation is required to file with the Secretary of Revenue an annual report setting forth the information itemized in section 55-16-22(a3), N.C.G.S. § 55-16-22(a) (1999), and pay those fees as stated in section 55-1-22(a), N.C.G.S. § 105-256.1 (1999). The failure to file the required report and/or pay the required fees requires the Secretary of State, upon notification from the Secretary of Revenue, to suspend the foreign corporation's certificate of authority. N.C.G.S. § 105-230(a) (1999). "Any act performed [by a foreign corporation] . . . during the period of suspension is invalid and of no effect." N.C.G.S. § 105-230(b) (1999); *Pierce Concrete, Inc. v. Cannon Realty & Construction Co.*, 77 N.C. App. 411, 412-13, 335 S.E.2d 30, 31 (1985); *South Mecklenburg Painting Contractors, Inc. v. Cunnane Group, Inc.*, 134 N.C. App. 307, 312, 517 S.E.2d 167, 170 (1999) (corporation "may not bring suit to enforce a contract entered into during a period of revenue suspension").[3]

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2. Although there is a requirement for all foreign corporations to obtain a certificate of authority prior to doing business in this State, "the failure . . . to obtain a certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in this State." N.C.G.S. § 55-15-02(e) (1999). Prior to the trial of a claim asserted by a foreign corporation without a certificate of authority, however, the corporation must first obtain a certificate of authority. N.C.G.S. § 55-15-02(a) (1999). In this case, Johnson, Inc. had obtained a certificate of authority and, thus, was not operating within the purview of section 55-15-02.

3. We note that in *South Mecklenburg* a domestic corporation was involved, not a foreign corporation, and the charter was suspended, not the certificate of authority to do business in this State. These distinctions are not material as section 105-230(a) has specific reference to the suspension of either the articles of incorporation of a domestic corporation or the certificate of authority of a foreign corporation. In either event, the acts of the corporation subsequent to the suspension are invalid. N.C.G.S. § 105-230(b).

In this case, Johnson, Inc. entered into the contract with Defendant and performed that contract at a time when its certificate of authority was in a state of suspension. Thus, the contract and any rights, including claims based in equity (*i.e.*, claims based on *quantum meruit*), arising under that contract are of no force and effect and are not enforceable. Accordingly, the trial court did not err in granting Defendant's motion for summary judgment on the contract claim but it did err in denying Defendant's motion on the *quantum meruit* claim.[4]

II

"If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). In this case, Johnson's claims, contract and *quantum meruit*, were based solely on the contract entered into by Johnson, Inc. All the evidence shows Johnson worked for Johnson, Inc., was paid by the corporation, and any services rendered by Johnson to Defendant were rendered on behalf of Johnson, Inc., not Johnson individually. Because we hold the contract was not enforceable and because the services rendered to Defendant by Johnson were rendered on behalf of the corporation, Johnson is not entitled to seek enforcement of and recovery on the corporation's invalid contract or recovery under *quantum meruit*. Accordingly, the trial court did not err in granting Defendant's motion for summary judgment on Johnson's breach of contract claim and it did err in denying Defendant's motion for summary judgment on the *quantum meruit* claim.[5]

III

[2] Plaintiffs argue N.C. Gen. Stat. § 105-230 is unconstitutional because it does not require the corporation, whose certificate of authority has been suspended, be notified of the suspension prior to the suspension taking effect. As the record does not reflect this constitutional argument was asserted at trial, we decline to address the issue. *See Midrex Corp. v. Lynch*, 50 N.C. App. 611, 618, 274 S.E.2d 853, 858, (appellant must "affirmatively show that the [constitutional]

4. As the trial court denied Defendant's motion for summary judgment on Johnson, Inc.'s claim in *quantum meruit*, we review that denial by granting Defendant's petition for *certiorari*.

5. As the trial court denied Defendant's motion for summary judgment on Johnson's claim in *quantum meruit*, we review that denial by granting Defendant's petition for *certiorari*.

question was raised and passed upon in the trial court"), *appeal dismissed and disc. review denied*, 303 N.C. 181, 280 S.E.2d 453 (1981).

Affirmed in part, reversed in part, and remanded.[6]

Judge HORTON concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge, concurring in part, dissenting in part.

I concur with the result of the majority as to the corporate plaintiff. This Court is bound by the statute and the cases the majority cites, holding that acts performed by a foreign corporation during a period of suspension are invalid. I note that such an opinion treats foreign corporations, which initially complied with the law, but subsequently had certificates of authority revoked for inadvertently not filing reports, far worse than those which never complied with the law requiring a certificate of authority.

I disagree with the majority as to the individual plaintiff, Ben Johnson. The trial court properly denied defendant's motion for summary judgment on Johnson's claim of *quantum meruit*. The majority holds that Johnson's claim for *quantum meruit* must fail because it was based on "an invalid contract." However, the law of this State has never required a claim for *quantum meruit* to be based on a contract.

In fact, recovery under *quantum meruit* has been held to be inappropriate because a contract existed. *See Barrett Kays & Associates, P.A. v. Colonial Bldg. Co. Inc. of Raleigh*, 129 N.C. App. 525, 529, 500 S.E.2d 108, 111 (1998) (citing *Whitfield v. Gilchrist*, 348 N.C. 39, 497 S.E.2d 412 (1998)) ("Because an express contract existed, *quantum meruit* was not appropriate.").

" 'To recover in *quantum meruit*, plaintiff must show (1) services were rendered to defendants; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously.' " *Scott v. United Carolina Bank*, 130 N.C. App. 426, 429, 503 S.E.2d 149, 152 (1998), *disc. review denied*, 350 N.C. 99, 528 S.E.2d

6. This case is remanded to the trial court in order for Defendant's counterclaims to be adjudicated and to enter summary judgment in favor of Defendant on Plaintiffs' *quantum meruit* claims.

584 (1999) (quoting *Environmental Landscape Design v. Shields*, 75 N.C. App. 304, 306, 330 S.E.2d 627, 628 (1985)). "*Quantum meruit* claims require a showing that both parties understood that services were rendered with the expectation of payment." *Id.* (citing *Bales v. Evans*, 94 N.C. App. 179, 379 S.E.2d 698 (1989)).

Our Supreme Court recently summarized applicable principles of *quantum meruit*:

> *Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment. *Potter v. Homestead Preservation Ass'n*, 330 N.C. 569, 578, 412 S.E.2d 1, 7 (1992); see also Dan B. Dobbs, Dobbs Law of Remedies § 4.2(3) (2d ed. 1993). It operates as an equitable remedy based upon a quasi contract or a contract implied in law. *Potter*, 330 N.C. at 578, 412 S.E.2d at 7. "A quasi contract or a contract implied in law is not a contract." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). An implied contract is not based on an actual agreement, and *quantum meruit* is not an appropriate remedy when there is an actual agreement between the parties. *Id.* Only in the absence of an express agreement of the parties will courts impose a quasi contract or a contract implied in law in order *to prevent an unjust enrichment. Id.*

Whitfield, 348 N.C. at 42, 497 S.E.2d at 414-15 (emphasis supplied).

Plaintiffs' complaint clearly stated that the term "plaintiff" in the complaint would refer interchangeably to both the corporate plaintiff and Ben Johnson individually. Ben Johnson stated a valid claim for *quantum meruit* in his complaint. Johnson alleged that he rendered services to defendant, that defendant knowingly and voluntarily accepted the services rendered, and that the services were not gratuitous. The trial court, having heard the evidence, determined that Johnson had forecast sufficient evidence of this claim to survive defendant's motion. I would affirm the trial court's denial of the defendant's motion for summary judgment in this regard. I cannot join the majority in holding that the denial was error because it was based on "an invalid contact." Accordingly, I respectfully dissent.

WILLIAM LEE DUNEVANT, PLAINTIFF v. ELIZABETH ANN LEWIS DUNEVANT, DEFENDANT

No. COA99-1336

(Filed 6 February 2001)

1. **Divorce— one year's separation—residency—findings labeled as conclusions**

The trial court erred by abrogating a divorce decree based on a finding that the decree contained no findings of fact regarding the issues of one year's separation and residency in North Carolina where the appropriate statements appeared under the heading "Conclusions of Law." These statements did not involve the application of legal precepts and were more in the nature of findings than conclusions. Mislabeling the findings as conclusions is not fatal because the judgment discloses each link in the chain of reasoning.

2. **Divorce— judgment—set aside and new hearing—death of party in interim—action abated**

The trial court was without jurisdiction to vacate a divorce judgment and resurrect the parties' marriage where a divorce judgment was issued; defendant filed a motion to set aside the judgment as void; the court conducted a hearing as to when the parties began living separate and apart; plaintiff died; and the court allowed defendant's motion for the substitution of the administrator of plaintiff's estate, found that the parties did not separate with the intent to remain separate and apart, and set aside the divorce decree as null and void. An action for absolute divorce does not survive the death of a party and the judgment of absolute divorce in this case in no way passed upon equitable distribution of the marital property. In view of the determination elsewhere in this opinion that the decree was valid on its face, the proceeding to set aside the decree abated upon plaintiff's death.

Appeal by plaintiff from order entered 6 July 1999 by Judge Pattie S. Harrison in District Court, Caswell County. Heard in the Court of Appeals 14 September 2000.

Farmer & Watlington, L.L.P., by R. Lee Farmer, for plaintiff-appellant.

Ronnie P. King, P.A., by Ben S. Holloman, Jr., for defendant-appellee.

TIMMONS-GOODSON, Judge.

The administrator of the estate of William Lee Dunevant ("plaintiff") appeals from an order setting aside a divorce decree entered 17 September 1997 dissolving the marriage of plaintiff and Elizabeth Ann Lewis Dunevant ("defendant"). The relevant factual and procedural background is summarized as follows.

Plaintiff and defendant were married on or about 14 February 1979 in Danville, Virginia. No children were born of the marriage. On 29 July 1997, plaintiff filed a complaint for absolute divorce alleging that the parties had lived separate and apart since 3 May 1996. The complaint also asserted a claim for equitable distribution. Plaintiff had defendant personally served with the summons and a copy of the complaint on 1 August 1997. Defendant, however, filed no answer to the pleadings.

On 4 September 1997, plaintiff moved for summary judgment as to the issue of absolute divorce. On 5 September 1997, plaintiff filed a "Notice of Motion" with the Clerk of District Court, Caswell County, which notice was addressed to defendant and advised her that the motion for summary judgment would be heard on 17 September 1997. A copy of the notice was mailed to defendant. Defendant, nonetheless, did not receive the notice and failed to appear at the hearing.

Pursuant to plaintiff's motion, the trial court entered a judgment of absolute divorce on 17 September 1997. The judgment provided, in pertinent part, as follows:

> FINDINGS OF FACT:
>
> 1. That this matter is an action for absolute divorce based on the separation of the Plaintiff and the Defendant for one (1) year.
>
> 2. That the Defendant was properly served on the 30th day of July, 1997 with Summons and a copy of the Complaint.
>
> 3. That the Defendant has not filed a request for a jury trial with the Clerk of Court.
>
> 4. That the action is at issue and properly called for trial.
>
> 5. That Plaintiff has filed a verified Complaint in this cause and Defendant has failed to respond.
>
> BASED UPON THE FOREGOING FINDINGS OF FACT, the Court makes the following:

CONCLUSIONS OF LAW:

1. That the Plaintiff has been a resident of the State of North Carolina for more than six (6) months next preceding the institution of this action.

2. That the Plaintiff and the Defendant were duly married on or about the 14th day of February, 1979.

3. That there were no children born of the marriage of the parties.

4. That the Plaintiff and the Defendant separated with the intent to live permanently separate and apart and have lived separate and apart from each other for more than one (1) year next preceding the institution of this action.

5. That there exists no genuine issue of material fact and Plaintiff is entitled to judgment as a matter of law.

WHEREFORE, the Court concludes that it has jurisdiction over the subject matter and the parties, and that Plaintiff's Motion for Summary Judgment should be allowed.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. That the bonds of matrimony heretofore existing between Plaintiff and Defendant be, and they are hereby dissolved, and the Plaintiff is granted an absolute divorce from the Defendant.

2. That the issue of equitable distribution of marital property is retained by this Court for further adjudication.

Defendant received notification of the divorce decree by mail and, on 21 October 1997, moved to set aside the judgment as void. The court conducted a hearing on the motion, during which the parties presented conflicting evidence as to when they began living separate and apart. On 14 May 1998, prior to a ruling on the motion, plaintiff died. On 3 February 1999, plaintiff's attorney moved to dismiss defendant's motion for lack of jurisdiction over the person of plaintiff. Defendant, in response, moved to substitute the administrator of plaintiff's estate as plaintiff in the proceeding and moved, once again, to set aside the divorce decree. As the basis for the latter motion, defendant asserted that the divorce decree contained no findings of fact (1) that the parties had lived separate and apart for one year, or

(2) that either of the parties had resided in the State for a period of six months.

The court allowed defendant's motion for substitution and entered an order finding that "the Parties did not separate with the intent to remain separate and apart" on 3 May 1996. The court, therefore, concluded that the averment in plaintiff's complaint relating to the date of separation perpetrated a fraud on the court and thereby deprived the court of jurisdiction over the matter. Additionally, the court concluded that "[t]he Divorce Judgment [was] irregular on its face due to deficiencies in the factual findings on the issues of one-year's separation and North Carolina residency." Consequently, the court set aside the divorce decree, declaring it to be null and void. From the order of the trial court, plaintiff, through his representative, filed timely notice of appeal.

---

[1] Plaintiff argues first that the trial court erred in abrogating the divorce decree based on the finding that the decree "contained no findings of fact regarding the issues of separation for one year and residency in North Carolina." Plaintiff's argument has merit.

Section 50-6 of the North Carolina General Statutes provides that the parties to a marriage may obtain an absolute divorce "on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months." N.C. Gen. Stat. § 50-6 (1999). Under section 50-10 of the General Statutes,

> (a) The material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury.
>
> . . . .
>
> (d) The provisions of G.S. 1A-1, Rule 56, shall be applicable to actions for absolute divorce pursuant to G.S. 50-6, for the purpose of determining whether any genuine issue of material fact remains for trial by jury, but in the event the court determines that no genuine issue of fact remains for trial by jury, the court must find the facts as provided herein. The court may enter a

> judgment of absolute divorce pursuant to the procedures set forth in G.S. 1A-1, Rule 56, finding all requisite facts from nontestimonial evidence presented by affidavit, verified motion or other verified pleading.

N.C. Gen. Stat. § 50-10 (a),(d) (1999).

"Findings of fact are statements of what happened in space and time." *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 351, 358 S.E.2d 339, 346 (1987). Pursuant to Rule 52(a)(1) of our Rules of Civil Procedure, a trial judge sitting without a jury must "find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment." N.C.R. Civ. P. 52(a)(1). This notwithstanding, a pronouncement by the trial court which does not require the employment of legal principles will be treated as a finding of fact, regardless of how it is denominated in the court's order. *See Gainey v. N.C. Dept. of Justice*, 121 N.C. App. 253, 257, 465 S.E.2d 36, 40 (1996) (footnote 1 explaining that Court would treat " 'conclusion' as a 'finding of fact' because its determination [did] not involve the application of legal principles"); *cf. Coble v. Coble*, 300 N.C. 708, 713, 268 S.E.2d 185, 189 (1980) (viewing "finding" as "conclusion of law," because it stated legal basis upon which ruling was made); *Gibbs v. Wright*, 17 N.C. App. 495, 498, 195 S.E.2d 40, 43 (1973) (stating that "findings of fact" which "[were] actually more in the nature of conclusions of law" were properly treated as such, and that "it [was] immaterial that they were incorrectly included under the heading of 'findings of fact' in the judgment.")

In the order vacating the judgment of absolute divorce, the trial court found that the judgment lacked factual findings pertaining to the issues of one year's separation and North Carolina residency. Granted, the judgment does not set forth any such statements under the heading "Findings of Fact." The following declarations, however, appear under the "Conclusions of Law":

> 1. That the Plaintiff has been a resident of the State of North Carolina for more than six (6) months next preceding the institution of this action.
>
> . . . .
>
> 4. That the Plaintiff and the Defendant separated with the intent to live permanently separate and apart and have lived separate and apart from each other for more than one (1) year next preceding the institution of this action.

Since these statements do not involve the application of legal precepts, they are, in actuality, more in the nature of "findings of facts" and should be treated as such. *See Gainey*, 121 N.C. App. at 257, 465 S.E.2d at 40. Furthermore, that the "findings" are mislabeled "conclusions of law" is not fatal, because the judgment discloses " 'each link in the chain of reasoning.' " *See Eddleman*, 320 N.C. at 352, 358 S.E.2d at 346 (quoting *Coble*, 300 N.C. at 714, 268 S.E.2d at 190). To be sure, the findings of fact appearing throughout the divorce decree, taken together, furnish the justification for the court's conclusion "that it ha[d] jurisdiction over the subject matter and the parties, and that Plaintiff's Motion for Summary Judgment [on the issue of absolute divorce] should be allowed."

A party may obtain relief from a final judgment pursuant to Rule 60(b)(4) of the Rules of Civil Procedure, if she can show that the judgment is void *ab initio*. N.C.R. Civ. P. 60(b)(4). Our courts have said that " 'a divorce decree, in all respects regular on the face of the judgment roll, is at most *voidable*, not void.' " *Howell v. Tunstall*, 64 N.C. App. 703, 705, 308 S.E.2d 454, 456 (1983) (quoting *Carpenter v. Carpenter*, 244 N.C. 286, 295, 93 S.E.2d 617, 625-26 (1956)). In light of the foregoing reasoning, we hold that contrary to the court's conclusion, the divorce decree at issue in this case was "in all respects regular on [its] face." *See id.* Therefore, the court had no basis upon which to declare the divorce decree void. This is especially true, given that the court specifically found that "Defendant was properly served in person with a Summons and the [Divorce Complaint]." *See Thomas v. Thomas*, 43 N.C. App. 638, 645, 260 S.E.2d 163, 168 (1979) (quoting 1 Robert E. Lee, *North Carolina Family Law* § 52, at 215 (3rd ed. 1963)) ("A divorce granted without proper service of process upon the defendant is void when [s]he does not appear in the action or does not otherwise waive service of process.").

[2] Plaintiff next argues that a divorce judgment which has not been shown to be void may not be set aside following the death of one of the parties so as to reinstate the marital relationship. Again, we find merit in plaintiff's argument.

Section 28A-18-1 of the General Statues states that:

> (a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of his estate.

(b) The following rights of action in favor of a decedent do not survive:

. . . .

(3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

N.C. Gen. Stat. § 28A-18-1 (1999). An action for absolute divorce is one that does not survive the death of a party. *Caldwell v. Caldwell*, 93 N.C. App. 740, 741, 379 S.E.2d 271, 272 (1989), *superseded by statute on other grounds as stated in Brown v. Brown*, 136 N.C. App. 331, 334, 524 S.E.2d 89, 91, *rev'd on other grounds*, 353 N.C. 220, 539 S.E.2d 621 (2000). Consequently, a divorce proceeding abates when one of the parties dies. *Brown*, 353 N.C. at 222, 539 S.E.2d at 622; *see* N.C.R. Civ. P. 25(a) (describing actions that do not survive by reason of a party's death as abated). This Court has said that:

> "[s]ince death itself dissolves the marital status and accomplishes the chief purpose for which the action is brought, there is no longer a marital status upon which a final decree of divorce may operate. The jurisdiction of the court to proceed with the action is terminated. The marital status of the parties is the same as if the suit had never begun."

Caldwell, 93 N.C. App. at 742, 379 S.E.2d at 272 (quoting 1 Robert E. Lee, *North Carolina Family Law* § 48 (4th ed. 1979)). Although our courts have not spoken on the issue raised by the facts of this case, it follows from the foregoing authority that the trial court may not set aside a valid divorce decree and thereby revive the marital status of a party who is deceased.

We find support for this proposition in *Hill v. Lyons*, 550 So. 2d 1004 (Ala. Civ. App. 1989), wherein the Alabama Court of Civil Appeals considered "whether the trial court had jurisdiction to nullify a divorce decree in its entirety after one of the parties thereto had died." *Id.* at 1005. The court noted that:

> Generally, the death of one of the parties to a divorce decree results in abatement of the cause of action. Abatement does not occur when the decree affects property rights, and matters touching the parties' property rights under the divorce decree are amenable to alteration or modification upon timely motion, or upon appeal.

> Here, the divorce decree . . . affected property rights of the parties, and upon timely motion the trial court had jurisdiction to amend, alter, or modify the decree. The trial court did not, however, have the jurisdiction to change the adjudged marital *status* of the parties.

Id. at 1006 (emphasis added) (citations omitted). Similarly, in *Cox v. Dodd*, 4 So. 2d 736 (Ala. 1941), the Alabama Supreme Court held that:

> "[When a divorce judgment does not affect property rights,] [p]roceedings to vacate it will not lie after the death of one of the parties. The only object which could be attained would be sentimental in its nature, for the death of the parties effectually severs the marriage relation and the practical result of the judgment or decree would not be affected. On the other hand, where the judgment or decree affects property rights, the death of one party or both parties does not affect the right of the unsuccessful party or his or her representative to institute vacation proceedings. This is permitted, not for the purpose of continuing the controversy touching the right to a divorce itself, but for the ascertainment of whether the property has been rightly diverted from its appropriate channel of devolution."

Id. at 739 (quoting 17 Am. Jur. *Divorce and Separations* § 462, at 378) (emphasis added).

In the case *sub judice*, the judgment of absolute divorce entered 17 September 1997 dealt exclusively with the parties' marital status. It in no way passed upon the issue of equitable distribution of the marital property. Defendant moved to set aside the judgment on 21 October 1997, but as fate would have it, plaintiff passed away on 14 May 1998, prior to a ruling on the motion. In view of our foregoing determination that the divorce decree was valid on its face, we hold that the proceeding to set aside the decree was abated upon plaintiff's death. Therefore, the trial court was without jurisdiction to vacate the divorce judgment and resurrect the parties' marriage.

As a final matter, plaintiff argues that the trial court erred in granting defendant's untimely motion to substitute the administrator of plaintiff's estate as plaintiff in the proceeding action to vacate the divorce decree. However, given our resolution of the preceding issues, a discussion of this argument would be extraneous.

In sum, the order setting aside the 17 September 1997 divorce judgment is hereby vacated, and this matter is remanded to the District Court, Caswell County, for further appropriate proceedings consistent with this opinion.

Vacated and remanded.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. ERIC LAMONT PERRY, DEFENDANT

No. COA99-1113

(Filed 6 February 2001)

Criminal Law— joinder of offenses—insufficient transactional connection—prejudicial error

The trial court abused its discretion and committed prejudicial error by granting the State's motion for joinder of defendant's offenses under N.C.G.S. § 15A-926(a) arising out of Durham Hispanic home invasions and financial card theft charges arising out of automobile break-ins and a Chapel Hill armed robbery, because: (1) the transactional connection between the offenses is insufficient when the possession of stolen property charges arose from automobile break-ins which occurred in August and October 1997, the armed robbery occurred in Chapel Hill in September 1997, the Hispanic home invasions occurred in Durham during a six-day period in October 1997, and the Hispanic home invasions were not involved in the offenses from which the possession of stolen property charges arose; (2) evidence of property stolen in the car break-ins and Chapel Hill robbery would not have been admissible under N.C.G.S. § 8C-1, Rule 404(b) had defendant been tried separately upon the charges arising out of the Durham Hispanic home invasions; and (3) the jury's assessment of the credibility of the testifying codefendants could have been affected by the substantial evidence connecting defendant with the other crimes.

Appeal by defendant from judgments entered 29 January 1999 by Judge David Q. LaBarre in Durham County Superior Court. Heard in the Court of Appeals 21 August 2000.

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

Brian Michael Aus for defendant-appellant.

MARTIN, Judge.

Defendant was charged on 6 April 1998 with three counts of first degree burglary, eleven counts of robbery with a dangerous weapon, three counts of attempted robbery with a dangerous weapon, eleven counts of second degree kidnapping, one count of first degree kidnapping, one count of first degree rape, one count of attempted first degree rape, two counts of felonious possession of stolen goods, two counts of misdemeanor possession of stolen goods, and five counts of financial transaction card theft. The possession of stolen goods charges stem from an armed robbery which occurred in Chapel Hill in September 1997, and three car break-ins which occurred in August and October of 1997. The remaining charges stem from three home invasions and armed robberies targeting Hispanic individuals that took place in Durham on 18, 20, and 24 October 1997.

The State moved to join the offenses for trial, and defendant moved to sever. The trial court granted the State's motion. The State offered evidence with respect to the 18, 20, and 24 October 1997 incidents through the testimony of six victims and three co-defendants, James Daye, Taqiyy Coley and Romone Miles. The first incident occurred at 1:00 a.m. on 18 October 1997. Three victims, Elmer Castro, Dina Solorsano and Neftali Aviles, testified that several armed intruders kicked open the door of their residence, entered a bedroom, and ordered Aviles, Castro and Serbelio Villalta to lie down on the floor. One intruder pointed a .12 gauge shotgun at Aviles and hit him in the head with the gun when he tried to look up. The intruders went through the belongings of the men and stole money, which Aviles and Castro valued at $2,350. The intruders then forced open the door to a second bedroom, held guns to the heads of Solorsano and Wenceslo Hernandez and took their money, which was less than $100. Co-defendants Daye, Coley and Miles testified that defendant participated in the burglary armed with a shotgun, and that money was taken from the residence.

The second incident occurred at 10:00 p.m. on 20 October 1997. Evangelina Gardner testified that two armed black men broke in a home occupied by her, her boyfriend, her baby and a few of her boyfriend's friends. One intruder shot at the bedroom door when he

realized that Ms. Gardner and her boyfriend were trying to hold it shut. Ms. Gardner testified that a "tall guy" came into the room pointing a gun at her and her boyfriend; he was later joined by a "short guy" with a "hideous" mask. They took her boyfriend's jewelry and ordered her to take off her t-shirt. When she refused, the "tall one" threatened to kill her baby; she then complied with his request. After the "short guy" forced her boyfriend out of the room, the "tall one" then ordered her to take off her underwear and held a gun to her baby's head. She testified that both men raped her. The intruders left with an undisclosed amount of money, rings and a camcorder. Daye testified that he and the defendant conducted this robbery. He testified that he held a gun on the men in the other room while defendant approached Ms. Gardner's bedroom. He further testified that he ordered Ms. Gardner to take her shirt off; he then tried to penetrate her but was unsuccessful, and defendant subsequently raped her.

The third incident occurred on 24 October 1997 at 1:00 a.m. Two victims, Guadalupe Rodriguez and Raul Hernandez, testified that the door to their apartment opened suddenly and several black men entered. Rodriguez testified that one intruder had a pistol and another had a long shotgun. The victims were told to lie down on the floor and both were held at gunpoint. Rodriguez was hit in the head with a gun and kicked in the stomach. Hernandez' fifteen year old son was also assaulted. The intruders fled with approximately $640. Coley testified that he, defendant, Daye, Christopher Thompson and Miles were involved in the robbery; that money was taken; and that defendant was armed with a shotgun.

None of the six victims of the Hispanic home invasions who testified against defendant was able to identify him positively as a perpetrator. Detective B.P. Hallan of the Durham City Police Department testified that he conducted a consensual search of defendant's bedroom and found property, including Mexican and Nicaraguan currency, a Halloween mask, a photo album, stereo equipment, jewelry, a shotgun, credit and bank cards. Though none of the property was identified as having been stolen during the Hispanic home invasions, the shotgun and mask were identified as being similar to those employed by the perpetrators. However, the State offered the testimony of victims of the Chapel Hill armed robbery and the automobile break-ins, who identified items found in defendant's home as belonging to them.

At the close of the State's evidence, the court dismissed one count of robbery with a dangerous weapon, four counts of attempted

robbery with a dangerous weapon, four counts of financial card theft, and all charges of kidnapping. Defendant renewed his motion to sever the offenses, which was denied by the court. Defendant then entered pleas of guilty to two counts of felonious possession of stolen goods, two counts of misdemeanor possession of stolen goods, and one count of financial transaction card theft, all of which involved property taken during the Chapel Hill armed robbery and the automobile break-ins. Sentencing for these offenses was deferred until the jury returned verdicts on the remaining charges.

Defendant offered the testimony of his step-father, who testified that he had a collection of foreign currency in a photo album, and that some of the currency was missing. The witness admitted, however, that he had never been to Nicaragua. Defendant also offered the testimony of co-defendant Thompson, who said he did not know defendant prior to his arrest, and the testimony of Dyaz McDougal who stated that she was with defendant in Greensboro from 11:45 p.m. on 24 October 1997 to approximately 12:45 a.m. on 25 October 1997.

The jury returned verdicts finding defendant guilty of two counts of first degree burglary, five counts of robbery with a dangerous weapon, one count of first degree rape, two counts of felonious possession of stolen goods, two counts of misdemeanor possession of stolen goods, and one count of financial transaction card theft. Defendant appeals from judgments entered on the verdicts.

Defendant assigns error to the trial court's ruling granting the State's motion for joinder of the offenses. Specifically, defendant argues that the charges related to the three Hispanic home invasions in Durham should not have been joined with those charges arising from the automobile break-ins and the Chapel Hill armed robbery.

G.S. § 15A-926(a) governs joinder of offenses and provides:

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

This rule requires a two-step analysis: (1) a determination of whether the offenses have a transactional connection, and (2) if there is such a connection, "consideration then must be given as to 'whether the accused can receive a fair hearing on more than one charge at the

same trial.' " *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250, *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000) (quoting *State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981)). A decision to consolidate offenses is within the discretion of the trial court, however, if the consolidated charges have "no transactional connection, then the consolidation is improper as a matter of law." *State v. Owens*, 135 N.C. App. 456, 458, 520 S.E.2d 590, 592 (1999).

We must first determine whether there was a transactional connection between the offenses. We consider the following factors to make this determination: "(1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case." *Montford*, 137 N.C. App. at 498-99, 529 S.E.2d at 250.

In this case, the transactional connection between the offenses is insufficient for joinder. The possession of stolen property charges arose from automobile break-ins which occurred in August and October, 1997 and a September 1997 armed robbery which occurred in Chapel Hill under circumstances quite different from the charges arising from the home invasions, all of which occurred in Durham during a six-day period in October, 1997. Furthermore, the co-defendants who were involved in the crimes arising out of the Hispanic home invasions were not involved in the offenses from which the possession of stolen property charges arose. The sole common denominator between the possession of stolen property charges and the charges arising out of the Hispanic home invasions is that some of the evidence found in defendant's bedroom linked him to the Chapel Hill armed robbery and the automobile break-ins, supporting the possession of stolen property and financial card theft charges, while other evidence found in the bedroom linked defendant to the Hispanic home invasions in Durham. This circumstance is not a sufficient transactional connection to support joinder, and the trial court erred in granting the State's motion to join the offenses for trial.

The error does not, however, entitle defendant to a new trial unless it resulted in prejudice to the defendant, i.e., unless "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (2000). In the case before us, joinder of the stolen property offenses with those arising from the Hispanic home invasions led to inclusion of a substantial amount of evidence and testimony linking defendant to the car break-ins and the Chapel

Hill armed robbery, including photographs of defendant's room showing large amounts of stolen property, as well as calling cards, checks, credit cards and driver's licenses belonging to the victims of the otherwise unrelated car break-ins and robbery.

The State argues that any error in joining the offenses was not prejudicial because the evidence would have been admissible at a separate trial pursuant to G.S. § 8C-1, Rule 404(b). The State contends the evidence of the stolen property, including the Mexican and Nicaraguan currency, is admissible to show defendant's identity as the perpetrator of the Hispanic home invasions because it refutes defendant's assertion that he did not commit those crimes. However, our review of the trial transcript reveals no testimony showing that Mexican or Nicaraguan currency was among the items stolen during the Durham Hispanic home invasions. The victims testified the robbers took "money" and valued the amount taken in U.S. dollars. Upon examination by the State, Guadalupe Rodriguez testified "money" was stolen; significantly, he did not have any Mexican pesos. Moreover, the four co-defendants who testified at trial all stated "money" was taken during the robberies. Two of the co-defendants, Daye and Coley, testified they stole money during the incidents and valued the amount taken in U.S. dollars. The co-defendants also testified as to other items taken, such as jewelry and stereo equipment, but did not mention Mexican or Nicaraguan money. The only evidence found in defendant's bedroom connecting him to the Durham robberies was the mask and shotgun, identified by the victims as similar to those used by the perpetrators. Thus, evidence of property stolen in the car break-ins and Chapel Hill robbery would not have been admissible under Rule 404(b) had defendant been tried separately upon the charges arising out of the Durham Hispanic home invasions.

We must next determine if there is a reasonable possibility that a different result would have been reached as to defendant's guilt or innocence of the charges arising out of the Durham Hispanic home invasions if the stolen property and financial card theft charges arising out of the automobile break-ins and Chapel Hill armed robbery had not been joined for trial. The remaining evidence against defendant with respect to the Durham Hispanic home invasions consisted of the testimony of three co-defendants who had entered into plea agreements in exchange for their testimony against defendant, and the shotgun and mask found in defendant's bedroom. None of the victims identified defendant as a perpetrator of those crimes. While the

State's evidence was clearly sufficient to go to the jury, the jury's assessment of the credibility of the testifying co-defendants could certainly have been affected by the substantial evidence connecting defendant with other crimes. In our view, had the jury not been exposed to the evidence of defendant's guilt of the stolen property and financial card theft charges arising out of the automobile break-ins and Chapel Hill armed robbery, there is a reasonable possibility of a different result in defendant's trial on the charges arising out of the Durham Hispanic home invasions. Thus, we must conclude that joinder for trial of the possession of stolen property and financial card theft charges with the charges arising from the Durham Hispanic home invasions was prejudicial error, entitling defendant to a new trial on those charges to which the jury returned verdicts of guilty. Because the charges to which defendant pled guilty were consolidated with one of the charges for which we have awarded a new trial, we must also remand cases 98 CRS 12427 and 98 CRS 12428 for a new sentencing hearing.

We need not address defendant's remaining assignments of error as they may not occur at retrial.

Cases 98 CRS 12427 and 98 CRS 12428—Remanded for resentencing.

Cases 98 CRS 12414, 98 CRS 12415, 98 CRS 12417, 98 CRS 12418, and 98 CRS 12420—New trial.

Chief Judge EAGLES and Judge HORTON concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. CAROLYN WALTERS, RANDY WALTERS, GENE GOUGE, RENA GOUGE & SHANE GOUGE, DEFENDANTS

No. COA00-281

(Filed 6 February 2001)

Insurance— automobile—coverage—vehicle furnished to another

An insurance policy issued by plaintiff to Gouge's parents did not provide liability coverage for an automobile accident involving a vehicle owned by Dickens and driven by Gouge. The dispositive issue was whether the vehicle was furnished for Gouge's

regular use within the meaning of an exclusion in plaintiff's policy; the undisputed facts showed that the vehicle was available to Gouge and used by Gouge on a daily basis for a period of approximately 8 weeks after his vehicle had burned. Although there was evidence that Gouge used the vehicle only with permission of the owner and primarily for her benefit, these allegations do not affect the availability of the vehicle to Gouge and his frequent use of the vehicle. Restrictions placed on the use of a vehicle may lead to a conclusion that the vehicle has not been furnished for the regular use of the non-owner in a particular case, but are not determinative.

Appeal by defendants Carolyn Walters and Randy Walters from judgment filed 10 January 2000 by Judge Richard D. Boner in Burke County Superior Court. Heard in the Court of Appeals 23 January 2001.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by Rex C. Morgan and Kevin P. Branch, for plaintiff-appellee.

Smith, James, Rowlett & Cohen, L.L.P., by Norman B. Smith; and Wayne W. Martin, for defendant-appellants Carolyn Walters and Randy Walters.

Morris, York, Williams, Surles & Barringer, L.L.P., by Paul J. Osowski, for defendant-appellee Shane Gouge.

GREENE, Judge.

Carolyn Walters and Randy Walters (collectively, Defendants) appeal an order filed 10 January 2000, granting summary judgment in favor of Nationwide Mutual Insurance Company (Plaintiff).

The record shows that on 1 February 1996, Defendants were involved in an automobile accident when Defendants' vehicle was struck by a vehicle driven by Shane Gouge (Gouge). Susan Dickens (Dickens) owned the vehicle driven by Gouge, and Dickens was a passenger in the vehicle when the accident occurred. As a result of the accident, Defendants filed a lawsuit against Gouge for personal injuries. At the time of the accident, Dickens' vehicle was covered under a North Carolina automobile liability insurance policy with limits of $25,000.00 per person and $50,000.00 per accident. Additionally, at the time of the accident, Gouge's parents were insured by an automobile liability policy issued by Plaintiff, and Gouge's father was

insured individually by a second automobile liability policy issued by Plaintiff. These policies (the Nationwide policies) provided coverage for "any auto" driven by a "family member" and the policies defined "family member" as "a person related to you by blood, marriage or adoption who is a resident of your household."[1] Part B(B) of both Nationwide policies contained the following liability coverage exclusion:

> 1. Any vehicle, other than your covered auto, which is:
>
> a. owned by you; or
>
> b. furnished for your regular use.
>
> 2. Any vehicle, other than your covered auto, which is:
>
> a. owned by any family member; or
>
> b. furnished for the regular use of any family member.

The Nationwide policies did not define the term "regular use."

On 14 April 1999, Nationwide filed a declaratory judgment action seeking a declaration that the Nationwide policies "do not provide liability coverage in connection with the motor vehicle accident of February 1, 1996." The complaint alleged, in pertinent part:

> 8. Prior to the accident . . . , on November 24, 1995, . . . Gouge had been given possession of the [vehicle] owned by . . . Dickens for his regular use. From November 24, 1995 until February 1, 1996, . . . Gouge had maintained possession of the [vehicle], and it was furnished for his regular use by the [vehicle's] owner, . . . Dickens.
>
> . . . .
>
> 11. Under the [exclusions stated in Part B(B) of the Nationwide policies], [P]laintiff does not provide any liability coverage for . . . Gouge or any other person in connection with the accident set forth herein, because the vehicle which he was driving, the 1994 Mazda Pickup truck owned by . . . Dickens, had been furnished for his regular use since November 24, 1995 up until the date of the accident on February 1, 1996.

In an answer and counterclaim filed 5 May 1999, Defendants alleged that prior to the 1 February 1996 accident, Gouge had been

1. We note Plaintiff does not dispute Gouge was a "family member" within the meaning of the Nationwide policies at the time of the 1 February 1996 accident.

"permitted to make certain limited use of [Dickens' vehicle] under the supervision and control, and usually in the presence, of . . . Dickens." Defendants alleged: "Plaintiff wrongfully and without basis has contended that [Dickens' vehicle] was furnished by . . . Dickens for the regular use of . . . Gouge." Defendants, therefore, requested a declaratory judgment that the Nationwide policies issued by Plaintiff "do provide liability coverage in connection with the motor vehicle collision of February 1, 1996."

On 20 August 1999, Gouge gave deposition testimony regarding his use of Dickens' vehicle at the time of the accident. Gouge testified that he began using Dickens' vehicle sometime around Thanksgiving of 1995, because Gouge's vehicle had "burned" and he had returned a second vehicle that he had been leasing to the lessor. When asked how often he drove Dickens' vehicle after Thanksgiving of 1995, Gouge responded: "I drove it pretty much on a daily basis. I drove it driving [Dickens] back and forth to work, drove her kids to school, and then I pretty much drove it on a day to day basis, to the best that I can remember, every day." After Thanksgiving of 1995, Gouge kept the vehicle at his house. Dickens told Gouge he could "drive the [vehicle] pretty much as [he] needed to but that she had to have a way back and forth to work because that was her only vehicle." Gouge, therefore, "had to make sure that [he] was available to [Dickens] at all times when she needed the [vehicle]." Additionally, Gouge was not permitted to take the vehicle "four[-]wheeling" and Dickens would not have "permitted [him] to take another girl out in that [vehicle]." The vehicle, however, "was available to [him] for [his] use for anything that [he] needed to do other than four-wheeling, unless [Dickens] needed the vehicle." Gouge could not recall any occasions from Thanksgiving of 1995 until the day of the accident when Dickens needed to take possession of the vehicle; however, Dickens was with Gouge "at least 50 percent of the time" when he was driving the vehicle. Gouge also did not recall driving any vehicles other than Dickens' vehicle from Thanksgiving of 1995 until the date of the accident. Gouge testified he did not have to ask for Dickens' permission to use the vehicle, and it was his responsibility to put gasoline in the vehicle. Gouge stated he did not intend to use the vehicle for as long a period of time as he did.

On 27 September 1999, Plaintiff filed a motion for summary judgment on the ground "there are no genuine issues of material fact and . . . [P]laintiff is entitled to Declaratory Judgment in its favor as a matter of law."

In an affidavit filed 21 December 1999, Dickens made the following statements:

> 6. For the purpose of taking me to work, transporting the children, and being with me on weekends, I permitted . . . Gouge to use my . . . [vehicle] beginning sometime in the late fall of 1995. . . .
>
> 7. . . . Gouge did not have unrestricted use of my . . . [vehicle], and his use of it was primarily for the benefit of my son and me.
>
> 8. I did place certain restrictions on . . . Gouge's use of the [vehicle]. For example, he was forbidden to take it four[-]wheeling, something that . . . Gouge very much enjoyed doing and certainly would have done with the [vehicle] if I had not forbidden it. . . .
>
> 9. . . . [Gouge] had a clear understanding that he could not use my [vehicle] for the purpose of going out with another woman. . . .
>
> 10. Also it was the understanding by . . . Gouge and me that he could use my [vehicle] only in a limited geographical area. By no means was he free to take road trips or travel outside of Catawba and Burke Counties with this vehicle unless I accompanied him. . . .
>
> . . . .
>
> 12. The [vehicle] clearly was not for . . . Gouge's personal use. He was not allowed to do whatever he pleased to do with it; and he and I both clearly understood that I could decide at any time that he would have no further access to this vehicle. I clearly had control of the vehicle the entire time.
>
> 13. . . . Gouge was required by me to check with me to see if I had any transportation needs, before he was allowed to use the vehicle for any purpose unrelated to the needs of my son and me. . . . Gouge's uses of the vehicle, when it was not for the purpose of benefitting my son and me, were occasional and infrequent.
>
> . . . .
>
> 15. . . . Gouge and I had a strict understanding that his use of my [vehicle] was temporary and only for a brief and limited period of time. . . . It was initially my intention and belief that . . .

> Gouge's use of my [vehicle] would only last for a few days, although, in fact, the period during which he used the vehicle stretched out longer than either of us had intended.
>
> . . . .
>
> 17. . . . Gouge's use of the vehicle was not intended to be as a substitute vehicle for him, and the vehicle was not furnished for his regular use.

In an order filed 10 January 2000, the trial court granted summary judgment in favor of Plaintiff on the ground "there are no genuine issues of material fact, and Plaintiff is entitled to Declaratory Judgment in its favor as a matter of law." The trial court, therefore, ordered "that Plaintiff's policies of automobile liability insurance as referenced in the Complaint provide no liability coverage in connection with the accident of February 1, 1996."

The dispositive issue is whether the pleadings, affidavits, and deposition testimony raise a genuine issue of material fact regarding whether Dickens' vehicle was furnished for Gouge's "regular use" within the meaning of the Nationwide policies.

Automobile liability policies that provide coverage for non-owned autos are intended " 'to provide coverage to a driver without additional premiums, for the occasional or infrequent driving of an automobile other than his own.' " *Whaley v. Great American Ins. Co.*, 259 N.C. 545, 552, 131 S.E.2d 491, 496 (1963) (citations omitted). Policies that include coverage for non-owned autos, therefore, often exclude from coverage vehicles " 'furnished for the regular use of the insured.' " *Id.* (citations omitted). When a liability policy does not define the term "regular use," no "absolute definition" can be established and a determination of coverage under the policy must be based on the facts and circumstances of the case. *Id.* at 552, 131 S.E.2d at 496-97. The determination of whether a vehicle has been furnished for "regular use" must be based on the "*availability*" of the vehicle for use by the non-owner and "the *frequency of its use*" by the non-owner.[2] *Id.* at 554, 131 S.E.2d at 498; *Nationwide Mut. Ins. Co. v.*

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2. Defendants argue in their brief to this Court that if the use and possession of a vehicle by a non-owner is "restricted," then the vehicle has not been furnished for the "regular use" of the non-owner. Although we agree with Defendants that restrictions placed on the use of a vehicle may lead to a conclusion in a particular case that the vehicle has not been furnished for the regular use of the non-owner, the restrictions placed on the use of the vehicle are relevant because they relate to the "availability" and "frequency of use" of the vehicle by the non-owner. *See, e.g., State Farm Mut.*

Bullock, 21 N.C. App. 208, 210, 203 S.E.2d 650, 652 (1974). The fact that the use of a vehicle by the non-owner requires the permission of the owner or is for the "principal purpose" of assisting the owner "affects neither the availability nor frequency of the use of th[e] . . . vehicle" by the non-owner. *Bullock*, 21 N.C. App. at 210-11, 203 S.E.2d at 652.

Where the language of an insurance policy is clear and unambiguous, "the court's only duty is to determine the legal effect of the language used and to enforce the agreement as written." *Cone Mills Corp. v. Allstate Ins. Co.*, 114 N.C. App. 684, 687, 443 S.E.2d 357, 359 (1994), *disc. review improvidently allowed*, 340 N.C. 353, 457 S.E.2d 300 (1995). Additionally, when the facts are undisputed, construction and application of the policy provisions to the undisputed facts is a question of law. *Id.* at 686, 443 S.E.2d at 359.

In this case, the undisputed facts show: Gouge began using Dickens' vehicle "on a daily basis" sometime around Thanksgiving of 1995; Gouge kept the vehicle at his house, and he could not recall driving any vehicles other than Dickens' vehicle from Thanksgiving of 1995 until the time of the accident; Gouge used the vehicle to drive Dickens to work and to drive Dickens' children to school; Gouge was required to make the vehicle available to Dickens "at all times when she needed the [vehicle]," but Gouge could not recall any times when Dickens needed to take possession of the vehicle for her use; Gouge was responsible for putting gasoline in the vehicle; and Gouge was restricted from using the vehicle for four-wheeling, taking women other than Dickens on dates, and taking the vehicle "outside of Catawba and Burke Counties . . . unless [Dickens] accompanied him." These undisputed facts show the vehicle was available to Gouge and used by Gouge on a daily basis for a period of approximately 8 weeks. Although Defendants presented evidence in Dickens' affidavit that Gouge used the vehicle only with the permission of Dickens and primarily for the benefit of Dickens, these allegations do not affect the availability of the vehicle to Gouge and his frequent use of the vehicle. *See Bullock*, 21 N.C. App at 210-11, 203 S.E.2d at 652. The undisputed facts, therefore, show Gouge had "regular use" of the vehicle

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Auto. Ins. Co. v. Branch, 114 N.C. App. 234, 239, 441 S.E.2d 586, 589 (vehicle placed in "exclusive possession" of non-owner held furnished for the "regular use" of non-owner based on the *frequency* and *availability* of the use of the vehicle by the non-owner), *disc. review denied*, 336 N.C. 610, 447 S.E.2d 412 (1994). Accordingly, whether restrictions have been placed on the non-owner's use of the vehicle is not determinative of whether the vehicle has been furnished for the "regular use" of the non-owner.

within the meaning of the Nationwide policies at the time the 1 February 1996 accident occurred; thus, Gouge's use of the vehicle falls within the coverage exclusions of Part B(B) of the Nationwide policies. *See id.* at 209-10, 203 S.E.2d at 651-52 (defendant made "regular use" of vehicle where: defendant used the vehicle to transport its owner to medical appointments and to run errands for owner; defendant used the vehicle to drive herself to and from work; defendant usually received permission from the owner to use the vehicle for trips made for defendant's personal benefit; defendant kept the vehicle at her residence; and defendant paid for gasoline and oil for the vehicle). Accordingly, the trial court properly granted summary judgment in favor of Plaintiff. *See* N.C.G.S. § 1A-1, Rule 56(e) (1999).

Affirmed.

Judges HORTON and TYSON concur.

WILLIAM DONALD BRITT, PLAINTIFF v. GEORGE DOUGLAS HAYES, DEFENDANT

No. COA99-792-2

(Filed 6 February 2001)

Negligence; Assault— intent to injure plaintiff—summary judgment improper

The trial court erred by granting summary judgment in favor of defendant on plaintiff's claim for negligence where defendant admitted he intentionally backed his vehicle into plaintiff's truck, and the one-year statute of limitations for assault and battery under N.C.G.S. § 1-54 had already run, because: (1) a defendant's conduct precludes an action for negligence only when defendant intended to injure the plaintiff; and (2) plaintiff's interrogatories in this case at least present a question as to that intent.

Judge TIMMONS-GOODSON concurring.

Appeal by plaintiff from orders entered 7 April and 3 May 1999 by Judge William C. Gore, Jr. in Bladen County Superior Court. Originally heard in the Court of Appeals 27 March 2000. An opinion was filed by this Court 3 October 2000. Plaintiff's Petition for Rehearing, filed 6 November 2000, was granted 6 December 2000 and

heard without additional briefs or oral argument. This opinion supersedes the 3 October 2000 opinion.

Hester, Grady, Hester, Greene & Payne, by H. Clifton Hester, for plaintiff-appellant.

Anderson, Daniel & Coxe, by Bradley A. Coxe, for defendant-appellee.

EAGLES, Chief Judge.

This case presents the question of whether the plaintiff has an action for negligence.

The underlying case arose out of a confrontation on U.S. Highway 701 in Tabor City, North Carolina. Plaintiff alleges that he was traveling north on 701 when defendant "suddenly and without warning began backing up in the north bound lane colliding forcibly with the vehicle which the Plaintiff was driving and causing the injuries of which Plaintiff complains." Plaintiff contends that by backing up, defendant acted negligently and caused damage to his person and property. Defendant filed an answer asserting the statute of limitations. According to the defendant, plaintiff's complaint states a cause of action for assault and battery and not for negligence. Since the one year statute of limitations for assault and battery had expired, defendant argues that plaintiff's action is time barred. *See* G.S. § 1-54 (1999).

In an order dated 7 April 1999, the trial court granted the defendant's motion for summary judgment. In its order, the court stated:

> 1. That Plaintiff's action is based upon an alleged assault and battery by Defendant, to wit, the intentional backing of his tractor trailer into the Plaintiff.
>
> 2. That Plaintiff has failed to file his action within the applicable one year statute of limitation for assault and/or battery.
>
> . . . .
>
> IT IS, THEREFORE, ORDERED that Defendant's Motion for Summary Judgment is granted and Plaintiff's action is DISMISSED WITH PREJUDICE.

Plaintiff appeals this order and an order denying plaintiff a new trial.

In his assignment of error, plaintiff contends that there is a genuine issue of material fact whether defendant intended to injure the plaintiff when he backed his vehicle into plaintiff's truck. We agree and reverse the trial court.

This case comes before us on a motion for summary judgment. A trial court may properly grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. § 1A-1 N.C.R. Civ. P. 56(c) (1999). In reviewing the disposition of a motion for summary judgment, we must view all evidence in the light most favorable to the nonmoving party. *Lynn v. Burnette*, 138 N.C. App. 435, 531 S.E.2d 275 (2000). The movant has the burden to show that there is no genuine issue of material fact. *Vernon v. Barrow*, 95 N.C. App. 642, 383 S.E.2d 441 (1989).

The intent necessary to show battery is the "intent to act, i.e., the intent to cause harmful or offensive contact . . . ." *Russ v. Great American Ins. Companies*, 121 N.C. App. 185, 188, 464 S.E.2d 723, 725 (1995), *disc. review denied*, 342 N.C. 896, 467 S.E.2d 905 (1996) (citation omitted.) The hostile intent of the defendant is not an issue in determining his liability for battery. *Lynn*, 138 N.C. App. at 439, 531 S.E.2d at 279. The intent to show an assault is the intent to cause apprehension of an imminent offensive or harmful contact without actually striking him. *Ormond v. Crampton*, 16 N.C. App. 88, 94, 191 S.E.2d 405, 409, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972). "Negligence is the breach of a legal duty proximately causing injury." *Lynn*, 138 N.C. App. at 439, 531 S.E.2d at 278. Despite these seemingly exclusive definitions, "there 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) (citing *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)); *Key v. Burchette*, 134 N.C. App. 369, 517 S.E.2d 667, *disc. review denied*, 351 N.C. 106, — S.E.2d — (1999).

To preclude a cause of action for negligence, the defendant must have acted with an intent to injure the plaintiff and not merely an intent to cause offensive contact. *See Jenkins v. Department of Motor Vehicles*, 244 N.C. 560, 563, 94 S.E.2d 577, 580 (1956). Our Supreme Court has stated:

> Negligence . . . does not include intentional acts of violence. For example, an automobile driver operates his car in violation of the speed law and in so doing inflicts injury as a proximate result, his liability is based on his negligent conduct. On the other hand, if the driver intentionally runs over a person it makes no difference whether the speed is excessive or not, the driver is guilty of an assault and if death results of manslaughter or murder. **If injury was intended it makes no difference whether the weapon used was an automobile or a pistol. Such willful conduct is beyond and outside the realm of negligence.**

Id. at 563, 94 S.E.2d at 580 (emphasis added). Likewise, our Courts have included similar statements of law in other cases. *See Pleasant v. Johnson*, 312 N.C. 710, 714, 325 S.E.2d 244, 248 (1985) ("[o]nly when the **injury is intentional** does the concept of negligence cease to play a part.") (emphasis added); *Siders v. Gibbs*, 39 N.C. App. 183, 187, 249 S.E.2d 858, 860 (1978) ("[t]his willful and deliberate purpose not to discharge a duty differs crucially . . . from the willful and deliberate purpose to inflict injury—the latter amounting to an intentional tort."); *Key*, 134 N.C. App. at 371, 517 S.E.2d at 669 (concluding that a determination that the act rather than the injury was "expected or intended" did not preclude a claim for negligence). Based on this precedent we now restate the principle that defendant's conduct precludes an action for negligence only when defendant intended to injure the plaintiff. *Id.* We now apply this principle here. The issue before us is whether as a matter of law the evidence shows that the defendant intended to injure the plaintiff.

Viewed in the light most favorable to the plaintiff, the evidence tends to show that the plaintiff first encountered the defendant in the northbound lane of Highway 701 near Loris, South Carolina. Plaintiff was driving a 1988 Ford pickup truck while defendant was driving a tractor trailer log truck. Plaintiff testified that defendant ran him into a ditch after attempting to pass him. Plaintiff returned to the highway and attempted to follow the defendant to obtain his license plate number. According to plaintiff, the defendant's plate was not on the rear of his vehicle. Therefore, plaintiff attempted to pass the defendant to view the plate in the front. When plaintiff attempted this maneuver, defendant ran him off the road again. Plaintiff continued to follow the defendant into Tabor City, North Carolina. At the junction of Highways 701 and 410, defendant reduced his speed, put the tractor trailer in reverse and backed into the plaintiff's truck.

Plaintiff acknowledged that he thought that the defendant had backed into him on purpose. However, the issue is not whether the defendant intentionally made contact with the plaintiff, but whether the defendant intended to injure the plaintiff. In his interrogatories, defendant responded that "I intentionally backed my tractor-trailer into his pickup to keep him from following me to my home." Defendant also answered that he "was not going very fast at all and only moved 3-5 feet before impact. Therefore, his truck did not move much if at all." Finally, defendant admitted that "[a]t the time of impact, my vehicle was in reverse and going approximately 1 m.p.h." While there is certainly some evidence to suggest that defendant intended to injure the plaintiff, we hold that his interrogatories at least present a question as to that intent. Therefore, we reverse and remand this case for trial.

We note that on remand to the trial court, the finder of fact should determine whether the defendant intended to injure the plaintiff. If the defendant intended to injure the plaintiff, then the plaintiff's claim lies solely in assault and battery and is barred by the one year statute of limitations. G.S. § 1-54.

For these reasons we reverse the judgment of the trial court.

Reversed and remanded.

Judge HUNTER concurs.

Judge TIMMONS-GOODSON concurs in the result with separate opinion.

TIMMONS-GOODSON, Judge, concurring in the result.

I agree with the majority's position that a negligence action will lie if the defendant did not intend to injure the plaintiff. However, although not explicitly stated, the majority implicitly holds that the defendant must specifically intend to cause *bodily* injury to the plaintiff before his actions will fall exclusively within the realm of intentional torts. I write separately to note that our courts have not previously distinguished between injury to the plaintiff's person and injury to the plaintiff's property in determining whether the defendant possessed the requisite intent. To the contrary, when discussing the origins of intentional torts, our Supreme Court has stated the following:

> At common law, actions for trespass and trespass on the case provided remedies for different types of injuries: *The former "for forcible, direct injuries, whether to persons or property,"* and the latter "for wrongful conduct resulting in injuries which were not forcible and not direct." *In the former, the injury was intended.* In the latter, injury was not intended but resulted from the careless or unlawful act. Negligence, in all its various shades of meaning, is an outgrowth of the action of trespass on the case and does not include intentional acts of violence. For example, an automobile driver operates his car in violation of the speed law and in so doing inflicts injury as a proximate result, his liability is based on his negligent conduct. On the other hand, if the driver intentionally runs over a person it makes no difference whether the speed is excessive or not, the driver is guilty of an assault and if death results, of manslaughter or murder. *If injury was intended it makes no difference whether the weapon used was an automobile or a pistol. Such willful conduct is beyond and outside the realm of negligence.*

Jenkins v. Department of Motor Vehicles, 244 N.C. 560, 563, 94 S.E.2d 577, 580 (1956) (emphasis added) (citation omitted).

In my opinion, there is no genuine issue of fact as to whether defendant, by backing his semi-truck/trailer into plaintiff's pickup truck, intended to cause injury, of some degree, to plaintiff's property. If the dispositive issue is whether defendant expressly intended to injure plaintiff's person, I agree that there is a factual dispute for the jury to resolve. If, on the other hand, intentional injury to plaintiff's property is sufficient to place the action outside the scope of negligence, plaintiff's action is barred by the one-year statute of limitations, *see* N.C. Gen. Stat. § 1-54(3) (1999), and summary judgment for defendant was appropriate.

Recently, however, this Court held that the plaintiff could maintain an action for negligence under facts analogous to those presented here. *See Lynn v. Burnette*, 138 N.C. App. 435, 531 S.E.2d 275 (2000). In *Lynn*, the plaintiff was injured when the defendant, who admittedly intended to shoot the tire of the plaintiff's vehicle, fired the gun before properly aiming and caused the bullet to strike the plaintiff in the neck. Id. at 443, 531 S.E.2d at 281. Because I am bound by that holding, *see In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (panel of Court of Appeals is bound by prior decisions of

another panel addressing the same issue), I concur in the result reached here.

PATTY T. COPPLEY, EMPLOYEE, PLAINTIFF v. PPG INDUSTRIES, INC., SELF INSURED, EMPLOYER, DEFENDANT

No. COA00-11

(Filed 6 February 2001)

Workers' Compensation— opinion—two-to-one vote—filed after retirement of concurring Commission member—invalid

An Industrial Commission workers' compensation award was remanded where the vote was two-to-one, one of the majority members signed the opinion on 22 June and left the Commission on 21 September, and the opinion was not filed until 19 October. The Commission acts by a majority of the votes of its qualified members at the time a decision is made, with two members constituting a majority, and no majority existed here at the time of the filing. By analogy, Rule 58 of the Rules of Civil Procedure provides that a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.

Judge GREENE dissenting.

Appeal by defendant from opinion and award entered 19 October 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 January 2001.

O'Briant, Bunch & Robins, by Julie H. Stubblefield, for plaintiff-appellee.

Womble, Carlyle, Sandridge & Rice, PLLC, by Clayton M. Custer and Philip J. Mohr, for defendant-appellant.

TYSON, Judge.

Plaintiff filed worker's compensation claims on 24 February 1995 and 9 March 1995, alleging that on 6 January 1995 she sustained a hip injury while moving an object from a conveyor belt to a hand truck at defendant's plant.

A hearing was held on 26 February 1996. Deputy Commissioner George T. Glenn, Jr. awarded temporary total disability benefits to plaintiff on 23 July 1997. On 16 July 1998, the Full Commission affirmed by a vote of two-to-one, with Commissioner Renee C. Riggsbee dissenting. On 15 July 1999, this Court reversed the decision of the Full Commission and remanded the case for further proceedings. On 19 October 1999, the Full Commission made additional findings and voted two-to-one to affirm its award of worker's compensation benefits to plaintiff. Commissioner Thomas J. Bolch authored the opinion, with Chairman J. Howard Bunn concurring. Commissioner Riggsbee again dissented.

Chairman Bunn signed the opinion and award on 22 June 1999. Chairman Bunn left the Commission on 21 September 1999. The opinion was filed on 19 October 1999.

The Commission awarded plaintiff temporary total disability benefits at the rate of $264.09 per week for the period of 31 January 1995 "through the date of this Opinion and Award and continuing until such time as plaintiff has returned to work earning the same or greater wages than she was earning at the time of her injury or further orders of the Industrial Commission." Defendant appeals. We vacate the order and again remand to the Commission.

The issue presented by this appeal is whether the Commission's decision should be vacated because it was filed after the retirement of one of the commissioners, resulting in less than a majority of the Commission concurring in the opinion.

Defendant argues that the 19 October 1999 opinion and award is void because it was filed after Chairman J. Howard Bunn, Jr. left the Commission. The Commission's vote was two-to-one, with Chairman Bunn in the majority. Defendant contends the opinion and award is void because no majority opinion existed when it was filed. We agree.

Chairman Bunn signed the opinion and award on 22 June 1999. Chairman Bunn left the Commission on 21 September 1999. The opinion was not filed until 19 October 1999.

"The Commission acts by a majority of the votes of its qualified members at the time a decision is made . . . a vote of two members constitutes a majority." *Estes v. N.C. State University*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994) (citing *Gant v. Crouch*, 243 N.C. 604, 607, 91 S.E.2d 705, 707 (1956)).

In *Estes*, the Commission panel consisted of three commissioners at the time of the original hearing. *Estes*, supra. Chairman Booker authored the opinion and Commissioner Davis concurred. Commissioner Ward dissented. *Id.* However, when the opinion and award was signed and filed, Commissioner Davis was no longer a qualified commissioner because his term had expired. *Poe v. Raleigh/Durham Airport Authority*, 121 N.C. App. 117, 126, 464 S.E.2d 689, 694 (1995) (citing *Estes*, supra). The decision was held to be void as a mater of law. *Id.* "Where a commissioner's vote was taken before the expiration of his term of office, but the decision was not issued until after the term expired, the decision of the Commission is void as a matter of law." Leonard T. Jernigan, Jr., *North Carolina Workers' Compensation Law and Practice* § 25-9 (3d ed. 1999).

Plaintiff contends that this case differs from *Estes* because Chairman Bunn, unlike Commissioner Davis, reviewed and signed the opinion and award before his retirement. This argument ignores the fact that Commissioner Davis attached an affidavit to the opinion and award stating he participated in the review of the case and that his decision had been made prior to the expiration of his term. *Estes* at 128, 449 S.E.2d at 764. This Court held that to give binding effect to Commissioner Davis' vote "would be to render meaningless the opinion and award signed and filed by the commissioners." *Id.* "Because the vote was two-to-one, and Davis was in the majority . . . the opinion and award was not rendered by a majority of the commission" and thus void as a matter of law. *Id.* at 127-28, 449 S.E.2d at 764.

In *Pearson v. C.P. Buckner Steel Erection*, 139 N.C. App. 394, 533 S.E.2d 532 (2000), only two commissioners signed the opinion and award. It was noted that the third commissioner had participated in the review of the case, but was unavailable at the time of filing because of illness. *Id.* Appellant in *Pearson* argued that the commission lacked jurisdiction because "two commissioners cannot constitute a panel." *Id.* This Court upheld the opinion and award because the case had been reviewed by three commissioners and rendered by a majority of the members of that panel. *Id.* The opinion and award was rendered and filed by a majority of the commission regardless of the decision of the third commissioner. In contrast, Chairman Bunn and Commissioner Davis were part of two-to-one majorities. Without their respective concurrences, the vote is one-to-one, short of the required majority.

Because Chairman Bunn left office prior to the opinion being filed, no majority existed at the time of filing. Therefore, in accord-

ance with our holding in *Estes*, the 19 October 1999 opinion and award is void as a matter of law. (By analogy, Rule 58 of the North Carolina Rules of Civil Procedure provides that "a judgment is entered when it is reduced to writing, signed by the judge, and *filed* with the clerk of court." N.C.G.S. § 1A-1, Rule 58, (1999) (emphasis added)).

For the reasons stated, the 19 October 1999 opinion and award is vacated. The case is remanded to the Commission. Upon remand the Commission shall make specific findings based on the evidence in the record, proper conclusions therefrom and enter an appropriate order in accordance with this Court's prior holding in *Coppley v. PPG Industries, Inc.*, 133 N.C. App. 631, 516 S.E.2d 184 (1999). In *Coppley I*, Chief Judge Eagles wrote, "to ensure effective appellate review, the Commission's findings must sufficiently reflect that plaintiff produced specific evidence to prove all three *Hilliard* factors." *Id.* at 635, 516 S.E.2d at 187. Findings not supported by competent evidence in the record are insufficient to support an award for benefits. *Id.* On remand the "Commission must make specific findings of fact as to each material fact upon which the rights of the parties . . . depend." *Id.*

Vacated and Remanded.

Judge HORTON concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

I read the majority as holding that an opinion and award (opinion) of the full Commission is valid if two of the commissioners, who are authorized to act (i.e. have not retired), indicate their written concurrence to the opinion at the time of its filing. This is so, according to my reading of the majority's opinion, even if the third commissioner is no longer authorized to act as a commissioner at the time of the filing. I disagree with this holding and I, therefore, dissent.

In my opinion, there must be three commissioners authorized to act at the time the opinion is signed and at the time the opinion

is filed.[1] This is so because the opinion is merely tentative until it is signed and filed and, in order for the opinion to reflect the *final* judgment of the full Commission, all three commissioners must be authorized to act not only at the time of its signing but also at the time of its filing. In other words, the opinion is not finalized until it is *entered* and it is not entered until it is in writing, signed by the three commissioners, and filed with the Industrial Commission.[2]

In this case, although all three commissioners signed the opinion and did so at a time when they were all authorized to act, one of the commissioners was not authorized to act when the opinion was filed, as he had retired. Thus, the opinion is void and I would remand the matter to the Commission for rehearing before a duly constituted Commission.[3]

I do not believe *Estes* or *Pearson v. C.P. Buckner Steel Erection*, 139 N.C. App. 394, 533 S.E.2d 532 (2000), requires a different result, as neither of these cases squarely address the issue presented in the case *sub judice*. In *Estes*, the opinion of the full Commission was vacated on the ground the term of one of the three commissioners had expired at the time he *signed* the opinion. *Estes*, 117 N.C. App. at 128, 449 S.E.2d at 764. Thus, this Court did not address in *Estes* the

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1. An opinion of the Commission is valid if concurred in by two of the three commissioners. *Estes v. N.C. State University*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994).

2. Although the Rules of Civil Procedure "are not strictly applicable to proceedings under the Worker's Compensation Act," *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985), a Rule of Civil Procedure may be applied when there is no counterpart to that Rule under the Rules of the Industrial Commission, *see* N.C.G.S. § 1A-1, Rule 1 (1999). In my opinion, it is appropriate to apply Rule 58 of the North Carolina Rules of Civil Procedure in this context. Pursuant to Rule 58, a judgment or order is not enforceable, or final, until it is entered. *See West v. Marko*, 130 N.C. App. 751, 755, 504 S.E.2d 571, 573 (1998). Rule 58 provides that "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C.G.S. § 1A-1, Rule 58 (1999).

Additionally, I acknowledge this Court often files opinions indicating a concurrence by a judge who was no longer serving on this Court at the time the opinion was filed. Such opinions indicate the judge concurred in the opinion while he or she was still serving on this Court. As this Court is not bound by the Rules of Civil Procedure, my holding in the case *sub judice* would not affect this Court's filing of opinions in the manner described above.

3. The problem created by the retirement of a commissioner can easily be resolved by the Industrial Commission. In the event a commissioner is, for any reason, unable to participate in the review of the award, section 97-85 gives authority to the chairman of the Industrial Commission to "designate a deputy commissioner to take the place of a commissioner on the review of any case." N.C.G.S. § 97-85 (1999).

issue of whether an opinion of the full Commission must be vacated when the opinion is properly *signed* by all three commissioners but is not *filed* until after one of the signing commissioners is no longer serving as a commissioner. Likewise, in *Pearson*, the intervenor argued the opinion of the full Commission was invalid because the panel of commissioners who reviewed the case consisted of only two commissioners. *Pearson*, 139 N.C. App. at 400, 533 S.E.2d at 535. Because "the opinion clearly state[d] that there was a third Commissioner on the panel," the *Pearson* court rejected the intervenor's argument. The intervenor did not argue the opinion was invalid because it was signed by only two commissioners at the time it was filed; thus, the issue in the case *sub judice* was not addressed in *Pearson*.

STATE OF NORTH CAROLINA v. MICHAEL CHRISTOPHER WHITE

No. COA99-1557

(Filed 6 February 2001)

1. Robbery— common law—larceny from person—instruction on lesser included offense not required

The trial court did not err in a common law robbery case by denying defendant's request for a jury instruction on the lesser included offense of larceny from the person even though defendant contends the State failed to show defendant assaulted his victims, because: (1) the use of force in common law robbery need not be actual, but may be constructive; (2) a reasonable person working as a convenience store clerk alone and in the middle of the night would be afraid of the potential for immediate bodily harm after receiving a note threatening to blow his or her head off; (3) all three victims testified they were not sure whether defendant had access to a weapon; and (4) fear and compliance with the threat were the natural and actual consequences of the victims' receiving the note.

2. Robbery— common law—requested instruction on assault and show of violence rule not required

The trial court did not commit reversible error in a common law robbery case by failing to submit defendant's requested instructions on "assault" and the "show of violence" rule, be-

cause: (1) the assault pattern instruction is more descriptive than the pattern instructions on common law robbery in regard to the necessity that the victim have a reasonable fear of immediate bodily harm; (2) the extra description is what defendant was seeking through his second requested jury instruction; and (3) although language from or similar to the assault pattern instruction could have been proper in a common law robbery case, any error in omitting it was harmless in light of the fact that reasonable jurors could not have differed on the issue of whether the victims had a reasonable apprehension of immediate bodily harm.

Appeal by defendant from judgment entered 15 July 1999 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 8 January 2001.

Attorney General Michael F. Easley, by Assistant Attorney General John P. Scherer II, for the State.

J. Scott Coalter, Assistant Public Defender, for defendant-appellant.

HUDSON, Judge.

Defendant appeals his conviction on three counts of common law robbery. He contends the trial court committed error by denying his request for an instruction to the jury on the lesser included offense of larceny from the person. He also protests the trial judge's refusal to give an instruction stating that "assault on the person" is an element of common law robbery and an instruction defining the "show of violence" rule. We find no error by the trial court.

Evidence at trial tended to show the following: at approximately 2:00 a.m. on 18 January 1999, defendant entered The Pantry convenience store in Greensboro. He browsed the store and eventually approached the check-out counter where store clerk Natt Nwosa stood. Defendant asked Nwosa for a piece of paper and pen so that he could make a list of items to buy, and Nwosa complied with his request. Defendant then passed a note to Nwosa ordering him to surrender the money or get his head blown off. Nwosa testified that when he read the note, he "know [sic] the game was up and anything can go from that moment." When defendant asked him if he would comply, he said, "Okay, no objection." Nwosa opened the cash register, and defendant took the money from it and ordered

Nwosa to lie on the floor. After defendant left, Nwosa called the police. Officer M.A. Wright testified that when he arrived at The Pantry, he found Nwosa to be "very frightened," "shaking," and "talking very fast."

On cross examination, Nwosa testified that during their exchange defendant had one hand on a cell phone, but that he could not tell what defendant was doing with his other hand. Even though defendant never pulled out a gun, Nwosa said he did not know the extent to which defendant was armed, and that "getting [his] head blown off was what [he] was concerned about." Furthermore, even though defendant did not strike him, "[t]here was a threat to do that, so, it could happen any minute from that moment."

Between 3:00 and 3:30 a.m. on 18 January 1999, defendant entered an Exxon station in Greensboro and laid a white envelope on the counter bearing the written message, "Give me the money or I'll blow your head off." Clerk Janet Sherrod testified that she "just read [the note] and [she] just knew he was serious." She opened her register and gave him its contents. He then asked her to open a second register. She told him she needed to get the key to open it, and testified that she "didn't want to make any sudden moves." After she opened the second register, and defendant took the money out of it, he asked her to "Come here," and he kissed her on the jaw. He started to leave the store and again told her, "Come here." He kept saying, "Now," because Sherrod was very scared and did not want to follow him. When they left the store, he told her to get in her car. She did not have the keys, so he told her to go stand by her car. Sherrod testified that she slowly went to her car and stood with her hands up until he drove away. The officer who came to investigate the crime testified at trial that Sherrod was "very nervous and scared" when he arrived at the scene. She told him she did not know whether defendant had a gun.

Later that night, at 3:45 a.m., defendant entered a B.P. Oil station in Greensboro and slid a note across the counter to clerk Robert Darst saying, "Give me all your money or I'll blow your head off." Darst, sixty-three years old, testified that when he saw the note, he "[s]hook a little bit inside." Although he did not see a weapon, he said he "took the threat seriously." He could not tell if defendant had a weapon hidden in his clothing and did not know if there might be someone in defendant's car who had a weapon. It took Darst a little time to open the register due to his nervousness, but he was able to take out the register tray and hand it to defendant. Defendant then

told him to go into the back room, which Darst did, and defendant left the store.

At the 14 July 1999 trial of this case, the court submitted to the jury the pattern instructions for common law robbery. The jury thereafter convicted defendant of three counts of common law robbery. Defendant filed notice of appeal to this Court.

[1] Defendant's first argument on appeal is that the trial court erred in denying his request for a jury instruction on the lesser included offense of larceny from the person. Common law robbery is defined as the non-consensual taking of money or personal property from another by means of violence or fear. *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). Larceny from the person is a lesser included offense of common law robbery. *State v. Young*, 305 N.C. 391, 393, 289 S.E.2d 374, 376 (1982). The only difference between the two crimes is that common law robbery has the additional requirement that the victim be put in fear by the perpetrator. *State v. Buckom*, 328 N.C. 313, 317, 401 S.E.2d 362, 365 (1991).

Defendant contends that the crime of common law robbery includes the element of assault, and the State did not show defendant assaulted his victims. Thus, he is guilty, if anything, of larceny from the person.

Our appellate courts have stated several times that the crime of common law robbery includes an assault on the person. *See, e.g.*, *State v. Hicks*, 241 N.C. 156, 159, 84 S.E.2d 545, 547 (1954); *State v. Griffin*, 57 N.C. App. 684, 686, 292 S.E.2d 156, 158, *cert. denied*, 306 N.C. 560, 295 S.E.2d 477 (1982); *State v. Thompson*, 49 N.C. App. 690, 692, 272 S.E.2d 160, 161 (1980). Assault is an intentional offer or attempt by force or violence to do injury to the person of another which causes a reasonable apprehension of immediate bodily harm. *State v. Thompson*, 27 N.C. App. 576, 577, 219 S.E.2d 566, 567-68 (1975), *disc. review denied*, 289 N.C. 141, 220 S.E.2d 800 (1976). The use of force in common law robbery need not be actual, but may be constructive:

> Actual force implies physical violence. Under constructive force are included "all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking . . . No matter how slight the cause creating the fear may be or

> by what other circumstances the taking may be accomplished, if the transaction is attended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person, the victim is put in fear.

State v. Norris, 264 N.C. 470, 473, 141 S.E.2d 869, 872 (1965) (citations omitted).

Defendant contends that his handing a note to the convenience store clerks stating, "Give me the money or I'll blow your head off," failed to create a reasonable apprehension of bodily harm on their parts. Specifically, none of the victims saw a firearm in defendant's possession and none could have reasonably believed they were in actual danger. The State, on the other hand, contends there was more than sufficient evidence of constructive force to satisfy the common law robbery requirement that the taking have been accomplished by violence or "putting in fear."

We do not agree with defendant's assertions above. To the contrary, a reasonable person working as a convenience store clerk—alone, and in the middle of the night, no less—would most certainly be afraid of the potential for immediate bodily harm after receiving a note threatening to "blow [his or her] head off." All three of defendant's victims testified they were not sure whether defendant had access to a weapon. The evidence was unequivocal that fear and compliance with the threat were the natural and actual consequences of the victims' receiving the note—a note which clearly threatened to kill them.

"The trial judge must charge on a lesser included offense if: (1) the evidence is equivocal on an element of the greater offense so that the jury could reasonably find either the existence or the nonexistence of this element; and (2) absent this element only a conviction of the lesser included offense would be justified." *State v. Whitaker*, 307 N.C. 115, 118, 296 S.E.2d 273, 274 (1982). In the case before us the State presented unequivocal evidence that defendant took money from his victims without their consent by putting them in fear of being physically harmed; furthermore, no rational trier of fact could have found that the victims' fear of immediate bodily harm was unreasonable under the circumstances. Therefore, the trial judge did not err in refusing to submit an instruction on the lesser included offense of larceny from the person.

[2] In a related assignment of error, defendant contends the trial court committed reversible error by failing to submit the following two requested instructions to the jury:

> Assault on the person is an element of common law robbery. *State v. Hicks*, 241 N.C. 156, 84 S.E.2d 545 (1954); *State v. Griffin*, 57 N.C. App. 684, 292 S.E.2d 156 (1982).
>
> The "show of violence" rule requires a show of violence accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed. *State v. Roberts*, 270 N.C. 655, 155 S.E.2d 303 (1967).

While we agree that the crime of "assault" is apparently a lesser included offense of common law robbery, *see State v. Whitaker*, 307 N.C. 115, 118, 296 S.E.2d 273, 274 (1982), we believe that the first proposed instruction is an oversimplification of the law and potentially confusing. It was not error to refuse to submit this instruction.

Our state's pattern jury instructions describe the elements for assault in a slightly different way than they describe the same elements in the instructions for common law robbery. The "simple assault" pattern instructions include language to the effect that a defendant's "show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." N.C.P.I., Crim. 208.40 (1996). The pattern instructions on common law robbery, however, include as element six only "that the taking was by violence or by putting the person in fear." N.C.P.I., Crim. 217.10 (1986). Thus, the assault pattern instruction is more descriptive in regard to the necessity that the victim have a *reasonable* fear of *immediate* bodily harm. It appears that this extra description is what the defendant in this case was seeking through his second requested jury instruction.

Although language from or similar to the assault pattern instruction could have been proper in a common law robbery case, any error in omitting it was harmless in this case. As we have previously discussed, we do not believe reasonable jurors could have differed on the issue of whether the defendant's victims had a reasonable apprehension of immediate bodily harm. Clearly, each feared for his or her life, and the circumstances warranted that fear.

In conclusion, the trial judge did not err in his refusal to submit an instruction on the lesser included offense of larceny from

the person. In his refusal to submit an instruction on "assault" or the "show of violence" rule, any error was not prejudicial.

No prejudicial error.

Chief Judge EAGLES and Judge SMITH concur.

STATE OF NORTH CAROLINA v. CLIFTON FRAZIER

No. COA00-122

(Filed 6 February 2001)

1. **Larceny— employee—inmate performing mandatory work assignment not an employee**

   The trial court erred by denying defendant's motion to dismiss the charge of larceny by employee and defendant's conviction of larceny by employee is vacated, because an inmate performing a mandatory work assignment cannot be convicted of larceny by employee when such an inmate is not an "employee" within the meaning of N.C.G.S. § 14-74.

2. **Sentencing— habitual felon—no underlying felony conviction—charge dismissed**

   An indictment charging defendant with being an habitual felon is dismissed and his conviction vacated because (1) defendant's conviction for larceny by employee was vacated; and (2) there is no felony conviction to which the habitual felon indictment attaches.

Appeal by defendant from judgment entered on 22 September 1999 by Judge Howard R. Greeson, Jr. in Montgomery County Superior Court. Heard in the Court of Appeals 11 January 2001.

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

Russell J. Hollers, III for the Defendant-Appellant.

THOMAS, Judge.

Clifton Frazier, defendant, was indicted for larceny by employee and found guilty in a jury trial. On appeal, defendant argues *inter*

alia, that an inmate performing a mandatory work assignment cannot be convicted of larceny by employee because such an inmate is not an "employee" within the meaning of N.C. Gen. Stat. § 14-74. We agree and, for the reasons discussed herein, reverse defendant's conviction.

The State's evidence tended to show defendant was assigned to work in the prison canteen at Southern Correctional Center in Troy, North Carolina on 30 July 1998. He received $1.00 per day from the State for his work. On 2 November 1998, the canteen supervisor, Donna McRae, while taking inventory, discovered merchandise was missing and reported it to her supervisor, Ralph Coble. Coble and another administrative officer, Jerry Lassiter, investigated and determined the amount of shortage in both money and goods to be $655.75. During an interrogation by Detective Chris Poole, defendant confessed to taking money from the canteen.

Defendant's evidence tended to show he worked at the canteen for over three months without any problems. However, at least one week before the inventory was taken, he realized merchandise was missing and proceeded to fill the merchandise boxes with clothing, paper bags and other materials. Upon discovery of the shortage by prison officials, defendant volunteered to make restitution with his own money when he believed it would amount to $140. Defendant maintained his innocence throughout his testimony and said the shortage was due to his "sloppiness."

The jury returned a verdict of guilty of larceny by an employee. Defendant then pled guilty to being an habitual felon. He was sentenced to 80-105 months to be served at the completion of the sentence he is currently serving. From this conviction, defendant appeals.

[1] By defendant's first assignment of error, he argues the trial court erred in denying defendant's motions to dismiss because there was insufficient evidence to prove every element of larceny by employee.

We agree, and note that this is a case of first impression in North Carolina.

In considering a motion to dismiss, "the question presented is whether the evidence is legally sufficient to support a verdict of guilty on the offense charged, thereby warranting submission of the charge to the jury." *State v. Walston*, 140 N.C. App. 327, 536 S.E.2d 630, 633 (2000) (citing *State v. Thomas*, 65 N.C. App. 539, 541, 309 S.E.2d 564, 566 (1983)). Larceny by employee is statutorily defined:

> If any servant or other employee, to whom any money, goods or other chattels, . . . by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods or other chattels, . . . with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by his said master; or if any servant, being in the service of his master, without the assent of the master, shall embezzle such money, goods or other chattels, . . . or otherwise convert the same to his own use, with like purpose to steal them, or to defraud his master thereof, the servant so offending shall be guilty of a felony . . . .

N.C. Gen. Stat. § 14-74 (1999). More concisely, the elements of larceny by employee are: (1) the defendant was an employee of the owner of the stolen goods; (2) the goods were entrusted to the defendant for the use of the employer; (3) the goods were taken without the permission of the employer; and (4) the defendant had the intent to steal the goods or to defraud his employer. *See State v. Canipe*, 64 N.C. App. 102, 103, 306 S.E.2d 548, 549 (1983); *State v. Brown*, 56 N.C. App. 228, 229, 287 S.E.2d 421, 423 (1982). To establish a conviction for larceny by employee, the State must prove each of the above elements beyond a reasonable doubt. The State has failed to meet its burden because defendant is not an employee.

An "employee" has been defined as a

> person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed . . . . One who works for an employer; a person working for salary or wages.

Black's Law Dictionary 525 (6th ed. 1990). Other dictionaries describe "employee" as a "person who works for another in return for compensation," American Heritage College Dictionary 451 (3d ed., 1997); and "one employed by another[.]" Webster's Third New International Dictionary (Unabridged) 743 (1966). In general, employees are subject to certain regulations, such as laws regarding the minimum wage, and are protected by acts such as the Workers' Compensation Act. Prisoners, however, are exempt from the Wage and Hour Act. *See* N.C. Gen. Stat. § 95-25.14(a)(6) (1999). They are barred from bringing a work-related claim under the Tort Claims Act and have limited remedies if they are injured while working. *See* N.C. Gen.

Stat. § 148-26(a)(4) (1999); *Richardson v. N.C. Dept. of Corrections*, 345 N.C. 128, 478 S.E.2d 501 (1996). The Workers' Compensation Act does not apply to inmates of prisons unless an accidental injury or death resulting from the prisoner's employment assignment amounts to a discharge. In such a case, the inmate would be able to recover no more than thirty dollars per week during the inmate's disability following his release from prison. The disability payments do not relate back to the date of the injury, but to the date of release. *See* N.C. Gen. Stat. § 97-13 (1999). Prisoners cannot earn more than $1.00 per day. *See* N.C. Gen. Stat. § 148-26(a)(4). Further, prisoners are not eligible to use the services of the Employment Security Commission even if on work release. *See* N.C. Gen. Stat. § 96-8(6)(k)(17) (1999).

Although defendant was assigned to work in the prison canteen and was accused of taking money and merchandise, the rationale in determining whether he was an employee must also fit the prisoner who is on work assignment on a highway and is accused of taking a shovel or the prisoner who is assigned to scrub the floor and is accused of taking a bristle brush.

The State asserts that an "employee," as the term is used in N.C. Gen. Stat. § 14-74, simply means a person in the service of another. The State argues that defendant was hired by the prison to work in the canteen, which was a revenue-generating operation. He was in the service of the prison.

However, the North Carolina Supreme Court has held that an inmate in a juvenile delinquency institution was not an employee within the meaning of the Tort Claims Act. *Alliance Co. v. State Hospital of Butner*, 241 N.C. 329, 85 S.E.2d 389 (1955). The *Alliance Co.* Court stated:

> the inmates [of a prison are] detained there for the purpose for which [the prison] was created, and are not employees of the State of North Carolina. Indeed the word "employed," in the sense it is used in G.S. 148-49.3 "Facilities and Programs for Youthful Offenders" (repealed)], means to make use of the services of the "prisoners," and not in the sense of hiring them for wages.

Id. at 333, 85 S.E.2d at 390. Moreover, the defendant was on work assignment, not work release. Work assignments at the prison are mandatory. *See* N.C. Gen. Stat. § 148-26(a). This state has continuously and traditionally held that an employment relationship

arises out of contract, whether express or implied. *See Dockery v. McMillan*, 85 N.C. App. 469, 355 S.E.2d 153, review denied, 320 N.C. 167, 358 S.E.2d 49 (1987); *Holleman v. Taylor*, 200 N.C. 618, 158 S.E. 88 (1931). There was neither an express nor an implied contract under these circumstances. Defendant did not make a wage that would have been lawful outside of prison, he could not lawfully refuse a work assignment, and he had no bargaining power or any of the other ingredients of a traditional employment relationship.

The primary policy supporting work assignments is to make the prisoner at least partly responsible for his own upkeep, with failure to perform such a work assignment possibly resulting in "disciplinary action." N.C. Gen. Stat. § 148-26(a).

[2] Therefore, we hold that defendant was not an employee of the prison or the State and, as such, could not be convicted of larceny by employee. Accordingly, the trial court erred by denying defendant's motion to dismiss the charge of larceny by employee, and defendant's conviction of larceny by employee is hereby vacated. There being no felony conviction to which the habitual felon indictment attaches, this indictment is also dismissed and the conviction vacated. Review of defendant's remaining arguments are thus unnecessary.

We render no opinion as to any charge which properly could have been brought against defendant under the facts of this case.

Vacated and remanded.

Judges MARTIN and TIMMONS-GOODSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 6 FEBRUARY 2001

BABB v. THOMPSON No. 00-4	Mecklenburg (98CVS1104)	Affirmed
BEN JOHNSON HOMES, INC. v. BERRYHILL No. 00-320	Jackson (99CVS683)	Affirmed and remanded
BEN JOHNSON HOMES, INC. v. PLAUCHE No. 00-84	Jackson (99CVS122) (98CVS644)	Affirmed and remanded
DAWKINS v. QUALITY OIL CO. No. 00-271	Richmond (99CVS951)	Affirmed
DAWKINS v. SALE No. 00-272	Richmond (90CVS293)	Affirmed
DKH CORP. v. RANKIN-PATTERSON OIL CO. No. 99-1617	Buncombe (95CVS2511)	Affirmed in part, reversed in part, and remanded
ESTATE OF PICKENS v. FORCE No. 99-1411	Guilford (99CVS6066)	Affirmed in part, reversed in part, and remanded
GEORGALIS v. EAST CAROLINA UNIV. No. 00-75	Ind. Comm. (T.A. 14045) (T.A. 14046)	Affirmed
HARRELL v. N.C. DEPT. OF CORR. No. 99-1430	Wake (98CVS6912)	Affirmed
HAUSTMAN v. HAUSTMAN No. 99-1323	Iredell (97CVD1411)	Affirmed
IN RE APPEAL OF GEN. ELEC. CO. No. 99-1504	Property Tax Comm. (96PTC174)	Affirmed
IN RE BRIM No. 00-474	Stokes (98J74)	Affirmed
IN RE FISHER No. 00-508	Wayne (99J6)	Affirmed
IN RE GORE No. 99-1622	Brunswick (97J127)	Affirmed
IN RE HOLSCLAW No. 99-1145	Catawba (99J42)	Affirmed

IN RE MAYNOR No. 00-590	Randolph (99J61) (99J62) (99J63)	Dismissed
IN RE WATTS No. 00-152	Catawba (98J338) (98J339) (98J340) (98J341)	Affirmed
LIPE v. STARR DAVIS CO. No. 99-1624	Ind. Comm. (429068)	Affirmed
STANLEY v. BRUNSWICK ELEC. MEMBERSHIP CORP. No. 00-29	Union (97CVS01065)	No error
STATE v. ANDERSON No. 00-685	Union (95CRS4789) (95CRS9023) (96CRS9358)	No error
STATE v. BETHEL No. 00-63	Alamance (97CRS30175) (97CRS30176) (97CRS30016) (97CRS30017)	Bethel—Case Nos. 97CRS30175 and 97CRS30176: no error. Walker—Case No. 97CRS30016: no error. Case No. 97CRS30017: vacated
STATE v. BROOKS No. 00-772	Alleghany (99CRS1083) (99CRS854)	Affirmed
STATE v. EMANUEL No. 99-1396	Robeson (96CRS24204) (96CRS24205) (96CRS24207)	New trial
STATE v. HAIRSTON No. 00-728	Guilford (98CRS100009) (98CRS100010) (98CRS100011) (99CRS23219) (99CRS23790)	No error
STATE v. JERNIGAN No. 00-49	Chowan (96CRS1908)	No error
STATE v. JEUDI No. 99-1618	Buncombe (96CRS67276) (98CRS5646) (96CRS67278)	Remanded in part, no error in part

STATE v. McQUAIG No. 99-1432	Durham (97CRS38912) (97CRS38914) (97CRS38915)	In sum, defendant a fair trial free of prejudicial error. In 97CRS38914, judgment is vacated and the case is remanded for resentencing. In 97CRS38912, assault with a deadly weapon inflicting serious bodily injury, no error. In 97CRS38914, second-degree kidnapping, no error in the trial, sentencing remanded. In 97CRS38915, attempted robbery with a dangerous weapon, no error.
STATE v. MOULTRY No. 99-1201	Mecklenburg (98CRS114110) (98CRS114112) (98CRS114114) (98CRS114115)	No error
STATE v. MYATT No. 00-591	Wake (99CRS002113)	No error
STATE v. PETERS No. 00-434	Forsyth (99CRS13118)	Defendant received a fair trial free of prejudicial error
STATE v. ROBINS No. 00-135	New Hanover (98CRS467)	Affirmed
STATE v. SANDERS No. 00-530	Buncombe (99CRS307) (98CRS59092) (98CRS59095) (98CRS59190) (99CRS306)	No error
STATE v. SCURLOCK No. 00-154	Robeson (97CRS1785) (97CRS1787) (97CRS1788) (97CRS1789)	No error

STATE v. WADDELL No. 00-111	Mecklenburg (98CRS120897)	Vacated and remanded
STATE v. WOODS No. 00-488	Alamance (94CRS32411)	Dismissed
WALL v. APPLING-BOREN CO. No. 00-277	Ind. Comm. (644273)	Reversed
WILLIAMS v. WAL-MART STORES, INC. No. 00-758	Jackson (99CVS204)	Dismissed

JAMES L. MARTISHIUS AND CINDY K. MARTISHIUS, PLAINTIFFS V. CAROLCO STUDIOS, INC., DEFENDANT

No. COA00-199

(Filed 20 February 2001)

1. Evidence— expert testimony—negligence—reasonable care for safety—no firsthand knowledge—basis of opinion given

The trial court did not err in a negligence case by admitting the testimony of two experts stating that plaintiff exercised reasonable care for his safety when he was injured by power lines while helping to construct a movie set on defendant landowner's property even though the experts did not testify from firsthand personal knowledge, because: (1) one expert based his opinion on depositions, affidavits, and measurements taken of the scene of plaintiff's accident; (2) the other expert's testimony was based on photographs and previous testimony at trial; and (3) any question as to the sufficiency of the factual basis affected the weight of the experts' testimony and not its admissibility.

2. Premises Liability— injury by power lines—negligence by landowner—motion for directed verdict and judgment notwithstanding verdict properly denied

The trial court did not err by denying defendant's motions for a directed verdict and judgment notwithstanding the verdict on the issue of defendant landowners's negligence for plaintiff's injuries caused by power lines on defendant landowner's property while plaintiff was helping to construct a movie set even though plaintiff was aware of the power lines, because: (1) plaintiff's awareness did not abrogate defendant's duty to inform the lawful visitor of an unreasonable risk of harm; (2) various alternatives were available to defendant to safeguard against the hazards posed by the presence of the power lines, but defendant took no precautions; and (3) defendant's representative who inspected the activities on the property every day admitted to plaintiff's supervisor that he had warned defendant for years to do something about the power lines.

3. Premises Liability— injury by power lines—contributory negligence—motion for directed verdict and judgment notwithstanding verdict properly denied

The trial court did not err by denying defendant's motions for a directed verdict and judgment notwithstanding the verdict on the issue of plaintiff's contributory negligence as a matter of law when plaintiff was injured by power lines while helping to construct a movie set on defendant landowner's property, because: (1) plaintiff's evidence shows he operated the pertinent equipment on several occasions and was a proficient operator of such equipment; (2) plaintiff was operating new equipment with electronic controls that caused the machine to be jerky and erratic; (3) plaintiff's experts as well as plaintiff's coworkers testified the sun was directly in plaintiff's eyes at the time of the accident making it difficult if not impossible to see the power lines; and (4) plaintiff's witnesses testified that no other safer methods were available to plaintiff.

4. Premises Liability— injury by power lines—motion for new trial properly denied

The trial court did not abuse its discretion in a negligence case by denying defendant's motion for a new trial in an action where plaintiff was injured by power lines on defendant landowner's property while plaintiff was helping to construct a movie set when the Court of Appeals has already concluded that plaintiff presented substantial evidence that defendant was negligent in failing to prevent plaintiff's injuries and that plaintiff was not contributorily negligent.

Judge TYSON dissenting.

Appeal by defendant from judgment filed 23 July 1999 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 9 January 2001.

Kirby & Holt, L.L.P., by David F. Kirby and Isaac L. Thorp, and Goldberg & Anderson, by Frederick D. Anderson, for plaintiff-appellees.

Law Offices of William F. Maready, by William F. Maready, for defendant-appellant.

GREENE, Judge.

Carolco Studios, Inc. (Defendant) appeals a 23 July 1999 judgment entered consistent with a jury verdict finding Defendant negligent in causing injuries to James L. Martishius (Plaintiff) and awarding Plaintiff $2,500,000.00.[1] Defendant also appeals the trial court's denial of Defendant's motion for judgment notwithstanding the verdict, the trial court's denial of Defendant's motion for a new trial, and the trial court's order assessing costs against Defendant.[2]

Crowvision, Inc. (Crowvision), a production company formed to produce the movie "The Crow," entered into a license agreement with Defendant on 29 December 1992 for the use of a portion of Defendant's land, stages, facilities, equipment, and personnel in connection with production of "The Crow." Defendant warranted to Crowvision that the premises and facilities were "satisfactory and in a safe condition."

Prior to Crowvision beginning production of "The Crow," Gerald Waller (Waller), a licensed electrician and Defendant's on-site facility manager, showed Jeffrey Schlatter (Schlatter), Crowvision's construction coordinator, the back lot of Defendant's facilities and inspected the back lot's power lines. Waller informed Schlatter that Carolina Power & Light Company (CP&L) had a thirty foot right-of-way and Crowvision would have to keep its set at least ten feet from the power lines to avoid encroaching on CP&L's easement. CP&L's three power lines ran parallel five feet apart. Both of the outer lines were energized and were installed 27.8 feet above the ground. The energized lines were buffered on both sides by ten feet of CP&L's easement.

In January 1993, Crowvision installed 10 or 11 telephone poles on the back lot to facilitate the construction of a church and cemetery set facade. On 1 February 1993, Paul Saunders, Plaintiff's supervisor, instructed Plaintiff to assist the construction foreman on the church/cemetery set. Plaintiff used a JLG, "a piece of equipment that

1. We note Cindy K. Martishius also filed suit against Defendant based on the loss of consortium of her husband, Plaintiff. The jury, however, found Defendant's negligence did not cause the loss of consortium of Plaintiff and Cindy K. Martishius did not appeal the jury's verdict.

2. Defendant has presented no argument in its brief to this court concerning the trial court's order assessing costs against Defendant. Therefore, we do not address this issue. *See* N.C.R. App. P. 28(a).

has tires and can move from spot to spot, rotates around with an extending boom [and a] work platform, so that it will get to high places," to attempt to move the church door. As Plaintiff positioned the JLG to pick up the church door, the basket of the JLG contacted an overhead power line. Plaintiff has no memory of how the accident happened, and Plaintiff sustained severe burns about his body as a consequence of the contact.

At trial, Plaintiff presented evidence Waller inspected the activities on the back lot every day and was physically present when the holes were dug for the telephone poles upon which the set facades were hung. In fact, Waller was aware the poles were within a foot or two of the power lines. Schlatter testified he obtained Waller's permission before making set alterations, including changes to or additions of set facades. Schlatter also testified that the route taken by Plaintiff to move the church door was the best route as other routes were blocked or inaccessible. Shortly after the accident, Waller told Schlatter that he had warned Defendant "for years to do something about these lines."

John Christopher Crowder, a carpenter with Crowvision, testified the job Plaintiff was performing on the day of the accident was a "one-man operation" and that most carpenters would not use two people to perform the job Plaintiff was performing at the time of the accident.

Witnesses testified Plaintiff was a competent operator of the JLG and was one of the best at running the JLG. On the day of the accident, Plaintiff was operating a new JLG which had different controls than other JLGs on the set. A representative of Hertz, the company Crowvision leased the JLG from, testified the new JLG had electronic controls and was jerky and erratic. The new JLG put individuals at a greater risk of striking objects in close proximity to the JLG.

Ralph Woollaston (Woollaston), Crowvision's construction foreman, testified it is very difficult to see power lines while operating a JLG. Woollaston stated the power lines become cluttered in trees and the power lines look invisible and "[i]f the sun is in your eyes, you are not going to see them at all." The day after Plaintiff's injury, Woollaston and Schlatter went to the scene of Plaintiff's injury. They looked at the power lines from several vantage points, conditions being similar to the time of Plaintiff's injury, and "[t]here were several places that . . . you couldn't see them." At times, the power lines appeared as "pencil lines in the air." Woollaston testified use of the

JLG was the best method to use in the work Plaintiff was performing at the time of the accident and that a forklift was not a preferable method because it would have flipped over. On cross-examination, Woollaston stated the door Plaintiff was moving was a very heavy door and otherwise would have taken five men to move the door.

Dr. Harvey Snyder (Dr. Snyder) was tendered as an expert in the field of human factors and visual perception. Over Defendant's objection, the trial court accepted Dr. Snyder as an expert in human factors and visual perception. The trial court, however, directed Dr. Snyder to avoid making legal conclusions. Based on depositions, affidavits, and measurements taken by Dr. Snyder, Dr. Snyder opined that Plaintiff approached the area where the accident occurred and:

> [h]is objective was to reach in through the gap between the vertical structure . . . and the poles to the right of it to pick up a flat which looked like a window or doorway lying on the ground, probably some 70 or 80 feet away . . . . [Plaintiff] operated the JLG from the bucket, raised it up over the structure . . . to his right, or beyond the bucket as we see it sitting right now, boomed out to attempt to pick up the flat lying on the ground and affixed it to the bucket to bring it back. [Plaintiff] could not reach it. The boom length was not adequate to get there. [Plaintiff], therefore, started booming back in to return to the position . . . [,] [b]oomed in, elevated and rotated to get back toward[] that position, and in the process, contacted or came very close to the energized line and made contact with the neutral line, the lower line, the lower line being hit by the bucket.

In Dr. Snyder's opinion, the power lines "were located dangerously close to the structures which [Plaintiff was] working on. . . . There is insufficient space between the structures and the lines for a person to use elevating equipment safely." Dr. Snyder stated Plaintiff's operation of the JLG was made extremely difficult because Plaintiff was looking directly into the sun as he operated the JLG and, thus, was prevented from seeing the power lines.

In addition, Plaintiff's "perception of the distance to the lines and even the ability to see the lines would have been greatly compromised, and it is reasonably likely that someone in that position looking at those lines would not be able to see them because of the sun['s] glare." Dr. Snyder testified the power lines did not "provide any freedom of movement for an operator, . . . any forgiveness, whatsoever,

to an operator who moves slightly in the wrong dimension in coming close to the lines." Dr. Snyder stated there were various alternatives available to Defendant to safeguard against the particular hazard including: de-energizing the power lines; moving or burying the power lines; or not permitting a set to be built in close proximity to the power lines. Dr. Snyder testified that "[w]arnings are not a fail-safe device for eliminating hazards, and if the hazard could have been eliminated, it should have been eliminated."

David MacCollum (MacCollum) is a licensed industrial engineer and a licensed safety engineer, who identifies hazards and defines available safeguards to control the hazards. MacCollum has been a certified safety professional for approximately thirty years. Plaintiff tendered MacCollum as an expert in the field of safety engineering. The trial court accepted Plaintiff's tender over Defendant's noted objection.

Based on photographs and previous testimony at trial, MacCollum testified:

> [Plaintiff] had to come within close proximity and work next to those power lines and judge the best that he could that he had visual clearance.
>
> . . . [Plaintiff was] looking toward[] the sun, which makes [the power lines] hard to see. It's hard to, in controlled studies, to be able to judge your clearance, particularly when you have multiple tasks. So in the process, my assessment, in summary, is that [Plaintiff] thought he had clearance, and he was doing his job as he was told to do, and he was doing it consistent with the requirements of the equipment and the labels in the manual that gave directions on how to perform your work around power lines safely.

MacCollum also formed an opinion concerning the conduct of Defendant. MacCollum opined that Defendant "had a hazardous workplace because the power lines were present[,] . . . the power lines could have been easily removed, and . . . [Plaintiff], the operator, was following the basic instructions from the JLG." MacCollum testified that the custom and practice in the construction industry "is to separate or remove the power lines from the workplace before the lift equipment is introduced into the work environment, so that it is now physically impossible to strike the power lines with lift equipment." Defendant could have removed the power lines from the work

site by: burying the power lines; barricading the area off to restrict entry into the area; or insulating on the power lines.

Dr. James Samuel McKnight (Dr. McKnight) was accepted, without objection, as an expert in the field of electrical engineering and electrical safety in construction sites. Dr. McKnight testified Defendant's back lot and the overhead power lines involved in this accident did not comply with industry customs, standards, and practices. In Dr. McKnight's opinion, the constant activity around the overhead power lines created an "unnecessary hazard" and the power lines could have been designed to reduce the hazard. Based on photographs taken of the accident scene after Plaintiff's injury and burn marks to the JLG, Dr. McKnight concluded Plaintiff did not back into the power lines, but instead, the side of the JLG contacted the power lines.

At the close of Plaintiff's evidence and the close of all the evidence, Defendant made motions for a directed verdict. The trial court denied Defendant's motions. After the jury returned its verdict, Defendant made motions for judgment notwithstanding the verdict and a new trial.

The issues are whether: (I) the opinions of Plaintiff's expert witnesses were based on an insufficient factual basis; (II) Defendant took adequate steps to protect lawful visitors from unreasonable risks; (III) Plaintiff was contributorily negligent as a matter of law; and (IV) the jury's verdict was against the greater weight of the evidence.

I

[1] Defendant argues the trial court erred in admitting the testimony of Dr. Snyder and MacCollum because there were not "sufficient facts upon which to base these opinions." We disagree.

"Once the trial court in its discretion determines that the expert testimony will not mislead the trier of fact, any question as to the sufficiency of the factual basis of the opinion affects the credibility of the testimony but not its competence as evidence." *Powell v. Parker*, 62 N.C. App. 465, 468, 303 S.E.2d 225, 227, *disc. review denied*, 309 N.C. 322, 307 S.E.2d 166 (1983). "It is well settled that an expert witness need not testify from firsthand personal knowledge, so long as the basis for the expert's opinion is available in the record or on demand." *State v. Purdie*, 93 N.C. App. 269, 276, 377 S.E.2d 789, 793 (1989).

In this case, Dr. Snyder based his opinion on depositions, affidavits, and measurements taken of the scene of Plaintiff's accident. MacCollum's testimony was based on photographs and previous testimony at trial. Furthermore, Plaintiff's witnesses testified that in reconstructing the accident scene, under conditions similar to those faced by Plaintiff, the power lines were very difficult, if not impossible, to see due to glare from the sun. The record clearly delineates the factual basis relied on by Dr. Snyder and MacCollum, and any question as to the sufficiency of the factual basis affected the weight of the experts' testimony and not its admissibility. Accordingly, the trial court did not err in allowing Plaintiff's expert witnesses to state their opinion that Plaintiff exercised reasonable care for his safety.

II

[2] Defendant argues the trial court committed reversible error in denying its motions for a directed verdict and judgment notwithstanding the verdict on the issue of Defendant's negligence. We disagree.

In order to prevail on a claim of negligence, the plaintiff must establish the defendant owed him a duty of reasonable care, that the defendant was negligent in this duty, and that such negligence was the proximate cause of the plaintiff's injuries. *Beaver v. Hancock*, 72 N.C. App. 306, 311, 324 S.E.2d 294, 298 (1985). A landowner owes a duty "to exercise reasonable care to provide for the safety of all lawful visitors on [its] property," and, thus, is required to "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). In some situations, however, a warning does not satisfy the landowners's duty. If a reasonable person would anticipate an unreasonable risk of harm to a visitor on his property, notwithstanding the lawful visitor's knowledge of the danger or the obvious nature of the danger, the landowner has a duty to take precautions to protect the lawful visitor. *See Southern Railway Co. v. ADM Milling Co.*, 58 N.C. App. 667, 673, 294 S.E.2d 750, 755, *disc. review denied*, 307 N.C. 270, 299 S.E.2d 215 (1982).

In this case, viewing the evidence in the light most favorable to Plaintiff, *see Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411

(1986) (the standard of review of a trial court's ruling on a motion for judgment notwithstanding the verdict is the same as that upon a motion for a directed verdict and in considering either motion, the evidence must be viewed in the light most favorable to the non-moving party), Plaintiff produced substantial evidence to support every element of his claim for relief, *see Cobb v. Reitter*, 105 N.C. App. 218, 220, 412 S.E.2d 110, 111 (1992) (a defendant is entitled to a directed verdict or judgment notwithstanding the verdict only if the plaintiff is unable to produce substantial evidence that the defendant's negligence was the proximate cause of plaintiff's injuries). Although Plaintiff was aware of the power lines, Plaintiff's awareness did not abrogate Defendant's duty. Defendant was aware of Crowvision's construction of a set near the power lines and Waller, Defendant's representative, inspected Crowvision's activities every day and was on the scene when the holes were dug to insert telephone poles within a foot or two of the power lines. Although the evidence shows Defendant warned Plaintiff's employer about the presence of the power lines, a reasonable person could anticipate an unreasonable risk of serious harm to employees of Crowvision (who were to be working underneath and adjoining the lines with equipment that could reach to the lines), caused by the power lines passing through the property. Thus, Defendant had a duty to take feasible precautions to guard against this serious harm. Plaintiff's expert witnesses testified various alternatives were available to Defendant to safeguard against the hazards posed by the presence of the power lines. Defendant, however, took no precautions to make its premises safe, despite its awareness of Crowvision's close proximity to the power lines and the unreasonable risk of harm to Crowvision's employees. In fact, Waller admitted to Plaintiff's supervisor that he had warned Defendant "for years to do something about these lines." Despite Waller's warnings to Defendant and the availability of alternative safeguards, Defendant took no precautions to remedy the dangerous conditions on its premises. Accordingly, this evidence is substantial evidence Defendant failed to take precautions against an unreasonable risk of serious harm. *See Cobb*, 105 N.C. App. at 220, 412 S.E.2d at 111 (substantial evidence is evidence a reasonable mind might accept to support a conclusion). The trial court, therefore, did not err in denying Defendant's motions for a directed verdict and judgment notwithstanding the verdict.

III

[3] Defendant next argues Plaintiff was contributorily negligent in causing his injuries, and, thus, Plaintiff's claim of negligence was barred. We disagree.

A plaintiff who is aware of a known danger, but fails to avoid it, is contributorily negligent. *Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 539 S.E.2d 331, 333 (2000). "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." *Id.* Because the test for contributory negligence requires application of the reasonable person standard, a directed verdict is rarely proper in determining contributory negligence and should be allowed only when the plaintiff's evidence, viewed in the light most favorable to him, clearly establishes the defense of contributory negligence so that no other reasonable conclusion could be drawn. *Id.*

In this case, Plaintiff's evidence shows he operated JLGs on several occasions and was a proficient operator of such. At the time of Plaintiff's accident, he was operating a new JLG, with electronic controls that caused the machine to be jerky and erratic. Furthermore, Plaintiff's experts, as well as Plaintiff's co-workers, testified the sun was directly in Plaintiff's eyes at the time of the accident making it difficult, if not impossible, to see the power lines. Moreover, Plaintiff's witnesses testified no other, safer methods were available to Plaintiff to move the church door. Viewing this evidence in the light most favorable to Plaintiff, we cannot say as a matter of law that Plaintiff was contributorily negligent. Accordingly, the trial court did not err in denying Defendant's motion for a directed verdict or judgment notwithstanding the verdict due to Plaintiff's contributory negligence.

IV

[4] Defendant finally argues the trial court abused its discretion in denying Defendant's motion for a new trial. We disagree. The trial court's ruling on a motion for a new trial is within the trial court's sound discretion and will not be reversed on appeal, absent a showing the trial court's ruling amounted to a substantial miscarriage of justice. *Allen v. Beddingfield*, 118 N.C. App. 100, 101-02, 454 S.E.2d 287, 289, *disc. review denied*, 340 N.C. 109, 456 S.E.2d 310 (1995). Because we have stated in parts II and III herein that Plaintiff presented substantial evidence Defendant was negligent in failing to

prevent Plaintiff's injuries and that Plaintiff was not contributorily negligent, we cannot say, based on this record, the trial court's decision not to grant Defendant a new trial was an abuse of discretion or resulted in a miscarriage of justice.

No error.[3]

Judge HORTON concurred before 8 February 2001.

Judge TYSON dissents.

TYSON, Judge, dissenting.

I would hold that the trial court erred in denying Carolco's motions for directed verdict and/or judgment notwithstanding the verdict and will address the following issues: (1) the duty Carolco owed to plaintiff; (2) whether Carolco breached its duty owed; (3) the obvious nature of the dangerous condition, and plaintiff's knowledge thereof; and (4) plaintiff's contributory negligence.

Facts

In addition to the majority's factual background, I add the following. Plaintiff worked for Crowvision, licensee of Carolco. Crowvision's representatives inspected Carolco's facilities on several occasions prior to executing the license agreement. Carolco representatives toured the facilities with Crowvision, explaining to Crowvision the layout of the studio, and the area in which Crowvision would be working. Gerald Waller, a licensed electrician and Carolco's Facility Manager, showed Crowvision employees, including Crowvision's Construction Coordinator Jeff Schlatter, the backlot of the studio.

Waller informed Schlatter and other Crowvision representatives about the presence of an easement on the backlot owned by Carolina Power & Light Company ("CP&L"). CP&L's easement was thirty feet wide and contained three overhead power lines, installed in 1984. The lines ran five feet apart and parallel. The easement extended fifteen feet from the center line, and ten feet beyond the outer power lines. The center line was a neutral line hanging twenty feet from the

3. We do not address Defendant's remaining assignments of error as Defendant has not presented any argument in its brief relating to these assignments of error. *See* N.C.R. App. P. 28(a) (questions raised by assignments of error but not "discussed in a party's brief, are deemed abandoned").

ground. Both outer lines were energized and were installed 27.8 feet above ground. The energized lines were buffered on both sides by ten feet of CP&L's easement.

Schlatter testified that Waller made "very clear" to Crowvision the presence of the easement, and that Waller stressed that the ten-foot easement boundary beyond the energized lines must not be invaded. Crowvision's Production Designer, Alex McDowell, expressed a desire to construct sets within CP&L's easement for the film's "artistic needs" and the need to obtain long, in-depth shots of the set. Schlatter testified that Waller again stressed that CP&L's easement and the boundary beyond the energized lines must not be violated.

Crowvision executed the license agreement with Carolco following repeated inspection of the premises, with notice of CP&L's easement and power lines thereon, and with explicit instruction from Carolco's Facility Manager not to violate the easement. Crowvision acknowledged in the license agreement that it "had full and fair opportunity to inspect the premises and facilities and that the licensed premises and facilities hereunder are satisfactory and in a safe condition." Crowvision further warranted under the agreement that it agreed to comply, "and will cause its agents, employees and invitees to comply, with all reasonable rules, regulations and procedures established by Studio for studio-wide operations and made known to Licensee."

Plaintiff testified that he first worked at Carolco's studio in October 1992 during the filming of the movie "Hudsucker Proxy". Plaintiff began work on the set of "The Crow" during late November 1992. Plaintiff was working on the backlot on 1 February 1993 in his capacity as a carpenter, employed by Crowvision. On that day, Crowvision constructed a twelve-foot high back wall of a church facade. The top of this new wall was 15.8 feet below the energized lines. Crowvision built the wall four feet into CP&L's easement, and only six horizontal feet from the energized power lines. Schlatter testified that the wall was built so far into the backlot because McDowell, Crowvision's Production Designer, wanted additional depth for a long-shot of the church and cemetery scene.

Crowvision's Construction Foreman, Ralph Woollaston, directed plaintiff to pick up a large church door and place it at the front of the church facade that Crowvision had constructed on CP&L's easement. Plaintiff, using an ariel lift bucket (a "JLG"), approached an opening

in the back of the church facade and positioned the JLG so that he could extend the bucket into the front churchyard and place the door. Chris Crowder, another Crowvision carpenter, was working nearby and saw plaintiff raise the JLG bucket in an attempt to reach and pick up the church door. Crowder briefly turned his back, and then "heard the spark and the explosion." Crowder turned to see plaintiff slumped over the controls of his JLG. Plaintiff's bucket had contacted the power lines on CP&L's easement. Plaintiff sustained serious and permanent injuries.

Plaintiffs filed suit against Carolco, CP&L, Crowvision, Edward R. Pressman Film Corporation, and Hertz Equipment Rental Corporation on 20 April 1994. Plaintiffs' claims against Carolco's co-defendants were either settled or dismissed, and the matter proceeded to trial solely against Carolco. Carolco moved for a directed verdict both at the close of plaintiffs' evidence and at the close of all evidence. Carolco argued that the evidence failed to establish its negligent breach of a duty, and that plaintiff was contributorily negligent.

I would hold that plaintiff's evidence, viewed in the light most favorable to plaintiff, fails to show plaintiff has a right to recover. Carolco was entitled to a directed verdict or judgment notwithstanding the verdict.

"A motion for directed verdict tests the sufficiency of the evidence to take the case to the jury." *Abels v. Renfro Corp.*, 335 N.C. 209, 214, 436 S.E.2d 822, 825 (1993) (citations omitted). In reviewing the grant of such motion, the evidence must be considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference. *Id.* at 215, 436 S.E.2d 822. A defendant is entitled to a directed verdict or judgment notwithstanding the verdict where the plaintiff cannot forecast evidence sufficient to establish an essential element of the claim for relief. *Williamson v. Liptzin*, 141 N.C. App. 1, — S.E.2d — (COA99-813) (19 December 2000).

Carolco's Duty

Plaintiff was a lawful visitor on Carolco's property as an employee of the licensee, Crowvision. Carolco owed a duty of reasonable care to provide for plaintiff's safety. *Nelson v. Freeland*, 349 N.C. 615, 631-32, 507 S.E.2d 882, 892 (1998), *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999). This duty has been defined as a duty of

ordinary care to maintain the premises in a safe condition and to warn of hidden dangers that had been or could have been discovered by reasonable inspection. *Husketh v. Convenient Systems*, 295 N.C. 459, 462, 245 S.E.2d 507, 509 (1978). Carolco is not an insurer of its premises, nor must it "undergo unwarranted burdens in maintaining [its] premises." *Nelson*, 349 N.C. at 632, 507 S.E.2d at 892.

North Carolina law does not support a theory that the mere presence of power lines within the boundaries of the CP&L easement on Carolco's property created an unreasonably dangerous condition, resulting in liability to Carolco. Our Supreme Court has consistently held that the mere maintenance of overhead power lines on one's property is not wrongful or negligence per se. *Floyd v. Nash*, 268 N.C. 547, 151 S.E.2d 1 (1966); *Philyaw v. City of Kinston*, 246 N.C. 534, 98 S.E.2d 791 (1957); *Mintz v. Town of Murphy*, 235 N.C. 304, 69 S.E.2d 849 (1952).

The lines at issue were well within CP&L's thirty-foot easement. A ten-foot buffer zone surrounded the lines on both sides. Maintaining power lines within a few feet of buildings or construction is also not negligence *per se*. *See Philyaw*, 246 N.C. at 535, 98 S.E.2d at 792 (defendant not negligent despite maintaining energized power lines within four feet of building on which plaintiff performed construction); *Brown v. Duke Power Co.*, 45 N.C. App. 384, 263 S.E.2d 366, *disc. review denied*, 300 N.C. 194, 260 S.E.2d 615 (1980) (defendant not negligent for maintaining 7200-volt power lines approximately 12 feet from decedent's house). Plaintiff did not present evidence that the lines were sagging, had eroded, or were in any state of disrepair. Even so, the burden of maintenance of such lines lies with CP&L, not Carolco. *See Green v. Duke Power Co.*, 305 N.C. 603, 611, 290 S.E.2d 593, 598 (1982) (owner of easement is party charged with duty to keep easement and improvements thereon in repair).

The mere presence of the lines within the boundaries of CP&L's easement on Carolco's backlot does not alone forecast evidence sufficient to establish defendant's breach of any duty of reasonable care. "The mere maintenance of high tension transmission line is not wrongful, and in order to hold the owner negligent, where an injury occurs, he must be shown to have omitted some precaution which he should have taken." *Philyaw*, 246 N.C. at 537, 98 S.E.2d at 794; *Mintz*, 235 N.C. at 314, 69 S.E.2d at 857-58.

The evidence presented at trial established that Carolco satisfied any duty it had, when it made known to Crowvision, plaintiff's

employer: (1) the layout of the backlot, (2) the location and specific dimensions of CP&L's easement, and (3) the presence of the power lines. The evidence is undisputed that Carolco warned Crowvision repeatedly to maintain the ten-foot buffer surrounding both outer power lines on the easement, and not to encroach on CP&L's easement.

Carolco took several Crowvision employees on numerous "walk-arounds" throughout the Carolco property to examine the facilities prior to signing the license agreement. Waller testified that he was present on one such walk-around with Ken Swaim, Carolco's Studio Manager, where Schlatter and Crowvision's Production Design and Production Management Teams examined the facility. The purpose of the walk-around was to make Crowvision aware of the work environment and conditions on Carolco's backlot.

Waller also testified that during this meeting with Crowvision representatives, the power lines in CP&L's easement were "discussed at length," and Crowvision was specifically told that right-of-way distances around the power lines must not be invaded. When McDowell, Crowvision's Production Designer, expressed a desire to build as far back on the lot as possible, Carolco "made very clear" that the right-of-way surrounding the power lines must not be encroached upon. This evidence is undisputed.

Schlatter confirmed that Carolco discussed the presence of the power lines and the easement during walk-arounds with Crowvision employees, and that Waller had warned McDowell about the easement. Schlatter testified that Waller specifically stated that there was "a thirty-foot right-of-way" and that Crowvision was limited to build no closer than fifteen feet of the center line, or ten feet from the outer lines. The evidence is unchallenged that, (1) Carolco showed Crowvision the property, (2) informed it about the specifics of the CP&L easement, and (3) warned Crowvision not to encroach on the buffer surrounding the lines.

Crowvision signed the license agreement with Carolco after the various walk-arounds and with notice of the power lines, the dimensions of the easement, and being warned not to encroach on the buffer. Crowvision acknowledged in the license agreement that the facilities were in safe condition, and that Crowvision and its agents and employees would comply with all studio regulations made known to them.

Proximate Cause

In order to establish a claim of negligence sufficient to survive a motion for directed verdict or judgment notwithstanding the verdict, a plaintiff must introduce evidence tending to establish that, "(1) defendant failed to exercise proper care in the performance of a duty owed to plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances as they existed." *Sheppard v. Zep Mfg. Co.*, 114 N.C. App. 25, 30, 441 S.E.2d 161, 164 (1994) (citing *Jordan v. Jones*, 314 N.C. 106, 331 S.E.2d 662 (1985)). "The element of foreseeability is a requisite of proximate cause." *Williamson*, *supra* (citing *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)).

In *Bogle v. Duke Power Co.*, 27 N.C. App. 318, 219 S.E.2d 308 (1975), *disc. review denied*, 289 N.C. 296, 222 S.E.2d 695 (1976), the plaintiff alleged that the electrocution death of her intestate resulted from the defendant's negligence in allowing its power line to remain near a school building where the defendant knew or should have known it posed a danger to maintenance personnel required to work around the building. Rejecting the plaintiff's argument, this Court determined that defendant complied with its duty to exercise reasonable care: "[i]t is unreasonable to call on the defendant to foresee that plaintiff's intestate would ignore the warning of his supervisor and cause a metal ladder to fall against the line. . . ." *Id.* at 322, 219 S.E.2d at 311; *see also*, *Sweat v. Brunswick Electric Membership Corp.*, 133 N.C. App. 63, 67, 514 S.E.2d 526, 529 (1999) ("defendant was not required to foresee that plaintiffs, for unexplained reasons, would permit the ladder to come in contact with the power lines. . . .").

The facts of the present case are similar to that of *Philyaw*, *supra*. In that case, the plaintiff's intestate was killed when he touched power lines that were in close proximity to a building he was helping to construct. *Philyaw*, 246 N.C. at 535, 98 S.E.2d at 792. The decedent was standing on a wall of the building when he arose and touched the power lines that were hanging approximately four to five feet above the building. *Id.* The Court noted that the wires were uninsulated, and that the defendant had not posted any warning signs on or near the premises. *Id.* at 535-36, 98 S.E.2d at 792. The Court further observed that the plaintiff's employer failed to request that the defendant relocate or de-energize the lines while construction was taking place. *Id.*

The Supreme Court affirmed the grant of the defendant's motion for judgment as of nonsuit. *Id.* at 538, 98 S.E.2d at 794. The Court stated that, regardless of any negligence of the defendant in maintaining the uninsulated power lines, "it is apparent from the evidence that the injury to and death of plaintiff's intestate was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person." *Id.* at 537, 98 S.E.2d at 793. The Court concluded that the decedent's injuries occurred because the decedent's employer chose to construct the building too close to the energized wires, and the defendant "was not charged with the duty of foreseeing that such would be done." *Id.* at 537-38, 98 S.E.2d at 794.

In *Mintz*, *supra*, our Supreme Court held the evidence insufficient to submit to the jury on the plaintiff's claim that the defendant breached a duty in maintaining its power lines:

> And applying the principles of law here stated to the evidence offered by plaintiff, such evidence fails to make out a case of actionable negligence. If it should be conceded that the evidence tends to show that defendant failed to maintain its transmission line in accordance with its legal duty, the evidence fails to show that such failure was the proximate cause of the injury to plaintiff. On the other hand, it clearly appears from the evidence that the injury of which plaintiff complains was 'independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person.'

Mintz, 235 N.C. at 315, 69 S.E.2d at 858; *see also*, *Brown* at 390, 263 S.E.2d at 370. In *Brown*, the Court held that the defendant was not required to foresee that the decedent, who was aware of the presence of power lines crossing his property pursuant to a valid easement, and who appreciated the danger posed, would hold a metal antenna in a manner that it would contact the power lines. *Id.*

In the present case, the dangerous condition which proximately caused plaintiff's injuries was created when Crowvision directed plaintiff to maneuver the church door around the twelve-foot wall, that encroached four feet into the CP&L easement, and only six horizontal feet from the energized power lines. This direction to plaintiff was in flagrant disregard for both Carolco's express warnings and regulations of the license agreement. The danger of working in such close proximity to the energized lines was obvious and known.

Schlatter testified that he understood that proper protocol at Carolco required that Waller be consulted about any electrical issue that arose in the course of production. Waller had previously assisted Schlatter with relocation of an electrical distribution box that interfered with a particular camera shot. However, no one from Crowvision ever consulted with Waller or requested that anyone at Carolco arrange to have the power lines relocated or de-energized on the day of the accident. Waller testified that no one from Crowvision submitted to Carolco a construction site plan indicating Crowvision would construct the church facade within CP&L's easement. A site plan was submitted by Crowvision to Carolco required by the license agreement. The site plan Crowvision furnished to Carolco did not show any construction within CP&L's easement.

Applying the principles set forth by our Supreme Court, I would hold that plaintiff's injuries were not proximately caused by any breach of legal duty owed plaintiff by Carolco. Crowvision violated the ten-foot buffer zone and constructed the church set facade only six feet from the overhead wires with full knowledge and warning of the existence of the energized wires. Crowvision then directed plaintiff to assist in the construction of the church facade. Plaintiff did so, using a JLG lift within the CP&L easement. Schlatter admitted that Crowvision "had no safety programs at all" for its employees working around power lines and with JLGs.

In accordance with *Philyaw* and *Mintz*, Carolco should not be held to the duty to foresee that Crowvision and plaintiff would, for unknown reasons, ignore explicit instructions and its written agreement to maintain the easement buffer zone surrounding the wires.

Obvious Nature of the Danger

Plaintiff argues that the evidence shows Carolco should have known of the close proximity to the power lines in which plaintiff was attempting to place the church door. However, evidence shows that Crowvision did not submit to Carolco any construction site plan showing that the twelve-foot church facade would be constructed within the easement. The wall was constructed at the direction of McDowell, Crowvision's Production Designer, who desired a "long shot looking through the gates of the church back towards the church." Contrary to the majority's statement that "Waller was aware the poles were within a foot or two of the power lines," Waller testified as follows:

> I was never aware of anything that actually encroached into the right-of-way, the recognized right-of-way, but we recognized that the right-of-way would be ten feet away from the power lines. I was never asked or presented with anything that would have informed the Studio of an encroachment into the right-of-way.

In any event, our Supreme Court has consistently held that a landowner is not obligated to protect a lawful visitor from obvious and known dangers. *See, e.g., Revis v. Orr*, 234 N.C. 158, 160-61, 66 S.E.2d 652, 654 (1951) (recovery permitted only where dangerous condition is known to landowner and not known to invitee); *Harris v. Nachamson Dept. Stores Co.*, 247 N.C. 195, 198-99, 100 S.E.2d 323, 326 (1957) (law does not impose duty on landowner to protect from dangers known or which should be anticipated by invitee); *Wrenn v. Hillcrest Convalescent Home, Inc.*, 270 N.C. 447, 448, 154 S.E.2d 483, 484 (1967) (defendant landowner under "under no duty to warn plaintiff, as an invitee, of an obvious condition or of a condition of which the plaintiff had equal or superior knowledge.").

The majority of decisions from this Court adhere to the Supreme Court's interpretation of the general rule. *See, e.g., Von Viczay v. Thoms*, 140 N.C. App. 737, 538 S.E.2d 629 (2000); *Jenkins v. Lake Montonia Club, Inc.*, 125 N.C. App. 102, 479 S.E.2d 259 (1997); *Farrelly v. Hamilton Square*, 119 N.C. App. 541, 459 S.E.2d 23 (1995).

In *Von Viczay*, this Court recently held that the defendant landowner could not be responsible for injuries sustained by the plaintiff when she fell on the defendant's icy walkway. Judge Smith stated,

> Plaintiff expends considerable effort in her brief to this Court focusing on defendant's knowledge of the dangerous condition. Indeed, defendant's own testimony that she had the driveway plowed and walkways surrounding the house salted evidences her knowledge of the potential danger. *However, the pivotal issue in this case is not defendant's knowledge of the condition, but is plaintiff's knowledge.*

Von Viczay, 140 N.C. App. at 739, 538 S.E.2d at 631 (emphasis supplied). Our Court noted the principles set forth by the Supreme Court in *Wrenn, supra*, and concluded that summary judgment for the defendant was proper where the " 'evidence presents no facts from which it can be inferred that defendant had more knowledge than

plaintiff of the alleged dangerous or unsafe condition.' " *Id* at 740, 538 S.E.2d at 632; *see also*, *James v. Wal-Mart Stores, Inc.*, 141 N.C. App. 721, __ S.E.2d —— (COA99-1465) (16 January 2001) (Edmunds, J., dissenting).

I am cognizant of the few decisions of this Court, upon which the majority relies, which appear to hold that a landowner has a duty to take precautions against obvious dangers where 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.*' " *James, supra* (emphasis in original) (quoting *Southern Railway Co. v. ADM Milling Co.*, 58 N.C. App. 667, 673, 294 S.E.2d 750, 755, *disc. review denied*, 307 N.C. 270, 299 S.E.2d 215 (1982)); *see also*, *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 516 S.E.2d 643, *cert. denied*, 351 N.C. 107, —— S.E.2d —— (1999); *Williams v. Walnut Creek Amphitheater Partnership*, 121 N.C. App. 649, 468 S.E.2d 501, *disc. review denied*, 343 N.C. 312, 471 S.E.2d 82 (1996).

The nature of the danger involved in those cases is easily distinguishable from the openness and obviousness of "the danger inherent in an electric power line," the knowledge of such "is generally possessed by adults of normal intelligence." *Floyd*, 268 N.C. at 551, 151 S.E.2d at 4. In *James*, the plaintiff was injured when she slipped and fell on a puddle of water near the entrance of a store. *James*, 141 N.C. App. at ——, —— S.E.2d at ——. The plaintiff in *Lorinovich* was hit by a falling can of salsa which dislodged as she reached for another can that had been stacked too high by the defendant store. *Lorinovich* at 160, 516 S.E.2d at ——. In *Williams*, the plaintiff was injured when she fell down a steep hill while exiting an open air theater in a crowd and with inadequate lighting. *Williams* at 652, 468 S.E.2d at 502-03; *see also*, *Southern Railway Co.* at 674, 294 S.E.2d at 755 (plaintiff injured when slipped on feed from defendant's mill).

We are required to follow the unchanged Supreme Court precedent enumerated in this dissent. *See, e.g.*, *Brundage v. Foy*e, 118 N.C. App. 138, 141, 454 S.E.2d 669, 671 (1995) ("our responsibility is to follow established precedent set forth by our Supreme Court."). The majority, in relying upon two decisions of this Court, wholly ignores the consistent precedent of our Supreme Court that a plaintiff cannot recover where he ignores the obvious danger of an energized power line when in close proximity thereto. *See, e.g.*, *Gibbs v. Carolina Power & Light Co.*, 268 N.C. 186, 192, 150 S.E.2d 207, 212 (1966)

(plaintiff who sustained electrical burns while working in close proximity to power lines could not recover where "in the face of obvious and recognized danger he turned his back on a known safe course of conduct and embraced a course of danger. . ."); *Mintz*, 235 N.C. at 315, 69 S.E.2d at 858 ("Where a person seeing [an uninsulated power line] knows that it is, or may be highly dangerous, it is his duty to avoid coming in contact therewith."); *Deaton v. Board of Trustees of Elon College*, 226 N.C. 433, 440, 38 S.E.2d 561, 566 (1946) (no recovery for electrocuted plaintiff where plaintiff, knowing dangers involved in working with power lines, chose to proceed with lines in unsafe manner); *Brown*, 45 N.C. App. at 390, 263 S.E.2d at 370 (citations omitted) ("With respect to power lines in particular, 'a person has a legal duty to avoid contact with an electrical wire of which he is aware and which he knows may be very dangerous.' ").

In *Lambert v. Duke Power Co.*, 32 N.C. App. 169, 231 S.E.2d 31, *disc. review denied*, 292 N.C. 265, 233 S.E.2d 392 (1977), the plaintiff sought to recover for injuries sustained when he touched a power line while working on a billboard. The evidence showed that the plaintiff had previously worked on the same billboard and had been warned about the presence of the wire by a co-worker. *Id.* at 171, 231 S.E.2d at 33. This Court held that the injuries did not result from the defendant's negligence, but from the plaintiff's " 'tragic lapse of attention to a known danger. . . .' " *Id.* (citation omitted). In *Floyd*, 268 N.C. at 551, 151 S.E.2d at 4, the court stated the mere fact that the defendant had knowledge of the danger posed did not support a theory of negligence in the absence of an indication that "deceased did not have an awareness of the danger inherent in an electric power line, such as is generally possessed by adults of normal intelligence." The majority has failed to cite any contrary precedent whatsoever in the context of power lines which would justify its position. Nor has the majority attempted to distinguish these Supreme Court cases from the present case.

Here, the evidence is undisputed that Crowvision employees, including Schlatter and plaintiff, knew of the dangers that the power lines presented. Evidence showed that plaintiff had been working on Carolco's property since October 1992. Plaintiff had worked on Carolco's backlot, and specifically the CP&L easement, prior to the accident. Plaintiff was given notice by Crowvision, his employer, of the power lines on the easement, and had been warned to be careful when working in the vicinity. Plaintiff testified that he knew the power lines were dangerous and could cause serious injury or death,

and he knew to avoid the lines when operating machinery, and specifically, a JLG.

Plaintiff's accident on 1 February 1993 was a terrible tragedy, and plaintiff suffered severe and life-long injuries as a result. However, as a matter of law, plaintiff failed to forecast evidence that Carolco negligently breached its duty of reasonable care. The evidence, taken in the light most favorable to plaintiff, fails to establish Carolco was negligent or that it proximately caused plaintiff's injuries. I would hold that the trial court erred in failing to grant defendant's motion for directed verdict and/or judgment notwithstanding the verdict. *Williamson, supra* (defendant entitled to directed verdict and judgment notwithstanding the verdict where plaintiff cannot produce evidence of foreseeability, and thus, proximate cause).

Contributory Negligence

In light of my previous conclusion that the trial court should have granted Carolco's motion for directed verdict, the issue of contributory negligence would not be addressed. However, Carolco also assigns as error the trial court's denial of its motions for directed verdict/judgment notwithstanding the verdict or a new trial on this ground. I would alternatively hold that the trial court should have granted either the directed verdict or judgment notwithstanding the verdict because plaintiff's contributory negligence.

Our Supreme Court has consistently held that a plaintiff has a duty to avoid the open and obvious danger of an energized power line. That Court has also consistently held that a plaintiff's failure to do so constitutes contributory negligence as a matter of law. *See, e.g., Floyd, supra*; *Gibbs, supra*; *Deaton, supra.*

In *Deaton*, the Supreme Court held that the deceased was contributorily negligent where "[a]t least two perfectly safe courses were open to the deceased, and yet he chose to handle a live wire with his bare hands while he was standing on wet ground. He discarded the safe and chose instead the patently dangerous and unsafe method. . . ." *Deaton*, 226 N.C. at 440, 38 S.E.2d at 566.

This Court has also decided other cases with similar facts to this case and unanimously reached the opposite result. *See, e.g., Brown, supra.* In *Brown*, this Court acknowledged that a plaintiff is not per se contributorily negligent if he contacts an energized power line. *Brown*, 45 N.C. App. at 390, 263 S.E.2d at 370. However, we noted that a court must find contributory negligence as a matter of law "where

the undisputed evidence reveals that plaintiff has failed to exercise due care while approaching or working around electric lines *despite being explicitly warned about the electric lines which subsequently injured him.*" *Id.* (citations omitted) (emphasis supplied). We concluded that the plaintiff's "lapse of attention to a known danger [of the power lines] constituted contributory negligence." *Id.* at 391, 263 S.E.2d at 370.

The law of contributory negligence regarding contact with power lines is set forth by well-established North Carolina law. *See Floyd, supra,* (deceased's "tragic lapse of attention to a known danger in the immediate vicinity must be deemed negligence by the deceased"); *Williams v. Power & Light Co.*, 296 N.C. 400, 404, 250 S.E.2d 255, 258 (1979) ("[i]t is well settled that when a person is aware of an electrical wire and knows that it is or may be highly dangerous, he has a duty to avoid coming in contact with it").

I cannot agree with the majority's statement that plaintiff was not contributorily negligent as a matter of law because "we cannot say a person using ordinary care would have recognized the danger of operating a JLG at or near the power lines." Not only is this statement in contravention to the precedent cited herein, but plaintiff affirmatively testified that he knew of the propensity for danger when working around the power lines, and that the lines must be avoided when working with machinery such as a JLG. The evidence is undisputed that both Crowvision and plaintiff knew of the easement and its dimensions. Plaintiff had worked on Carolco's property since October 1992, and knew of the presence of the power lines. Plaintiff had been warned about the easement and the power lines.

Nevertheless, plaintiff operated the JLG within the CP&L easement and in close proximity to the power lines, without requesting that the lines be de-energized or moved. There is evidence that plaintiff could have accomplished his task by moving the door from the other side of the wall, or by using other non-elevating equipment. Plaintiff had "[a]t least two perfectly safe courses . . . open to [him]," but "discarded the safe and chose instead the patently dangerous and unsafe method." *Deaton*, 226 N.C. at 440, 38 S.E.2d at 566.

Both the Supreme Court's and this Court's precedent supports the conclusion that plaintiff failed to exercise due care while approaching and working around power lines which he knew to be dangerous. Plaintiff was contributorily negligent as a matter of law for his disre-

gard for the obvious and known danger the energized power lines presented.

I conclude that the trial court erred by not granting Carolco's motions for directed verdict or judgment notwithstanding the verdict for the reasons set out above. Accordingly, I respectfully dissent.

MEINHART LAGIES, PLAINTIFF v. BOBBY MYERS, DEFENDANT

No. COA99-1238

(Filed 20 February 2001)

1. Vendor and Purchaser— lease and option to purchase— exercise of option

The trial court did not err in a bench trial of claims for specific performance and damages arising from a lease and option to purchase a residence by concluding that plaintiff was required to tender the full balance of the purchase price prior to 5 April 1997 to exercise the option. The option must be exercised strictly in accordance with its terms and, while the better practice may be to provide for simultaneous tender of the deeds and a period to negotiate unsettled issues, the courts do not have the authority to rewrite the parties' agreement. Because the nature and terms of the parties' agreement relating to the expiration of the option were ambiguous, the parties' intent was ascertained by examining their actions.

2. Vendor and Purchaser— contract to sell—specific performance—option not exercised

The trial court did not err by not ordering specific performance of a contract to sell real estate resulting from an option where plaintiff did not exercise the option as specified in the agreement.

3. Vendor and Purchaser— lease and option to purchase— improvements—reimbursement

The trial court did not err in a bench trial resulting from a lease and option to purchase a residence by concluding that plaintiff was not entitled to reimbursement for renovations where plaintiff could not recover under unjust enrichment because there was an express agreement concerning improve-

ments and could not recover under the agreement because the court found that defendant never received defendant's approval for the improvements.

Appeal by plaintiff from judgment entered 2 March 1999 by Judge E. Lynn Johnson in Superior Court, Cumberland County. Heard in the Court of Appeals 24 August 2000.

George B. Currin and Robert H. Hale, Jr. for plaintiff-appellant.

The Plyler Law Firm, P.A., by Matthew P. Plyler, and H. Dolph Berry for defendant-appellee.

TIMMONS-GOODSON, Judge.

Meinhart Lagies ("plaintiff") appeals from a judgment denying his claims for breach of contract, specific performance, and unjust enrichment. Having carefully considered the record, briefs, and arguments of counsel, we affirm.

The pertinent factual and procedural background is as follows: Plaintiff and Bobby Myers ("defendant") entered into an "Agreement for Lease Option and Offer to Purchase" ("the agreement"). Under the agreement, plaintiff leased and retained an option to purchase defendant's residence and surrounding property ("the property") located in Fayetteville, North Carolina. The agreement specified the following:

> 2. [Plaintiff] shall pay [defendant] the sum of $20,000.00 for a two (2) year Option to Purchase. After two (2) years, [plaintiff] may extend the Option for one (1) more year with a payment of $10,000.00. Such payments shall be credited toward the balance.
>
> 3. For the first year of the Option, [plaintiff] shall make monthly payments to [defendant] covering [defendant's] current first mortgage (at this time approximately $736.00 a month) plus interest at five (5%) percent on the balance. [Plaintiff] understands the first mortgage to be approximately $98,000.00. The balance would be, after the $20,000.00 payment, approximately $107,000.00.
>
> 4. In the second and third years of the Option, the interest rate on the balance shall be the same as the prevailing Federal

Reserve prime rate. Further, in the second and third years, [plaintiff] shall increase his monthly payments by a minimum of $300.00. He has the option of paying more. All such payments shall go to reduce the balance due.

5. Possession shall be on the day of the $20,000.00 payment, on or about May 12, 1994.

. . . .

10. Any minor cosmetic improvements made by [plaintiff] shall be at his own risk. The cost of other improvements, and all mechanical repairs and changes, shall be refunded to [plaintiff] should he not exercise his Option.

11. [Defendant's] approval shall be required on all repairs, improvements and changes.

12. The Option may be exercised at any time during the three (3) years by payment of the full balance.

. . . .

15. [Defendant] has the right to keep the property listed until date of possession for the sole purpose of soliciting back-up offers in case [plaintiff] has to invoke the contingency clause.

. . . .

17. The option payments are not refundable, except for any money spent by [plaintiff] on major improvements or repairs as outlined above.

On 11 May 1994, plaintiff paid defendant $20,000.00 and took possession of the property. During the first year of the option, plaintiff began extensive improvements to the property, including repairs and renovations to one of the two kitchens in the main residence and a guest house.

A dispute over the repairs and renovations developed between the parties. Defendant testified that in November 1994, he informed plaintiff, through his attorney, James Thorp ("Thorp"), that plaintiff should not begin renovations to the kitchen. In a subsequent letter, Thorp reminded plaintiff that he would be held accountable for any damages arising out of unauthorized improvements to the kitchen. Plaintiff responded, informing Thorp that defendant had, in fact, approved the improvements.

In May and August 1995, plaintiff informed defendant of various improvements to the property and invited him to inspect the improvements at his convenience. In response, Thorp again forewarned plaintiff:

> [Defendant] has not approved any improvements, repairs or changes within the contemplation of Paragraph 11 and in the event of the non-exercise of the option, the cost of such major improvements and repairs will not be refundable to you in the event of non-exercise of the option.

Plaintiff and his wife testified at trial that plaintiff discussed the renovations to the property with defendant on several occasions. Plaintiff further testified that defendant had prior knowledge of the repairs, consented to them, and approved of them. Defendant, however, maintained that he had not approved any repairs or improvements. Defendant further maintained that when he received correspondence from plaintiff concerning the renovations and repairs, he "turned it over—all these letters went to my attorney. My attorney answered him, do not do any repairs."

In addition to the dispute over the repairs and renovations, plaintiff and defendant developed differing interpretations of certain provisions of the agreement. Plaintiff maintained that pursuant to a provision in the agreement stating, "All such payments shall go to reduce the balance due[,]" he was entitled to reduce the balance due on the property's purchase price by his monthly payments on the balance of the first mortgage. Plaintiff testified at trial that defendant did not dispute his interpretation of the agreement for two years. Plaintiff noted that he provided defendant with monthly "mortgage amortization tables," indicating a reduction in the balance of the purchase price by the monthly mortgage payments.

Defendant acknowledged below that he and plaintiff differed in their opinions concerning the reduction in the purchase price. However, he maintained that under the agreement, only the yearly option payments and the $300.00 increase in the monthly payments reduced the property's purchase price. Defendant explained that plaintiff's monthly payment reducing the first mortgage was part of the rent on the property.

In April 1996, Thorp informed plaintiff that "[t]he only monies used for reduction of the principle [are] the monies paid to [defend-

ant] as per your agreement, which is the $300.00 per month." On 11 May 1996, plaintiff paid defendant $10,000.00, extending the option for an additional year.

Plaintiff's attorney, Richard Wiggins ("Wiggins"), informed plaintiff that the option began on the date the agreement was executed, not the date of possession. In a 23 January 1997 letter entitled, "Notice of Intent to Exercise Option," Wiggins advised defendant: "This letter serves as legal notice that [plaintiff] intends to exercise his option to purchase the property before the option expires later this year."

On 4 April 1997, defendant's new attorney, Stuart Clarke ("Clarke"), informed plaintiff that according to defendant's calculations, the balance due on the purchase price of the property was $190,045.58. On that same day, Wiggins informed Clarke that according to plaintiff's records, the "pay-off at this time should be $180,153.21," thereby giving plaintiff credit for the portion of his monthly payments reducing the first mortgage's balance.

Wiggins believed that the option originally terminated on 5 April 1997. Accordingly to both Clarke and Wiggins, the two attorneys discussed extending the option past 5 April 1997. In fact, Wiggins informed Clarke that plaintiff had another monetary commitment expiring on 15 April 1997, and as a result, the attorneys agreed to extend the option until that date. Both Clarke and Wiggins testified that pursuant to their negotiations, the option had been extended until and expired on 15 April 1997.

On 11 April 1997, Wiggins informed Clarke that plaintiff "continu[ed] to be ready to close the transaction under the terms of the option between him and [defendant]" and "rais[ed] no issues, pos[ed] no demands and question[ed] nothing outside the terms of the agreement." On 14 April 1997, Clarke informed Wiggins that although plaintiff "insist[ed] upon getting whatever benefit that was paid on the first mortgage over the period of time[, that] was not contemplated by the parties and that is the reason [defendant] insist[ed] upon the $190,045.58 figure." Clarke testified at trial that on that same day, he prepared two warranty deeds to the property, which were executed by plaintiff but not notarized, and that at some point, he faxed the deeds to Wiggins. Wiggins testified that he received the faxed deeds on 17 April 1997.

Plaintiff maintained that during this period of time, he was preparing to tender what he believed to be the purchase price due on the property. However, plaintiff did not tender the purchase price to defendant by 15 April 1997.

On 23 April 1997, Clarke advised Wiggins that he had "been directed by [his] client to inform [plaintiff] that his failure to exercise his option within the time allowed by the agreement has expired and he no longer ha[d] an interest in the property." Upon inquiry by Wiggins, however, Clarke stated that defendant would accept $190,045.58 within seven days of 29 April 1997 and would deliver deeds to the property upon tender of that amount. Clarke informed Wiggins that defendant made the aforementioned offer without waiving his rights under the agreement and that if plaintiff did not tender the full payment by the specified date, defendant would take possession of the property. At trial, Clarke testified that the 29 April 1997 communication was a new offer and not an extension of the option.

On 1 May 1997, Wiggins communicated a counteroffer to Clarke via telephone. In response, Clarke informed Wiggins of the terms by which defendant was willing to convey the property. On 8 May 1997, Clarke advised Wiggins that defendant directed him to withdraw all offers and that defendant intended to take possession of the property immediately. On 12 May 1997, Clarke again informed Wiggins that defendant was "no longer interested in selling his property to [plaintiff]" and that "[a]ll further negotiations [were] in vain."

Plaintiff filed the present action against defendant, asserting that despite defendant's contentions to the contrary, he had indeed exercised his option to purchase the property and that as a result, a contract for sale was created. Plaintiff sought specific performance of the resulting contract for sale. In the alternative, plaintiff requested damages for breach of contract and "reimbursement" for the cost of repair and improvements to the property, "to prevent [d]efendant's unjust enrichment."

Following a bench trial, the trial court denied relief on all claims. Pertinent to the arguments presented on appeal, the trial court made the following findings of fact:

> 6. Defendant told Plaintiff that he objected to paragraph No. 15; that he was not going to give Plaintiff credit toward the purchase price for the principal reduction paid in his mortgage . . . ; Defendant further told Plaintiff he wanted the right

to approve any repairs, improvements and changes before Plaintiff did the same.

. . . .

21. The payment of the additional $10,000 [in May 1996] extended the option to purchase granted Plaintiff until and including April 5, 1997.

. . . .

23. Defendant informed Plaintiff that the remodeling changes and repairs were without Defendant's consent; that Plaintiff would be held liable; that Plaintiff was further informed by Defendant's attorney on November 9, 1994 that Defendant had not approved any improvements, repairs or changes and again by letter dated August 15, 1995.

. . . .

29. On April 5, 1997[,] Defendant was ready, willing and able to deliver Warranty Deeds conveying the subject property to Plaintiff.

. . . .

35. On April 14, 1997 Defendant's attorney prepared Warranty Deeds for delivery to Plaintiff and faxed copies of the same to Plaintiff's attorney.

. . . .

39. Considering the totality of the negotiations and documentary evidence, the accounting methodology utilized by the Defendant, . . . in determining the balance due on the purchase price[,] is the more reasonable.

Based upon its factual findings, the court concluded the following:

(2) Under the terms of the Agreement of April 5, 1994, Plaintiff's Option to Purchase was to expire April 5, 1997, the same having been extended for an additional year by Plaintiff's payment of $10,000 in 1996.

(3) The parties, by and through their respective counsel, mutually agreed to extend Plaintiff's option period until April 15, 1997.

(4) Plaintiff's option to purchase expired April 15, 1997.

(5) The balance due on the purchase price on April 15, 1997 was . . . $190,045.58.

(6) In order to exercise his option to purchase, it was necessary for Plaintiff to tender or pay the balance of the purchase price due Defendant before the option expired.

(7) The Plaintiff failed to exercise his option to purchase before the same expired on April 15, 1997.

(8) Plaintiff is not entitled to an Order of Specific Performance compelling Defendant to convey the subject property.

(9) Plaintiff failed to accept any new offer of sale by the Defendant made after April 15, 1997 before the new offer or offers were withdrawn by Defendant.

. . . .

(11) The Agreement, in Paragraph [Ten] and Eleven, required Plaintiff to obtain Defendant's approval on all repairs, improvements and changes in order for Plaintiff to be reimbursed for the cost thereof if the option was not exercised;[] that the same is an express contract regarding Plaintiff's entitlement to reimbursement.

(12) Plaintiff has failed to carry his burden of proof by representing [sic] evidence from which the Court could find, by the greater weight thereof, that any repairs, improvements and changes were authorized by Defendant.

(13) Plaintiff is not entitled to recover any sums from Defendant upon his claim of unjust enrichment, there being an express contract between the parties governing the matters for which Plaintiff seeks relief.

Plaintiff appeals the trial court's judgment.

In a bench trial, the trial court is required to "find the facts specifically and state separately its conclusions of law." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (1999). If the court's factual findings are supported by competent evidence, they are conclusive on appeal, even though there is evidence to the contrary. *Newland v. Newland*, 129 N.C. App. 418, 420, 498 S.E.2d 855, 857 (1998). In reviewing the court's factual findings, we "presume[] that the judge disregarded any

incompetent evidence." *In re Huff*, 140 N.C. App. 288, 298, 536 S.E.2d 838, 845 (2000) (citation omitted).

In contrast, "the trial court's conclusions of law are reviewable *de novo*." *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000) (citation omitted). Furthermore, in examining the conclusions of law, we must determine whether they are supported by the court's factual findings. *See In re Oghenekevebe*, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

The questions presented in the appeal *sub judice* are whether the trial court erred in concluding: (I) that to exercise the option, plaintiff was required to tender the full balance on the purchase price of the property prior to 5 April 1997; (II) that plaintiff was not entitled to specific performance or damages for breach of contract; and (III) that plaintiff was not entitled to "reimbursement" for improvements and repairs made to the property. To answer the foregoing questions requires construction of the parties' agreement.

Generally, the same principles of construction applicable to all contracts apply to option contracts. *See Catawba Athletics v. Newton Car Wash*, 53 N.C. App. 708, 711-12, 281 S.E.2d 676, 678-79 (1981). "[T]he ultimate test in construing any written agreement is to ascertain the parties' intentions in light of *all* the relevant circumstances." *Davis v. McRee*, 299 N.C. 498, 502, 263 S.E.2d 604, 606 (1980) (emphasis in original). If the option terms are clear and unambiguous, "it must be enforced as it is written, and the court may not disregard the plainly expressed meaning of its language." *Catawba Athletics*, 53 N.C. App. at 712, 281 S.E.2d at 679 (citation omitted). For the language of the contract reflects the intent of the parties, and we therefore presume that the language means what it purports to mean. *Williamson v. Burlington*, 139 N.C. App. 571, 574, 534 S.E.2d 254, 256 (2000).

Where the language of a contract is ambiguous, courts consider other relevant and material extrinsic evidence to ascertain the parties' intent, including but not limited to the parties' construction of the contract after its execution. *Patterson v. Taylor*, 140 N.C. App. 91, 535 S.E.2d 374 (2000); *Davis*, 299 N.C. at 502, 263 S.E.2d at 607 (citation omitted) ("where the parties have placed a particular interpretation on their contract after executing it, the courts ordinarily will not ignore that construction which the parties themselves have given it prior to the differences between them"). If the court considers extrin-

sic evidence, it must "determine the weight and credibility of that evidence." *Patterson*, 140 N.C. App. at 97, 535 S.E.2d at 378.

A contract provision is ambiguous if its language "is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993). "The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous." *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988) (citation omitted).

Ambiguities in contracts are construed against the drafting party. *Rice v. Wood*, 91 N.C. App. 262, 371 S.E.2d 500 (1988). However, "[o]ptions, 'being unilateral in their inception, are constructed strictly in favor of the maker, because the other party is not bound to perform[], and is under no obligation to buy.' " *Catawba Athletics*, 53 N.C. App. at 712, 281 S.E.2d at 679 (quoting *Winders v. Kenan*, 161 N.C. 628, 633, 77 S.E. 687, 689 (1913)).

I.

[1] By his first assignment of error, plaintiff argues that the option to purchase in the present case could be exercised by simply notifying defendant of his intent to purchase the property. In so arguing, plaintiff contends that the trial court erred in concluding that tender of the purchase price was required to exercise the option. With plaintiff's argument, we cannot agree.

An option contract is not a contract to sell, but "a continuing offer to sell [] land which is irrevocable until the expiration of the time limit of the option." *Catawba Athletics*, 53 N.C. App. at 714, 281 S.E.2d at 680. *See generally* 1 Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina*, § 9-1 (5th ed. 1999). In the context of option contracts, "time is of the essence[,] and acceptance and tender *must* [therefore] be made within the time required by the option." *Rice*, 91 N.C. App. at 263, 371 S.E.2d at 502 (emphasis added) (citation omitted). Furthermore, the option must be exercised strictly "in accord with all of the terms specified in the option." *Catawba Athletics*, 53 N.C. App. at 712, 281 S.E.2d at 679 (citations omitted); *see also Theobald v. Chumley*, 408 N.E.2d 603, 605 (Ind. Ct. App. 1980) ("since the optionee is the sole party capable of consummating the option, courts require strict adherence to the option's terms"). The plaintiff has the burden of

demonstrating that he exercised the option in accordance with the option's terms. *Parks v. Jacobs*, 259 N.C. 129, 129 S.E.2d 884 (1963).

The agreement in the present case plainly and unambiguously stated, "The Option may be exercised at any time during the three (3) years by payment of the full balance." Relying upon *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976), plaintiff asserts that despite the terms specified by the agreement, notice was sufficient to exercise the option in the present case.

In *Kidd*, our Supreme Court examined an option which specified that the optionors would deliver to optionees "*upon demand by* [them] a good and sufficient deed for the . . . premises *upon payment.*" *Kidd*, 289 N.C. at 347, 222 S.E.2d at 396 (emphasis added). The option further specified, "In the event of the exercise of this option . . . the said purchasers *may have a reasonable additional time for title examination.*" *Id.* at 362, 222 S.E.2d at 405 (alteration in original). Because the option provided that the deed was to be delivered "upon demand" by the optionee and further allowed him additional time to examine the title, our Supreme Court found that notice was sufficient to exercise the option. *Id.* In so concluding, the court announced the following:

> Whether tender of the purchase price is necessary to exercise an option depends upon the agreement of the parties as expressed in the particular instrument. The acceptance *must* be in accordance with the terms of the contract. Where the option requires the payment of the purchase money or a part thereof to accompany the optionee's election to exercise the option, tender of the payment specified is a condition precedent to a formation of a contract to sell unless it is waived by the optionor. On the other hand, the option may merely require that notice be given of the exercise thereof during the term of the option.

Id. at 361, 222 S.E.2d at 405 (emphasis added) (citations omitted).

Plaintiff's reliance on *Kidd* to support his argument is misplaced. First, the option in *Kidd* is distinguishable from the option in the case *sub judice*. The *Kidd* option specified that "upon payment," the optionors were to deliver a deed to the property. The option examined in *Kidd* also required that the property deed was to be delivered "upon demand" and further allowed the optionee additional time to examine the title. In contrast, the option agreement in the present

case stated only that the option may be exercised by payment of the full balance.

Second, if anything, the *Kidd* decision compels the conclusion that the only acceptable method for exercising the option in the present case was by payment of the full balance. *Kidd* reaffirmed the well-established principle stated *supra*—that options arising under the laws of this State *must* be exercised strictly as specified by the option agreement. *See generally* Thomas W. Christopher, *Options to Purchase Real Property in North Carolina*, 44 N.C. L. Rev. 63, 83 (1965) ("The importance of specifying the means of acceptance in plain language is evident in North Carolina."). Given our jurisprudence concerning options to purchase and in accordance with *Kidd*, we conclude that under the unambiguous terms of the agreement, the only method for exercising the option in the present case was by payment of the full balance of the purchase price.

In addition to his reliance on *Kidd*, plaintiff argues that notice, not tender of the purchase price, was required to exercise the option because the agreement contained no provision for the simultaneous tender of the deeds to the property. Plaintiff further argues that because several issues remained unsettled at the time the option was to expire, the parties clearly intended that the option could be exercised by giving notice, thus allowing time to resolve those issues.

We find no authority supporting plaintiff's arguments. Certainly, the better practice may have been to provide for simultaneous tender of the deeds and a period to negotiate the allegedly unsettled issues prior to the time that the purchase price was to be tendered. However, neither the trial court nor this Court has the discretion to rewrite the parties' agreement. *See cf. Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 300, 524 S.E.2d 558, 563 (2000) (citation omitted) (" 'courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein' "). As such, the trial court correctly concluded that the only method for exercising the option was the method specified in the agreement—payment of the balance.

In the alternative, plaintiff contends that even if he was required to tender the full balance of the purchase price to exercise the option, he was not given the opportunity to do so because defendant withdrew or revoked the option prior to its expiration. In so arguing, plaintiff asserts that the trial court erred in concluding that the option

originally expired on 5 April 1997 and that it was extended until 15 April 1997. Plaintiff further asserts that the court erred in finding that "payment of the additional $10,000 extended the option to purchase granted Plaintiff until and including April 5th, 1997."

Plaintiff argues that the option expired on 11 May 1997, exactly three years after he took possession of the property. Plaintiff contends that this conclusion is supported by the agreement's terms which specify that he was to take possession of the property on or about 12 May 1994 and that defendant retained the right to list the property until that date. With plaintiff's argument, we cannot agree.

The document scrutinized *sub judice* did not indicate the exact date upon which the option was to begin or expire. Furthermore, it is admittedly difficult to discern whether the terms of the agreement refer to or implicate the option or the lease. The parties executed the agreement on 5 April 1994. However, it specified that plaintiff was not to take possession of the property until or about 12 May 1994 and that defendant was entitled to list the property until that date.

We find the nature and terms of the parties' agreement relating to the expiration of the option, at best, ambiguous. We therefore examine the parties' actions subsequent to the execution of the agreement to ascertain their intent concerning the option's expiration.

Plaintiff's attorney, Wiggins, and defendant's attorney, Clarke, conducted business as if the option expired on 5 April 1997. Wiggins began preparation to exercise the option in January 1997. Based on the assumption that the option expired on 5 April 1997, plaintiff's own attorney requested an extension of the option, thus allowing plaintiff time to settle another financial obligation. Pursuant to Wiggins' request, the attorneys extended the offer until 15 April 1997. If the parties indeed intended that the option expire 11 May 1997, it would have been unnecessary for Wiggins to request an extension. Furthermore, after 15 April 1997, communications between the attorneys were referred to as "offers," not continuing negotiations. We also find it significant that in his trial brief below plaintiff himself stated, "It is undisputed between the parties that, at the earliest, the option expired on April 15, 1997," and did not argue that the option expired on 11 May 1997.

The aforementioned review of the parties' conduct during the option period reveals their intention that the option expire 5 April

1997. Accordingly, the trial court did not err in concluding that the option was to expire on 5 April 1997 and was thereafter extended until 15 April 1997. Furthermore, we find no evidence in the record indicating that defendant withdrew or revoked the option prior to its 15 April 1997 expiration.

Plaintiff argues that even if we conclude the option expired on 15 April 1997, he was excused from tendering payment of the purchase price in exercising the option because defendant refused to accept a reduced purchase price, thus indicating his refusal to honor their agreement. In so arguing, plaintiff contends that the trial court erroneously found: "Considering the totality of the negotiations and documentary evidence, the accounting methodology utilized by [defendant], in determining the balance due on the purchase price[,] is the more reasonable." We disagree.

It is well established that notice from the optionor of his refusal to honor the terms of the option renders tender of payment by the optionee unnecessary. *Oil Co. v. Furlonge*, 257 N.C. 388, 393, 126 S.E.2d 167, 171 (1962). However, defendant *sub judice* never indicated his refusal to honor the terms of the agreement. In fact, Wiggins testified, "[T]hroughout this transaction [defendant] never refused to convey title based upon his interpretation of the money that he was due to receive upon the closing of the transaction."

Furthermore, contrary to plaintiff's contentions, our review of the agreement reveals that the provision specifying, "All such payments shall go to reduce the balance due" clearly refers to the $300.00 plus increase in the monthly payments but not plaintiff's monthly payments reducing defendant's first mortgage. The aforementioned provision immediately followed the term providing for the $300.00 increase in the monthly payments. Moreover, the provision was contained solely within paragraph four and made no reference to the paragraph providing for the payments that reduced the first mortgage. Based upon our examination of the agreement, we conclude that defendant sought to enforce the terms of the agreement as written.

The parties' negotiations prior to the formation of the final agreement also support our conclusion. Defendant testified that he and plaintiff discussed the possibility of a reduction in the purchase price by the amount of the mortgage payments. Plaintiff presented defendant with a draft agreement, which included the following provision: "Reduction in [the] principal of first mortgage as well as balance shall

be credited to buyer when option is exercised." Defendant testified that during the negotiation period and upon advice from his attorney, the term providing for a credit due to plaintiff's payment on the mortgage was removed. Plaintiff testified that defendant presented him with a copy of the final agreement and that he signed it. Plaintiff further testified that "like an utter idiot [he] did not read on to notice that the principal reduction paragraph . . . was deleted[.]" However, plaintiff's failure to review the document did not excuse his obligations under the parties' agreement. *See Isley v. Brown*, 253 N.C. 791, 794, 117 S.E.2d 821, 824 (1961) (quoting *Upton v. Tribilcock*, 91 U.S. 45, 23 L. Ed. 203 (1875)) (" 'contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission' ").

Based upon the aforementioned analysis, we conclude that plaintiff did not exercise the option as specified by the agreement. We further conclude that defendant never expressed a refusal to honor the agreement and therefore, plaintiff was not excused from tendering the purchase in order to exercise the option. Plaintiff's first assignment of error is consequently overruled.

II.

[2] By his next assignment of error, plaintiff argues that the court erred in failing to order specific performance of the resulting contract for sale. This assignment of error is without merit. Because plaintiff did not exercise the option as specified in the agreement, it did not result in a contract for sale, and plaintiff is therefore not entitled to specific performance. *See Kidd*, 289 N.C. at 352, 222 S.E.2d at 399 (citations omitted) (an option becomes a contract for sale only "upon acceptance by the optionee in accordance with its term[,]" and only then is it "specifically enforceable as a contract to convey if it is otherwise a proper subject for equitable relief").

In the alternative, plaintiff assigns as error the court's failure to order damages for breach of the option contract. Because plaintiff presents no argument on appeal in support of this assignment of error, it is deemed abandoned. *See* N.C.R. App. P. 28(b)(5) (2001).

III.

[3] Finally, plaintiff contends that under the agreement, he was entitled to reimbursement for repairs, improvements, and replacements to the property. As such, plaintiff argues that the court erred in finding that "[d]efendant informed [p]laintiff that the remodeling changes

and repairs were without [d]efendant's consent" and in concluding that "[p]laintiff has failed to carry his burden of proof by representing [sic] evidence from which the Court could find, by the greater weight thereof, that any repairs, improvements and changes were authorized by [d]efendant." In so arguing, plaintiff points to a myriad of evidence he presented below that conflicts the court's factual findings concerning the repairs and improvements to the property.

As to any claim by plaintiff that defendant was unjustly enriched by improvements or renovations to the property, plaintiff cannot recover under a theory of unjust enrichment because an express agreement concerning the improvements existed between the parties. *See Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 415 (1998) ("Only in the absence of an express agreement of the parties will courts impose a quasi contract or a contract implied in law in order to prevent an unjust enrichment.").

Furthermore, plaintiff was not entitled to reimbursement pursuant to the terms of the express agreement because according to the trial court's factual findings, plaintiff never received defendant's approval. Defendant testified that he, through his attorney, informed plaintiff that plaintiff was not to begin any improvements and that defendant had not approved any improvements. Based upon this and other competent evidence, the trial court found that defendant had not approved any repairs or renovations. The court's findings are conclusive on appeal, despite what evidence plaintiff presented to the contrary. *See Newland*, 129 N.C. App. at 420, 498 S.E.2d at 857. Based upon its aforementioned finding, the court concluded that plaintiff failed to establish that defendant approved the renovations and was therefore not entitled to reimbursement for them. We find that the court's conclusion was fully supported by its factual finding. Accordingly, this assignment of error is overruled.

Based on the foregoing analysis, we affirm the judgment of the trial court.

Affirmed.

Judges WYNN and McGEE concur.

HEATHER GOODAN SMITH, PLAINTIFF v. WINN-DIXIE CHARLOTTE, INC., NEIL CHHABIL BHAYANI, KAREN J. BHAYANI, NICLAS TIM SCHEWZYK, BENJAMIN A. WILLIAMS, ROBERT BENAJMIN CURRIE AND JOHN DOE, UNKNOWN EMPLOYEE OF WINN-DIXIE CHARLOTTE, INC., DEFENDANTS

No. COA00-284

(Filed 20 February 2001)

1. Alcoholic Beverages— impaired driver—seller of alcohol—common law negligence—purchaser not noticeably intoxicated

The trial court did not err by granting summary judgment for defendant Winn-Dixie where plaintiff was injured in a car accident with defendant Bhayani after Bhayani consumed alcoholic beverages purchased from Winn-Dixie by defendant Schewzyk. Evidence that Schewzyk entered the Winn-Dixie was sufficient to show that Winn-Dixie knew or should have known that he was going to drive a motor vehicle because a reasonable person could find that someone traveling to and from a grocery store does so by motor vehicle (but this does not create a per se rule of liability); however, there was no evidence that Schewzyk consumed alcoholic beverages prior to making a purchase at Winn-Dixie or that he exhibited any signs of intoxication at the time of the sale.

2. Alcoholic Beverages— impaired driver—furnisher of alcohol—common law negligence—driver not noticeably intoxicated

The trial court erred by not granting summary judgment for defendant Schewzyk where plaintiff was injured in a car accident with defendant Bhayani after Bhayani consumed alcoholic beverages purchased from Winn-Dixie by defendant Schewzyk. There was evidence that Bhayani drove his vehicle to the Winn-Dixie parking lot and that Schewzyk furnished Bhayani with alcoholic beverages in the parking lot, but there was no evidence that Bhayani was noticeably intoxicated at the time Schewzyk furnished him with the beverages.

3. Alcoholic Beverages— impaired driver—companions furnishing alcohol—common law negligence—insufficient evidence

The trial court did not err by granting summary judgment for defendant Williams and erred by denying summary judgment for defendant Currie in an action arising from plaintiff being struck by Bhayani's vehicle after he had been drinking with Williams and

Currie. Plaintiff cannot maintain a common law negligence claim against Williams and Currie for furnishing alcoholic beverages because there was no evidence that they furnished Bhayani with alcoholic beverages at any time on the day of the accident.

4. Motor Vehicles— impaired driving—aiding and abetting—intent—insufficient evidence

Summary judgment was properly granted for defendant Williams and should have been granted for defendants Schewzyk and Currie in an action arising from plaintiff being struck by Bhayani's vehicle after he had been drinking with Schewzyk, Williams, and Currie. Although plaintiff contended that Schewzyk, Williams, and Currie aided and abetted Bhayani in driving while impaired, there was no evidence of intent to aid Bhayani in driving while impaired and no evidence that any such intent was communicated to Bhayani. Consuming alcoholic beverages with Bhayani and not stopping him from driving does not render them guilty as principals.

5. Motor Vehicles— impaired driving—no duty to prevent

Summary judgment was properly granted for defendant Williams and should have been granted for defendant Currie in an action arising from plaintiff being struck by Bhayani's vehicle after he had been drinking with Schewzyk, Williams, and Currie where plaintiff contended that Williams and Currie knew that Bhayani was intoxicated and failed to prevent him from driving. This is not a duty which the law of North Carolina places upon a person.

Judge TYSON concurring in the result.

Appeals by plaintiff, defendant Niclas Tim Schewzyk, and defendant Robert Benjamin Currie from judgment filed 18 November 1999 by Judge Charles C. Lamm, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 January 2001.

Erdman, Hockfield and Burt, L.L.P., by David W. Erdman and Ronald A. Skufca, for plaintiff-appellant.

The Robinson Law Firm, PLLC, by William C. Robinson, for defendant-appellant Schewzyk.

Templeton & Raynor, P.A., by Kenneth R. Raynor, for defendant-appellant Currie.

Guthrie, Davis, Henderson & Staton, P.L.L.C., by Kimberly R. Matthews, for defendant-appellee Winn-Dixie Charlotte, Inc.

Morris, York, Williams, Surles & Barringer, L.L.P., by John P. Barringer and Jennifer J. Cross, for defendant-appellee Williams.

GREENE, Judge.

Heather Goodan Smith (Plaintiff) appeals from an order filed 18 November 1999, granting summary judgment in favor of Winn-Dixie Charlotte, Inc. (Winn-Dixie) and Benjamin A. Williams (Williams). Additionally, Niclas Tim Schewzyk (Schewzyk) and Robert Benjamin Currie (Currie) appeal from the 18 November 1999 order, in which the trial court denied their motions for summary judgment.[1]

In a complaint filed 25 November 1998, Plaintiff alleged that on 11 October 1996, seventeen-year-old Neil Chhabil Bhayani (Bhayani), sixteen-year-old Williams, seventeen-year-old Schewzyk, and seventeen-year-old Currie met in the parking lot of a Winn-Dixie store in Weddington (the Winn-Dixie). While in the parking lot, the parties "exchanged money and placed orders for the purchase of alcoholic beverages." Schewzyk then entered the Winn-Dixie, purchased at least two six-packs of alcoholic beverages, and gave some of the alcoholic beverages to Bhayani, Williams, and Currie. Bhayani consumed alcoholic beverages in the presence of Schewzyk, Williams, and Currie. Bhayani subsequently left the location where the parties were drinking, and drove his vehicle in the direction of Providence Road. On Providence Road, Bhayani was involved in a car accident when his vehicle struck a vehicle driven by Plaintiff. Plaintiff was injured in the accident. At the time of the accident, Bhayani had a blood alcohol level of 0.118. Subsequent to the accident, Bhayani was convicted of driving while impaired under N.C. Gen. Stat. § 20-138.1.

Plaintiff's complaint alleged claims against Winn-Dixie, in pertinent part, for common law negligence and negligence *per se* based on

1. Plaintiff's complaint also alleged claims against Neil Chhabil Bhayani and his mother, Karen J. Bhayani; however, these claims are not before this Court.

We acknowledge the appeals in this case are interlocutory in nature because the trial court's order did not fully dispose of all of Plaintiff's claims. *See DeHaven v. Hoskins*, 95 N.C. App. 397, 399, 382 S.E.2d 856, 858, *disc. review denied*, 325 N.C. 705, 388 S.E.2d 452 (1989). Without deciding whether these appeals affect a substantial right and are therefore properly before this Court, *see id.*, we treat the appeals as petitions for writ of certiorari and address the merits of the appeals, *see Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 555, 353 S.E.2d 425, 427 (1987).

Winn-Dixie's alleged violation of N.C. Gen. Stat. § 18B-302 (sale of alcohol to underage persons).[2] Plaintiff's complaint also alleged claims against Williams, Schewzyk, and Currie for common law negligence, negligence *per se* based on the parties' alleged conspiracy to violate N.C. Gen. Stat. § 18B-302 (purchase of alcohol by underage persons), and negligence *per se* based on the parties' alleged aiding and abetting of Bhayani in his violation of section 20-138.1.

In a deposition taken 13 February 1998, Schewzyk testified that at the time of the accident he had a false identification. Schewzyk obtained the identification for the purpose of purchasing alcoholic beverages. On the date of the accident, Bhayani gave Schewzyk a ride home from school at approximately 3:00 p.m. Later that evening, Schewzyk met Bhayani either at Bhayani's house or at the Winn-Dixie. Sometime between 6:30 p.m. and 7:00 p.m., the parties met Williams and Currie in the Winn-Dixie parking lot. Schewzyk then went inside the Winn-Dixie to purchase beer for Bhayani, who gave him money to pay for the beer. Schewzyk also purchased beer for either Williams or Currie. Schewzyk purchased a total of two six-packs of beer and he gave one of the six-packs to Bhayani. Schewzyk did not recall whether the cashier in the Winn-Dixie asked him for identification when he purchased the beer. When asked during his deposition whether Bhayani had consumed any alcoholic beverages prior to meeting Schewzyk in the parking lot, Schewzyk responded, "I know for sure that he hadn't."

After Schewzyk returned to the Winn-Dixie parking lot with the beer, the parties got into two vehicles and drove to a dirt road. Schewzyk saw Bhayani "drink one or maybe two [beers]" in "a short period of time." The parties originally planned to leave one of the two vehicles at a BP gas station near the dirt road and ride together in one vehicle to a high school football game, with either Currie or Williams acting as a "designated driver." When the parties went to the BP gas station, however, Bhayani decided to ride by himself in his own vehicle. Schewzyk stated that when Bhayani left the BP gas station, "[h]e wasn't acting any different[ly] than he usually does."

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2. Plaintiff also brought a claim against Winn-Dixie pursuant to N.C. Gen. Stat. § 18B-121 (the North Carolina Dram Shop Act). The trial court dismissed this claim on the ground it was not filed within the one-year statute of limitations, *see* N.C.G.S. § 18B-126 (1999), and Plaintiff does not appeal from this dismissal. Additionally, Plaintiff's complaint alleged a claim against "JOHN DOE[,] unknown employee of [Winn-Dixie]." Plaintiff, however, subsequently dismissed her claim against "JOHN DOE," and Plaintiff does not appeal from the order of dismissal.

On 26 November 1997, Bhayani gave deposition testimony regarding the 11 October 1996 accident. Bhayani testified that at approximately 3:00 p.m. on the day of the accident, he met several acquaintances, including Schewzyk, at the Winn-Dixie after school. Bhayani and several others then gave Schewzyk money and Schewzyk went inside the Winn-Dixie and purchased alcoholic beverages. Schewzyk purchased a six-pack of beer for Bhayani. Bhayani placed the beer in his vehicle, and went to the YMCA to work out. Later that evening, at approximately 6:00 p.m., Bhayani again met up with Schewzyk and several others at the Winn-Dixie parking lot. The parties then drove in separate vehicles to a dirt road, where Bhayani drank three twelve-ounce beers from the six-pack. Bhayani drank the beer approximately thirty minutes prior to the accident. He testified that, other than this beer, he had not consumed any alcoholic beverages in the 24-hour period preceding the accident. After Bhayani finished drinking the beer, he left the dirt road alone in his vehicle. He intended to meet up with his friends later that evening.

In a deposition taken 30 September 1999, Williams testified that on 11 October 1996, he left school with Currie and went to the Winn-Dixie to meet Schewzyk and Bhayani. The parties then separated and Williams and Currie went to the homes of several friends. William and Currie met Schewzyk and Bhayani back at the Winn-Dixie at approximately 6:00 p.m. At the Winn-Dixie, Williams gave Schewzyk money and Schewzyk went inside the Winn-Dixie and purchased a twelve-pack and six-pack of beer. Prior to the purchase, Williams did not notice "any alcohol on [Schewzyk's] breath," Schewzyk was walking and talking "fine," and his "eyes looked fine." After Schewzyk purchased the beer, the parties drove in the vehicles of Bhayani and Currie to a dirt road located across the street from the Winn-Dixie. Williams drank six beers while at the dirt road and he was "pretty sure" Bhayani also drank six beers. Williams testified he did not believe Bhayani consumed any alcoholic beverages prior to the arrival of the parties at the dirt road on the day of the accident because Bhayani appeared "[s]ober" at 6:00 p.m. when the parties met in the Winn-Dixie parking lot.

In a deposition taken on 30 September 1999, Currie testified that he began working as a bagger at the Winn-Dixie in February 1996 and he was employed by the Winn-Dixie on the date of the accident. Currie stated that on the afternoon of 11 October 1996, he met Williams, Bhayani, and Schewzyk in the Winn-Dixie parking lot. In the parking lot, Currie saw Williams and Bhayani give Schewzyk money

to purchase beer and Schewzyk and Bhayani entered the Winn-Dixie. At the time Schewzyk and Bhayani entered the Winn-Dixie, neither of them appeared to have been drinking alcoholic beverages. Schewzyk and Bhayani returned to the parking lot a few minutes later with two six-packs of beer and they put the beer in the trunk of Bhayani's vehicle. Currie then went home, got dressed for work, and returned to the Winn-Dixie to work for "two or three hours." After he finished working, Currie met up with Bhayani, Williams, and Schewzyk on a gravel road located approximately one mile from the Winn-Dixie. Currie drove his vehicle to the gravel road and Williams was riding with Currie. Bhayani and Schewzyk arrived at the gravel road in Bhayani's vehicle, and the parties "hung out" on the gravel road "for no longer than an hour." Currie observed Bhayani drink "[n]o more than two or three beers" and Bhayani "did not appear to be drunk." Williams and Currie then left in Currie's vehicle to go to the football game, and Bhayani drove Schewzyk to Schewzyk's vehicle, which was parked somewhere near the gravel road.

In a judgment filed 18 November 1999, the trial court granted summary judgment in favor of Winn-Dixie on Plaintiff's claims against it for negligence and negligence *per se* on the ground there was "no genuine issue as to any material fact." The trial court also granted summary judgment in favor of Williams on Plaintiff's claims against him on the ground there was "no genuine issue as to any material fact." Finally, in its 18 November 1999 judgment, the trial court denied Schewzyk's and Currie's motions for summary judgment.

The issues are whether: (I) there is substantial evidence (A) Winn-Dixie breached a duty owed to Plaintiff when it sold alcoholic beverages to Schewzyk, (B) Schewzyk breached a duty owed to Plaintiff when he furnished Bhayani with alcoholic beverages, and (C) Williams and Currie breached a duty owed to Plaintiff by furnishing Bhayani with alcoholic beverages; (II) there is substantial evidence Schewzyk, Williams and/or Currie aided and abetted Bhayani in committing the offense of driving while impaired under N.C. Gen. Stat. § 20-138.1; and (III) a duty exists in North Carolina to prevent another from driving while impaired.

I

A plaintiff may maintain a common law negligence action against a defendant who furnished alcoholic beverages to a third-party pro-

vided the plaintiff presents substantial evidence[3] "to satisfy all elements of a common law negligence suit, that is, duty, breach of duty, proximate cause, and damages."[4] *Estate of Mullis v. Monroe Oil Co.*, 349 N.C. 196, 202, 505 S.E.2d 131, 135 (1998). Generally, a defendant has a duty "to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions." *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992). A defendant who furnishes alcoholic beverages to third-parties breaches this duty of reasonable care, owed to people who travel on the public highways, when it furnishes alcoholic beverages "to a noticeably intoxicated person who is going to drive [a motor vehicle]." *Mullis*, 349 N.C. at 201-02, 505 S.E.2d at 135. Thus, the test for whether a defendant has, by its furnishing of alcoholic beverages, breached a duty to individuals traveling on the public highways consists of two parts. In order to prevail on the element of duty, the plaintiff must present substantial evidence the defendant: (1) furnished alcoholic beverages to someone the defendant knew or should have known was "noticeably intoxicated," and (2) the defendant knew or should have known this "noticeably intoxicated" person was going to drive a motor vehicle. Evidence the defendant knew or should have known a person was "noticeably intoxicated" might include, but is not limited to, such outward signs of intoxication as slurred speech, lack of control over body motions, and an odor of alcohol. *Id.* at 204, 505 S.E.2d at 136.

A

[1] Plaintiff argues the trial court erred by granting summary judgment in favor of Winn-Dixie because the pleadings, depositions, and affidavits raise a genuine issue of material fact regarding whether

3. "Summary judgment is proper when there is no genuine issue as to any material fact." *Johnson v. Trustees of Durham Technical Community College*, — N.C. App. —, —, 535 S.E.2d 357, 361, *appeal dismissed and disc. review denied*, — N.C. —, — S.E.2d —, 2000 WL 33115321 (Dec. 20, 2000) (No. 474P00); N.C.G.S. § 1A-1, Rule 56 (1999). "An issue is genuine where it is supported by substantial evidence." *Johnson*, — N.C. App. at —, 535 S.E.2d at 361.

4. A common law negligence claim based on the furnishing of alcoholic beverages to a third-party may be brought against a defendant regardless of the capacity in which the defendant furnished the alcoholic beverages. Such causes of actions are not limited to defendants who furnished alcoholic beverages in their capacities as social hosts or commercial vendors. *See Mullis*, 349 N.C. at 202, 505 S.E.2d at 135 (claims against commercial vendors and social hosts do not create a new cause of action, "but merely allow 'established negligence principles' to be applied to the facts of plaintiff's case").

Winn-Dixie breached a duty to Plaintiff when it sold alcoholic beverages to Schewzyk.[5] We disagree.

In this case, the record contains evidence Schewzyk entered the Winn-Dixie and purchased alcoholic beverages. This evidence is sufficient to show that Winn-Dixie knew or should have known that Schewzyk was going to drive a motor vehicle, as a reasonable person could find that someone who travels to and from a grocery store does so by driving a motor vehicle.[6] Plaintiff did not, however, present any evidence Schewzyk was "noticeably intoxicated" at the time he purchased the alcoholic beverages from Winn-Dixie. There is no evidence in the record that Schewzyk consumed alcoholic beverages prior to making a purchase at Winn-Dixie, and the record contains no evidence Schewzyk exhibited any signs of intoxication at the time of the sale. Rather, the only evidence in the record regarding whether Schewzyk was "noticeably intoxicated" at the time of the sale is the testimony of Williams and Currie that Schewzyk did not exhibit signs of intoxication at the time of the sale. Plaintiff argues in her brief to this Court that a jury could infer, based on evidence Schewzyk made two purchases of alcoholic beverages from Winn-Dixie within an approximately four-hour period on the day of the accident, that Schewzyk was "noticeably intoxicated" at the time of the second purchase. We disagree. The sole fact that Schewzyk entered the Winn-Dixie and purchased alcoholic beverages twice on the same afternoon does not give rise to an inference Schewzyk was "noticeably

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5. Plaintiff also argues in her brief to this Court that because the sale of alcohol to Schewzyk was in violation of N.C. Gen. Stat. § 18B-302(a) (sale of alcohol to anyone below 21 years of age), the sale of alcohol was negligence *per se*. As the North Carolina Supreme Court has held a plaintiff may not maintain a negligence *per se* action based on a violation of section 18B-302, *Mullis*, 349 N.C. at 200, 505 S.E.2d at 134, Plaintiff's argument is overruled.

6. We note the concurring opinion would hold a reasonable person could not find based on the facts of this case that Winn-Dixie knew or should have known Schewzyk was going to drive a motor vehicle. We disagree. The concurring opinion would apparently impose a standard that required some additional evidence the party making the purchase was going to drive a motor vehicle after he left the grocery store. Under such a standard, a commercial vendor would not be on notice a purchaser was going to drive a motor vehicle unless the commercial vendor saw the purchaser drive into the commercial establishment in a motor vehicle. Thus, in our opinion, this standard imposes an unreasonable burden on a plaintiff. We emphasize the standard we impose does not create a *per se* rule of liability; rather, we hold the evidence is merely sufficient to create a question of fact for the jury and to, therefore, withstand a motion for summary judgment or directed verdict. The jury, upon hearing all of the evidence, is free to reject a finding that the commercial vendor knew or should have known the purchaser was going to drive a motor vehicle.

intoxicated" at the time of the second purchase.[7] *See Mullis*, 349 N.C. at 203-04, 505 S.E.2d at 136 (evidence person purchased alcoholic beverages from commercial vendor twice on the same evening was not substantial evidence person was "noticeably intoxicated" at time of second purchase). Accordingly, because the record does not contain substantial evidence Schewzyk was "noticeably intoxicated" at the time he purchased alcoholic beverages from Winn-Dixie, the trial court properly granted summary judgment in favor of Winn-Dixie.[8]

B

[2] Schewzyk argues the pleadings, affidavits, and depositions do not raise a genuine issue of material fact regarding whether Schewzyk breached a duty to Plaintiff when he furnished alcoholic beverages to Bhayani.[9] We agree.

In this case, the record contains evidence Bhayani drove his vehicle to the Winn-Dixie parking lot and Schewzyk furnished Bhayani

7. Plaintiff argues in her brief to this Court that Schewzyk's status as a "minor" is some evidence Winn-Dixie breached a duty to Plaintiff by furnishing alcoholic beverages to Schewzyk. Schewzyk's status as a "minor," however, has no relation to the issue of whether Schewzyk was "noticeably intoxicated" at the time of the sale. *See Mullis*, 349 N.C. at 204, 505 S.E.2d at 136 (plaintiff failed to establish breach of duty "based on a forecast of evidence showing only that defendants sold alcohol to an individual who was later found to be an underage person"). We note that the sale of alcoholic beverages to an "underage person" may give rise to a cause of action under section 18B-121 (North Carolina Dram Shop Act).

8. We note that assuming the evidence in the record did raise a genuine issue of material fact regarding whether Schewzyk was "noticeably intoxicated" at the time of the purchase, an issue would remain regarding whether Winn-Dixie's negligent sale of alcoholic beverages to Schewzyk, who subsequently furnished the alcoholic beverages to Bhayani, proximately caused Plaintiff's injuries. "Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injures, and without which the injuries would not have occurred[.]" *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). Whether a plaintiff has provided substantial evidence a commercial vendor's negligent sale of alcoholic beverages proximately caused her injuries when those alcoholic beverages were furnished to a third-party subsequent to the sale and the third-party caused the motor vehicle accident that injured the plaintiff, may be a question of fact for the jury. *See Freeman v. Finney and Zwigard v. Mobil Oil Corp.*, 65 N.C. App. 526, 529, 309 S.E.2d 531, 534 (1983), *disc. review denied*, 310 N.C. 744, 315 S.E.2d 702 (1984).

9. Plaintiff argues in her brief to this Court that Schewzyk's participation in a conspiracy to violate N.C. Gen. Stat. § 18B-302 (purchase of alcoholic beverages by underage person) was negligence *per se*. As the North Carolina Supreme Court has held a violation of section 18B-302 does not constitute negligence *per se*, *Mullis*, 349 N.C. at 200, 505 S.E.2d at 134, any violation or conspiracy by Schewzyk to violate section 18B-302 does not constitute negligence *per se*. Accordingly, Plaintiff's negligence *per se* claim is overruled.

with alcoholic beverages in the parking lot. Based on this evidence, a jury could find Schewzyk knew or should have known Bhayani was going to drive. The record does not contain any evidence, however, that Bhayani was "noticeably intoxicated" at the time Schewzyk furnished him with the alcoholic beverages. Rather, the only evidence in the record regarding whether Bhayani was "noticeably intoxicated" is testimony from Schewzyk that he knew "for sure" Bhayani had not consumed any alcoholic beverages prior to the time the parties met in the parking lot; Bhayani's testimony he had not consumed any alcoholic beverages prior to the time Schewzyk purchased the beer; and the testimony of Currie and Williams that Bhayani did not appear intoxicated at the time Schewzyk purchased the beer. Accordingly, the pleadings, depositions, and affidavits do not contain substantial evidence Schewzyk breached a duty to Plaintiff by furnishing alcoholic beverages to Bhayani.

C

[3] Plaintiff argues the pleadings, affidavits, and depositions raise a genuine issue of material fact regarding whether Williams and Currie breached a duty to Plaintiff by furnishing him with alcoholic beverages.[10] We disagree.

In this case, there is no evidence in the record Williams or Currie furnished Bhayani with alcoholic beverages at any time on the day of the accident. Plaintiff, therefore, cannot maintain a common law negligence claim against Williams or Currie based on the negligent furnishing of alcoholic beverages.

II

[4] Plaintiff argues Schewzyk, Williams and/or Currie "aided and abetted Bhayani in driving while impaired" under N.C. Gen. Stat. § 20-138.1. Plaintiff contends their actions, therefore, constitute negligence *per se*.

The elements of impaired driving under section 20-138.1 are:

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10. Plaintiff also alleged in her complaint that participation by Williams and Currie in a conspiracy to violate N.C. Gen. Stat. § 18B-302 (purchase of alcohol by underage persons) was negligence *per se*. As the North Carolina Supreme Court has held a violation of section 18B-302 does not constitute negligence *per se*, *Mullis*, 349 N.C. at 200, 505 S.E.2d at 134, any conspiracy by Williams and Currie to violate section 18B-302 does not constitute negligence *per se*. Accordingly, Plaintiff's negligence *per se* claim is overruled.

1. Driving

2. A vehicle

3. On a highway, street, or public vehicular area:

(a) While under the influence of an impairing substance; or

(b) After consuming a sufficient quantity of alcohol that the person has an alcohol concentration of 0.08 or more at any relevant time after driving.

State v. McAllister, 138 N.C. App. 252, 256, 530 S.E.2d at 859, 862, *appeal dismissed*, 352 N.C. 681, — S.E.2d — (2000). A party who aids and abets another in committing a violation of section 20-138.1 is guilty as a principal. *See State v. Nall*, 239 N.C. 60, 65, 79 S.E.2d 354, 357-58 (1953). A party aids and abets another when he is "present, actually or constructively, with the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and . . . such intent was communicated to the actual perpetrators." *State v. Sanders*, 288 N.C. 285, 290-91, 218 S.E.2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091, 47 L. Ed. 2d 102 (1976). "The mere presence of [a party] at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense." *Id.* at 290, 218 S.E.2d at 357.

A violation of section 20-138.1 is negligence *per se*. *See Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34-35 (1964). It follows, therefore, that a party who aids and abets another in committing a violation of section 20-138.1 is a principal in the commission of the crime and, as such, is negligent *per se*.

In this case, the record shows Bhayani was convicted of driving while impaired under section 20-138.1. The record does not, however, contain any evidence Schewzyk, Williams and/or Currie had the intent to aid Bhayani in driving a vehicle while impaired, or that any such intent was communicated to Bhayani. While the record contains evidence Bhayani, Schewzyk, and Williams consumed alcoholic beverages together on the evening of the accident, and though Schewzyk, Williams, and Currie observed Bhayani consume as much as a six-pack of beer in a "short period of time" and did not stop Bhayani from driving while impaired, these activities do not render these parties guilty as principals of Bhayani's driving while impaired offense. The record, therefore, does not contain substantial evidence Schewzyk,

Williams, and/or Curry aided and abetted Bhayani in committing the offense of driving while impaired under section 20-138.1.

III

[5] Plaintiff argues Williams and Currie breached a duty to Plaintiff when they "knew that Bhayani was intoxicated, and . . . failed to prevent Bhayani from getting into his car and attempting to drive." Assuming the record contains substantial evidence Williams and Currie knew or should have known Bhayani was intoxicated, this is not a duty the law of this State places on a person. We, therefore, reject Plaintiff's argument.

In summary, the trial court's 18 November 1999 order granting summary judgment in favor of Williams and Winn-Dixie is affirmed. Additionally, the trial court's 18 November 1999 order denying summary judgment in favor of Schewzyk and Currie is reversed and remanded to the trial court for entry of judgment in favor of Schewzyk and Currie.

Affirmed in part and reversed in part.

Judge HORTON concurred before 8 February 2001.

Judge TYSON concurs in the result with a separate opinion.

TYSON, Judge, concurring in the result.

I concur in the result of the majority. However, I disagree with the majority's statement that the evidence "is sufficient to show that Winn-Dixie knew or should have known that Schewzyk was going to drive a motor vehicle, as a reasonable person could find that someone who travels to and from a grocery store does so by driving a motor vehicle."

There is evidence that Schewzyk did not drive a motor vehicle from the Winn-Dixie after purchasing alcohol. Schewzyk testified in his deposition that he was a passenger in another driver's car at all relevant times. I cannot agree with a per se rule that Winn-Dixie should be on notice that all patrons drive to and from the store in motor vehicles. It is entirely reasonable for Winn-Dixie to assume that some patrons travel to and from the store by foot, by bike, by public transportation, or as in Schewzyk's case, as a passenger in an automobile. Also, we cannot presume that a patron pur-

chasing alcohol from a store would consume it while driving, after leaving the store. The vast majority of individuals do not drink and drive, waiting until they get home or to their final destination before consuming their purchase.

The majority's position requires that Winn-Dixie assume in all instances that patrons buying alcohol will disobey the law. However, "[i]n the absence of anything which gives or should give notice to the contrary, [one] has the right to assume and to act on the assumption that others will observe the rules of the road and obey the law." *Penland v. Greene*, 289 N.C. 281, 283, 221 S.E.2d 365, 368 (1976) (citing *Wrenn v. Waters*, 277 N.C. 337, 177 S.E.2d 284 (1970)). Accordingly, I concur only in the result.

SUSAN FOX-KIRK, GUARDIAN AD LITEM FOR WHITNEY P. KIRK (MINOR), SUSAN FOX-KIRK, INDIVIDUALLY, AND MARK CHANDLER KIRK, INDIVIDUALLY v. WILLIAM RAY HANNON, BRAD RAGAN, INC., D/B/A CAROLINA TIRE COMPANY

No. COA99-1168

(Filed 20 February 2001)

1. **Damages and Remedies— future damages—loss of future earning capacity**

The trial court did not err in a negligence action arising out of a car accident by admitting testimony concerning the almost three-year-old injured minor child's future damages including loss of future earning capacity, because: (1) while proof of future damages for young children involves a significant degree of speculation, the Court of Appeals declines to hold that young children cannot recover for loss of earning capacity when they are injured so early in life where there is sufficient evidence offered so that such damages are not unreasonably speculative; and (2) plaintiffs presented sufficient evidence including testimony and medical records pertaining to the minor child's mental and physical condition prior to injury to provide the jury with a reasonable basis to estimate damages of lost earnings.

2. **Damages and Remedies— future damages—inability to complete college—effect of scarring on future employability**

The trial court did not err in a negligence action arising out of a car accident by admitting testimony concerning the almost

three-year-old injured minor child's future damages including her inability to complete college and the effect of her scarring on future employability, because the record shows that experts who testified as to the minor child's ability to attend college and her future employment opportunities all testified based on their own personal evaluations of the child, a review of her additional medical records, and their expertise and training. N.C.G.S. § 8C-1, Rule 702(a)

3. Emotional Distress— negligent infliction—foreseeability—mother viewing injury of child—denial of directed verdict proper

The trial court did not err by denying defendants' motion for a directed verdict as to plaintiff mother's negligent infliction of emotional distress claim arising out of the severe injury of her child during an automobile accident, because: (1) plaintiff's burden of negligence was met by defendants' stipulation as to negligence; (2) plaintiff presented evidence from her psychiatrist of diagnosable mental health conditions to show she suffered severe emotional distress; and (3) it was foreseeable to defendant driver that his negligent act which injured the minor child would cause her mother severe emotional distress when the mother was present in the car, personally observed defendant's negligent act, and immediately perceived the injuries suffered by her daughter.

4. Evidence— hearsay—unavailability—non-testifying treating doctor's letter—no requisite findings of trustworthiness—prejudicial error

The trial court erred in a negligence case arising out of an automobile accident by admitting the 1 July 1998 letter from a non-testifying treating doctor to plaintiffs' counsel under N.C.G.S. § 8C-1, Rule 804(b)(5), the unavailable declarant residual exception to the hearsay rule, which indicated for the first time that a brain injury was more likely for plaintiff minor child, because: (1) the trial judge relied upon findings in a pretrial order of another judge permitting defendants to introduce the doctor's medical records and correspondence; (2) the judge needed to either ensure that the prior judge's order contained sufficient findings to render the letter admissible under Rule 804(b)(5), or to hear evidence and make such findings himself when the trustworthiness of the letter was at issue; (3) there are no findings of trustworthiness in the rulings of either judge regarding the letter

to permit the Court of Appeals to determine whether it was properly admitted under Rule 804(b)(5); and (4) in view of the conflicting testimony by the experts at trial, the opinion of the minor child's treating doctor for more than two years as to whether the minor child suffered a traumatic brain injury likely carried significant weight and was thus prejudicial.

5. Trials— personal injury cases—"golden rule" statements improper

Counsel should avoid using "golden rule" statements in closing arguments in personal injury cases which ask the jury to put themselves in the position of the injured party.

6. Jury— quotient verdict—juror affidavits properly refused

The trial court did not err in a negligence case arising out of an automobile accident by refusing to consider juror affidavits which indicated that the jury rendered a quotient verdict, because the evidence must come from sources other than the jurors themselves in order to impeach a jury's verdict as a quotient verdict.

7. Costs— attorney fees—awarded to defendants—respondeat superior—negligent retention and hiring—improper after first set of interrogatories

The trial court erred in a negligence case arising out of an automobile accident by awarding attorney fees to defendants under N.C.G.S. § 6-21.5 regarding plaintiffs' claim of respondeat superior and negligent retention and hiring against defendant Goodyear dating back to the first set of interrogatories, because the trial court's finding stated that the non-existence of the requisite relationships was established through defendants' answer and course of discovery.

8. Costs— attorney fees—awarded to defendants—no showing of negligent infliction of emotional distress

The trial court did not err in a negligence case arising out of an automobile accident by awarding attorney fees to defendants under N.C.G.S. § 6-21.5 regarding plaintiff father's claim for negligent infliction of emotional distress, because plaintiff had no evidence to show he suffered severe and disabling psychological problems when he had not sought medical treatment in the two-year period of time between the accident and summary judgment disposition of the claim.

Appeal by defendants from judgment entered 31 August 1998 and order entered 22 September 1998; appeal by plaintiffs from order entered 6 October 1998, both by Judge Steve A. Balog in Person County Superior Court. Heard in the Court of Appeals 21 August 2000.

Poe, Hoof & Reinhardt, by G. Jona Poe, Jr., and J. Bruce Hoof, for plaintiffs.

Yates, McLamb & Weyher, L.L.P., by Kirk G. Warner, Gwenda L. Laws, and Michael J. Byrne for defendants.

MARTIN, Judge.

On 22 July 1995, defendant Hannon backed out of a driveway and hit the rear passenger side of plaintiffs' vehicle, which was traveling south on U.S. Hwy. 701. At the time of the accident, defendant Hannon was acting within the course and scope of his employment with defendant Brad Ragan, Inc. [hereinafter defendant Ragan]. The impact caused plaintiffs' vehicle to overturn. Plaintiff Whitney Kirk, a minor, was seated in her car seat near the point of impact, and suffered a skull fracture. She was transported to Columbus County Hospital, then airlifted to UNC Hospitals. She was discharged five days later after undergoing plastic surgery, and later underwent two additional scar revision surgeries. Whitney's parents, plaintiffs Mark Kirk and Susan Fox-Kirk, were treated for minor injuries and released.

Plaintiffs sued to recover for their personal injuries and for the negligent infliction of emotional distress upon Susan Fox-Kirk and Mark Kirk. They alleged negligence on defendant Hannon's part, imputed to defendants Ragan and Goodyear Tire and Rubber Company [hereinafter "defendant Goodyear"], and negligence on the part of defendants Ragan and Goodyear in hiring and retaining defendant Hannon and entrusting him with a vehicle.

Defendants' answered, denying negligence and asserting Mark Kirk's negligence as a defense. Defendants denied in their answer that there was an agency relationship between defendant Hannon and defendant Goodyear, and denied that defendant Goodyear exercised any control over defendant Ragan. Plaintiffs then sought discovery information regarding the relationship between defendant Goodyear and defendant Ragan. After discovery, defendants' motion for summary judgment as to Mark Kirk's claim for negligent infliction

of emotional distress was granted, but their motion for summary judgment as to a like claim by Susan Fox-Kirk was denied. Defendant Goodyear's motion for summary judgment as to all claims was allowed, and defendant Ragan's motion for summary judgment as to the negligent hiring and retention claim was also granted.

Prior to trial, Dr. Mark Chandler of North Carolina Neuropsychiatry Clinic, P.A., one of Whitney Kirk's treating physicians, declined to be deposed or to testify due to a stress-related mental illness medically preventing him from testifying at trial or in deposition. On 29 July 1998, Judge W. Osmond Smith, III, entered an order permitting defendants to introduce into evidence at the trial all written hearsay statements of Dr. Chandler, including medical records and correspondence, pursuant to G.S. § 8C-1, Rules 804(a) and (b)(5).

Defendants subsequently stipulated to Hannon's negligence, though they continued to deny that such negligence was a proximate cause of plaintiffs' alleged injuries. The trial commenced before Judge Balog on 3 August 1998 on the issues of proximate cause and damages. During the trial, citing Judge Smith's 29 July ruling, Judge Balog permitted plaintiffs to introduce into evidence as a medical record, a portion of a 1 July 1998 letter from Dr. Chandler to plaintiffs' counsel. In the letter Dr. Chandler stated, for the first time, his opinion that Whitney Kirk had sustained a brain injury.

On 14 August 1998, the jury returned a verdict awarding Whitney Kirk $1,675,000, awarding Susan Fox-Kirk $125,000, and awarding Mark Kirk $35,000. Judgment was entered on the verdict. Defendants were granted attorneys' fees pursuant to G.S. § 6-21.5 in the amount of $504 for fees incurred in defending Mark Kirk's negligent infliction of emotional distress claim and $6,381 for defending the claims against defendant Goodyear. Defendants appeal from the judgment entered on the verdicts. Plaintiffs appeal from the order allowing defendants' attorneys' fees as to the claims against defendant Goodyear and Mark Kirk's claim for negligent infliction of emotional distress.

I.

[1] Defendants assign error to the trial court's rulings admitting testimony as to Whitney Kirk's future damages. Specifically, defendants contend testimony regarding her loss of future earning capacity, her inability to complete college, and the effect of her scarring on future

employability, was too speculative and should have been excluded. We disagree.

The law is well settled that an infant can recover for impairment of earning capacity once attaining majority. *Kleibor v. Rogers*, 265 N.C. 304, 144 S.E.2d 27 (1965). It is also recognized that some speculation is inherent in the projection of future earning capacity of a child or an adult. *Bahl v. Talford*, 138 N.C. App. 119, 530 S.E.2d 347, *disc. review denied*, 352 N.C. 587, 544 S.E.2d 776 (2000). Citing *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966), defendants contend that Whitney was too young for the testimony to be anything but speculative.

In *Gay*, the Court held there was no recovery available under the then-existing Wrongful Death Act for a stillborn child because damages would be based on sheer speculation. *Id.* at 400, 146 S.E.2d at 429. The Court revisited this issue in *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E.2d 73 (1987), again holding that losses related to income are too speculative where the child is stillborn. Although the Court in *DiDonato* did not address income losses for a young child, we find it instructive that the Court did cite the following passage from a New Jersey court's opinion:

> On the death of a very young child . . . at least some facts can be shown to aid in estimating damages as, for example, its mental and physical condition.
>
> But not even these scant proofs can be offered when the child is stillborn. It is virtually impossible to predict whether the unborn child, but for its death, would have been capable of giving pecuniary benefit to its survivors. We recognize that the damages in any wrongful death action are to some extent uncertain and speculative. But our liberality in allowing substantial damages where the proofs are relatively speculative should not preclude us from drawing a line where the speculation becomes unreasonable.

Id. at 431, 358 S.E.2d at 493-94 (quoting *Graf v. Taggert*, 204 A.2d 140, 144 (N.J. 1964)). While we acknowledge that with young children proof of future damages involves a significant degree of speculation, we decline to hold that young children cannot recover for loss of earning capacity because they are injured so early in life, where there is sufficient evidence offered so that such damages are not unreasonably speculative. Whitney Kirk was two years and eleven months

old when the accident occurred. Plaintiffs presented sufficient evidence, including testimony and medical records pertaining to Whitney's mental and physical condition prior to her injury, to provide the jury with a reasonable basis upon which to estimate damages of Whitney's lost earnings.

[2] Defendants' further contend that the court erred in allowing expert testimony as to whether Whitney would attend college and the effect of scarring on her future employability. Again, we disagree. As noted above, some speculation is inherent in the determination of loss of earning capacity. *Bahl*, 138 N.C. App. at 125, 530 S.E.2d at 351. Furthermore, G.S. § 8C-1, Rule 702(a) provides that an expert may testify "in the form of an opinion." Although opinion testimony cannot be offered if it is based on inadequate data, we have not deemed such testimony to be speculative where there is competent evidence in the record which shows the basis of that expert's opinion. *State v. Crumbley*, 135 N.C. App. 59, 519 S.E.2d 94 (1999). The record shows that the experts who testified as to Whitney's ability to attend college and her future employment opportunities all testified based on their own personal evaluations of Whitney, a review of her additional medical records, and their expertise and training. We hold, therefore, that the trial court did not err in admitting this testimony.

II.

[3] Defendants also assign error to the denial of their motion for directed verdict as to Susan Fox-Kirk's negligent infliction of emotional distress claim. A motion for a directed verdict can be granted only if evidence is insufficient, as a matter of law, to support a verdict for the nonmoving party. *Goodwin v. Investors Life Insurance, Co.*, 332 N.C. 326, 419 S.E.2d 766 (1992). To make out a claim for negligent infliction of emotional distress, a plaintiff must produce evidence that the defendant was negligent, that it was foreseeable to the defendant that his negligence would cause the plaintiff severe emotional distress, and that the conduct, in fact, caused severe emotional distress. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990).

In the case before us, plaintiff's burden of showing negligence was met by defendants' stipulation as to negligence. We also believe that plaintiff has shown adequate evidence she suffered severe emotional distress to survive a motion for directed verdict. Severe emotional distress means "any emotional or mental disorder, such as . . . neurosis, psychosis, chronic depression, phobia, or any other type of

severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Id.* Plaintiff presented evidence from her psychiatrist of diagnosable mental health conditions.

At issue is whether there was sufficient evidence to show that it was foreseeable to defendant that his negligence would cause the plaintiff severe emotional distress. The complaint in this case seeks recovery for Susan's emotional distress arising from her concern for Whitney. Therefore, we must determine whether it was foreseeable to defendant that his negligent act which injured Whitney would cause Susan severe emotional distress.

The Supreme Court has held that a parent-child relationship, in itself, is not sufficient for a defendant to foresee that injury to one party caused by the defendant's negligence would cause emotional distress to the other. *Hickman v. McKoin*, 337 N.C. 460, 446 S.E.2d 80 (1994); *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993). Some factors to be considered in making the foreseeability determination, where the claim is based on concern for another's welfare, include (1) plaintiff's proximity to defendant's negligent act, (2) the relationship between the plaintiff and the injured person, and (3) whether plaintiff personally observed the negligent act. *Ruark*, 327 N.C. at 305, 395 S.E.2d at 98. A determination of foreseeability is done on a case-by-case basis and "[a]lthough the question of foreseeability is generally for the jury, the trial judge is required to dismiss the claim as a matter of law upon a determination that the injury is too remote." *Wrenn v. Byrd*, 120 N.C. App. 761, 765, 464 S.E.2d 89, 92 (1995), *disc. review denied*, 342 N.C. 666, 467 S.E.2d 738 (1996).

In *Gardner*, the Court affirmed summary judgment where the plaintiff mother was not present at the accident scene but learned of the accident by telephone and saw her son undergoing resuscitation in the emergency room prior to being told of his death. 334 N.C. at 666-67, 435 S.E.2d at 328. The Court said:

> Plaintiff was not, however, in close proximity to, nor did she observe, defendant's negligent act. At the time defendant's vehicle struck the bridge abutment, plaintiff was at her mother's house several miles away. This fact, while not in itself determinative, unquestionably militates against defendant's being able to foresee, at the time of the collision, that plaintiff would subsequently suffer severe emotional distress as a result of his accident. Because she was not physically present at the time of

> defendant's negligent act, plaintiff was not able to see or hear or otherwise sense the collision or to perceive immediately the injuries suffered by her son. Her absence from the scene at the time of defendant's negligent act, while not in itself decisive, militates against the foreseeability of her resulting emotional distress.

Id. Unlike the mother in *Gardner*, Susan Fox-Kirk was present in the car, personally observed defendant's negligent act, and immediately perceived the injuries suffered by her daughter. Applying the factors delineated by the Court in *Ruark* to the facts of this case and considering the Court's dicta in *Gardner*, we believe there is sufficient evidence that defendant could foresee that his negligent act would cause plaintiff emotional distress. Thus, we find no error in the denial of defendants' motion for directed verdict.

III.

[4] Defendants assign error to the trial court's admission of the 1 July 1998 letter from Dr. Chandler to plaintiffs' counsel. Defendants contend that the court failed to make the requisite findings and conclusions. We agree.

The trial court admitted the letter pursuant to N.C.R. Evid. 804(b)(5), which is the residual exception to the hearsay rule that applies when a declarant is unavailable. In *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986), the Supreme Court stated that a trial court must make the following determinations when admitting evidence pursuant to Rule 804(b)(5): (1) that proper notice was given to the opponent about the evidence and the desire to have it admitted pursuant to 804(b)(5); (2) that no other hearsay exception applies to the statement; (3) that the statement possesses " 'equivalent circumstantial guarantees of trustworthiness' " to the enumerated hearsay exceptions; (4) that the statement is material; (5) that the "statement 'is more probative on the point for which it is offered than any other evidence' " which could be otherwise produced; and (6) that " 'the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence.' " *Id.* at 9, 340 S.E.2d at 741 (quoting N.C. Gen. Stat. § 8C-1, Rule 804(b)(5)).

The admissibility of Dr. Chandler's medical records and correspondence was first addressed by Judge Smith in his 29 July 1998 pre-trial order. In the order, Judge Smith concluded, *inter alia*:

> 3. The written hearsay statements of Dr. Mark C. Chandler, including all medical and psychiatric records and bills generated or maintained by Dr. Mark C. Chandler, physician's notes/progress notes, memoranda, patient reports, evaluations, performance tests, history, diagnosis, treatment, prognosis, opinions, narratives, and correspondence relating to Whitney Kirk have sufficient guarantees of trustworthiness, are evidence of a material fact, are more probative on the point for which they may be offered than any other evidence which the defendants can procure through reasonable efforts, and the general purposes of the North Carolina Rules of Evidence and the interests of justice will best be served by the admission of such hearsay statements into evidence as exceptions to the hearsay rule under the rule of Rule 804(a) and Rule 804(b)(5) of the North Carolina Rules of Evidence.

He then ordered that:

> 2. The above referenced hearsay statements of Dr. Mark C. Chandler are not excluded by the hearsay rule and same are admissible into evidence at the trial herein under Rule 804(a) and Rule 804(b)(5) Other Exceptions, without reference to the reasons for the unavailability of Dr. Mark C. Chandler as a witness.
>
> 3. The ruling of the Court as contained in this order is made and intended as a ruling of inclusion upon the offer of such hearsay statements by the defendants at trial herein and is not made nor intended as a ruling to allow for the admission of such hearsay statements upon offering of same by the plaintiffs.

Neither party assigns error to Judge Smith's order, therefore, it is not directly at issue on this appeal. At issue, however, is whether Judge Balog's reference to these findings at trial when allowing plaintiffs to admit a portion of the 1 July 1998 letter from Dr. Chandler is sufficient. In granting plaintiffs' motion to admit the letter into evidence, Judge Balog made the following statement:

> I believe that the July 1 report or letter is part of the medical record proposed and should be admitted with the deletion of the first paragraph. Finding that it is part of Dr. Chandler's medical records, and for the same reasons as stated in Judge Smith's order with regard to hearsay on Dr. Chandler's unavailability find-

ing that he's not unavailable by any reason of the plaintiff and, therefore, his entire medical records should be admitted.

Initially, we find no error in the trial court's reference to the preliminary order because it pertained to the same evidence, i.e., Dr. Chandler's medical records and correspondence. Moreover, Judge Smith's limitation in his order to evidence offered by defendants did not limit the trial judge from extending the hearsay exclusion to the same evidence offered by plaintiffs.

Nevertheless, Judge Smith made insufficient findings in the preliminary order to comply with the requirements set out by the Court in *Triplett*, and, therefore, Judge Balog erred in relying upon those findings. *Id.* at 9, 340 S.E.2d at 741. In *Triplett*, the Court stated "[t]he trial judge also must include in the record his findings of fact and conclusions of law that the statement possesses 'equivalent circumstantial guarantees of trustworthiness.' " *Id.* (citation omitted). In making a determination of trustworthiness, the trial judge must consider factors such as: (1) "the declarant's motivation to speak the truth"; (2) "whether the declarant has ever recanted the statement," and (3) the character and nature of the statement. *Id.* at 10-11, 340 S.E.2d at 742. Although Judge Smith concluded in his preliminary order that the records possessed the requisite guarantee of trustworthiness, he found no facts to support such a conclusion. The sole finding with regard to the records and correspondence was:

> Dr. Chandler has provided written reports and other medical records detailing his treatment and expert opinions regarding Whitney Kirk.

Before admitting the 1 July letter in reliance on Judge Smith's preliminary order, Judge Balog needed to either ensure that the order contained sufficient findings to render the letter admissible pursuant to the Rule 804(b)(5) test set forth in *Triplett*, or to hear evidence and make such findings himself. The trustworthiness of the 1 July letter was at issue; defendants argued that the letter represented a change in opinion by Dr. Chandler with regard to whether Whitney Kirk suffered a brain injury, and that by concurring with his partner, Dr. C. Thomas Gualtieri, it was Dr. Chandler's intent to avoid having to testify. There are no findings in either Judge Smith's or Judge Balog's rulings regarding the trustworthiness of the letter to permit this Court to determine whether it was properly admitted pursuant to Rule 804(b)(5), and we must therefore hold that the trial court erred in relying on the earlier order in admitting the letter.

The next question we must address is whether the erroneous admission of the 1 July letter was prejudicial. A major issue at trial was whether Whitney Kirk sustained a traumatic brain injury. Dr. Chandler was Whitney's treating physician beginning in October 1995, three months after the accident. He had regular, almost monthly, visits with Whitney until September 1996, and then treated her again in 1997 and 1998. Until the 1 July 1998 letter, Dr. Chandler's notes, correspondence and medical records indicated that he did not see signs of a brain injury. In the 1 July letter, Dr. Chandler indicated for the first time that a brain injury was "more likely."

At trial, five experts testified regarding whether Whitney suffered a traumatic brain injury. Dr. Gualtieri, a neuropsychiatrist in the same practice group as Dr. Chandler, evaluated Whitney for the first time in December 1997 and diagnosed her as having a brain injury. Dr. Cynthia Wilhelm, a psychologist who evaluated Whitney Kirk in late 1997 or early 1998 and prepared a life care plan, testified that she is not a medical doctor but that she concurs with the traumatic brain injury diagnosis. Dr. Gail Spiridigliozzi, a child psychologist who evaluated Whitney in March 1996 and in October 1997, testified that her findings after her second evaluation of Whitney at age five were consistent with a diagnosis of a traumatic brain injury. Defendants offered the testimony of two experts, Dr. Marcel Kinsbourne, a pediatric neurologist, and Dr. Frank Wood, a neurologist, both of whom testified that there were no signs that Whitney Kirk had sustained a traumatic or permanent brain injury.

In light of the conflicting testimony by these experts at trial, the opinion of Dr. Chandler, Whitney's treating medical doctor for more than two years after the accident, as to whether she suffered a traumatic brain injury, likely carried significant weight. Therefore, we must conclude that admission of the 1 July letter without the requisite findings of trustworthiness as required in *Triplett* was prejudicial error, entitling defendants to a new trial as to the claims of Whitney Kirk.

IV.

[5] Defendants also assign error to the trial court's overruling their objections to plaintiffs' "golden rule" argument. In his closing argument, plaintiffs' counsel made various statements which asked the jurors to put themselves in the position of plaintiff Whitney Kirk. For example, counsel argued:

> What would you require us to pay you? Would you take $100 a day for it to live with that the rest of your life?

Defendants' objections were overruled.

Though the propriety of using "golden rule" statements in closing arguments in civil cases has not been addressed by our courts, the Supreme Court has held that closing arguments in a criminal case which ask the jury to put themselves in the position of the victim are improper. *State v. Perkins*, 345 N.C. 254, 481 S.E.2d 25, *cert. denied*, 522 U.S. 837, 139 L. Ed. 2d 64 (1997). It is noteworthy, however, that the Supreme Court held such "golden rule" expressions in the trial court's jury instructions to be erroneous. The Court noted:

> The question in any given case is not what sum of money would be sufficient to induce a person to undergo voluntarily the pain and suffering for which recovery is sought or what it would cost to hire someone to undergo such suffering, but what, under all the circumstances, should be allowed the plaintiff in addition to the other items of damages to which he is entitled, in reasonable consideration of the suffering necessarily endured. The amount allowed must be fair and reasonable, free from sentimental or fanciful standards, and based upon the facts disclosed.

Dunlap v. Lee, 257 N.C. 447, 452, 126 S.E.2d 62, 66-67 (1962) (quoting 15 Am. Jur. *Damages* § 72). The Court stated that such instructions "encourage verdicts based on sympathy in areas of the law in which jurors are already prone to sympathize." *Id.* Thus, we believe that in personal injury cases, as in criminal cases, a closing argument in which the jury is asked to put itself in the position of the injured party is improper.

At oral argument in this Court, plaintiffs' counsel conceded that such arguments should not have been made but contended that defendants were not prejudiced. Having already determined that a new trial should be granted as to the claims brought by Whitney Kirk, we need not determine whether the argument in this case, which related only to Whitney Kirk's claims, was prejudicial. Suffice it to say that counsel should avoid such arguments at re-trial.

V.

[6] Defendants' next contend the court erred in refusing to consider juror affidavits which indicate that the jury rendered a quotient ver-

dict, and further erred in denying their related motion for a new trial. We disagree.

The law is well-settled that in order to impeach a jury's verdict as a quotient verdict, the evidence must come from sources other than the jurors themselves. *State Highway Commission v. Matthis*, 2 N.C. App. 233, 163 S.E.2d 35 (1968). Therefore, the trial court properly refused to consider the juror affidavits. Defendants have offered no other evidence to meet their burden of establishing that a quotient verdict has been rendered and the trial court did not err in denying defendants' motion for a new trial.

We have reviewed defendants' remaining assignments of error which pertain to the claims of Mark Kirk and Susan Fox-Kirk and determine that they are without merit. As to such claims, we find no error. Moreover, we do not need to address defendants' remaining assignments of error which pertain to Whitney Kirk as they may not recur at re-trial.

VI.

PLAINTIFFS' APPEAL

[7] Plaintiffs' sole argument on appeal is that the trial court erred in awarding attorneys' fees to defendants pursuant to G.S. § 6-21.5. The statute provides for an award of attorney's fees "if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." The trial court awarded attorneys' fees for the cost of defending the claims brought against defendant Goodyear and for the cost of defending the negligent infliction of emotional distress claim brought by plaintiff Mark Kirk.

We first consider the claims brought against defendant Goodyear. To determine whether a claim is non-justiciable, the trial court may consider evidence developed after the pleadings have been filed. *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 258, 400 S.E.2d 435, 438 (1991). The test is whether the "party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue." *Id.*

In this case, plaintiffs brought claims against defendant Goodyear for negligence via the theories of *respondeat superior* and negligent retention and hiring. At issue was whether defendant

Hannon was an agent of defendant Goodyear and whether defendant Goodyear exercised control over defendant Ragan. Defendants denied both an agency relationship and any exercise of control by defendant Goodyear in their answer. Plaintiffs sought further information on the relationship between the defendants in numerous interrogatories and depositions. The trial court found:

> 9. The non-existence of an employer-employee relationship between defendant Goodyear and defendant Hannon as well as the non-existence of an agency relationship between defendant Goodyear and defendant Brad Ragan was established through the pleadings *and course of discovery* such that the plaintiffs should reasonably have become aware that the Complaint they filed as to Goodyear no longer contained a justiciable issue (emphasis added).

The court then awarded, however, all attorneys' fees regarding discovery incurred by defendant Goodyear dating back to the time they received the *first* set of interrogatories. We believe this award is inconsistent with the trial court's finding that the non-existence of the requisite relationships was established through the defendants' answer *and course of discovery*. Accordingly, we remand to the trial court for findings as to when plaintiffs should have reasonably determined that their claim against Goodyear was not justiciable, and for an award of attorneys' fees from that point forward.

[8] As to the award of fees for the negligent infliction of emotional distress claim brought by Mark Kirk, we find no error. The trial court found:

> 2. At the time of the filing of the Complaint, almost two years after the accident date of July 22, 1995, plaintiff Mark Kirk had not sought any medical treatment or received any diagnosis for any condition that could support a claim for severe emotional distress as that term is defined by law.
>
> 3. Plaintiff Mark Chandler Kirk's claim for negligent infliction of emotional distress was therefore a nonjusticiable issue of both law and fact.

"A justiciable issue has been defined as an issue that is 'real and present as opposed to imagined or fanciful.' " *Id.* at 257, 400 S.E.2d at 437 (citations omitted). To show severe emotional distress, the plaintiff must forecast some evidence showing severe and disabling psychological problems. *Waddle v. Sparks*, 331 N.C. 73, 414 S.E.2d 22

(1992). The trial court found and we agree that plaintiff had no such evidence, since he had not sought medical treatment in the two year period of time between the accident and summary judgment disposition of the claim.

For the foregoing reasons, we hold there must be a new trial as to the claims of Whitney Kirk. We find no error in the trial of the claims of Susan Fox-Kirk and Mark Kirk. That portion of the trial court's 6 October 1998 order which taxes plaintiffs with attorneys' fees incurred in defense of plaintiffs' claims against defendant Goodyear is vacated and this cause remanded for a proper determination of such fees in accordance with this opinion; in all other respects, the 6 October 1998 order is affirmed.

Defendants' Appeal—No error in part; new trial in part.

Plaintiffs' Appeal—Affirmed in part, vacated in part, and remanded.

Chief Judge EAGLES and Judge HORTON concur.

Judge HORTON concurred in this opinion prior to 31 January 2001.

CLAREMONT PROPERTY OWNERS ASSOCIATION, INC., PLAINTIFF v. W. STEPHEN GILBOY, JOAN GILBOY, R. MICHAEL GILBOY, AND MYRON E. STEPPE, DEFENDANTS

No. COA00-1

(Filed 20 February 2001)

Deeds— subdivision protective covenants—road maintenance fees—combined lots

The trial court did not err by granting a declaratory judgment for plaintiff in an action to determine whether the purchaser of a subdivision lot which had been formed of two original lots was required by the subdivision protective covenants to pay road maintenance fees for one lot or two. The obligation to pay the road maintenance fees was a real covenant that ran with the land and the combining of the lots did not alter the real covenants that had previously attached to each lot; defendant was therefore

obligated to pay the fees for two lots. This is not to suggest that property may not be combined or re-subdivided for purposes of ownership or convenience, but, absent a provision to the contrary in the covenants, the property must always conform to the servitudes created by the covenants as they originally attached to the property.

Appeal by Defendants from judgment entered 30 August 1999 by Judge Dennis J. Winner in Henderson County Superior Court. Heard in the Court of Appeals 8 January 2001.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Michelle Rippon and Craig D. Justus, for Plaintiff-Appellee.

Prince, Youngblood & Massagee, by Sharon B. Alexander, for Defendants-Appellants.

HUDSON, Judge.

Claremont Property Owners Association, Inc. (plaintiff) filed a complaint seeking a declaratory judgment as to the rights and restrictions established by the Protective Covenants for the Claremont Subdivision. The trial court entered a declaratory judgment in plaintiff's favor, and defendants appeal. We affirm.

I.

The pertinent facts in this case are undisputed. Defendants W. Stephen Gilboy, Joan Gilboy, and R. Michael Gilboy (the developers) sought to develop a subdivision on approximately 180 acres of land in Henderson County. On 30 April 1987, the developers executed and recorded Protective Covenants (the covenants) for the Claremont Subdivision (the subdivision). Paragraph 16A of the covenants provides that the cost of maintaining all of the roads within the subdivision will be divided by the number of lots, with the owner of each lot paying an equal pro rata share. Paragraph 16B states in pertinent part: "Each lot is hereby made subject to a specific and continuing lien to secure the payment of such charges, including interest thereon, and this lien shall run with the land and be enforceable notwithstanding any change of ownership of the lot." Paragraph 16 also provides that the developers will pay road maintenance fees on the same basis as any other lot owner for any lot that has not yet been sold. Finally, Paragraph 16D provides that the developers may assign to an association of the property owners "the right to maintain the subdivision

roads and to collect the costs thereof from the owners of the lots." In 1990, pursuant to this provision, the developers assigned these rights to plaintiff.

The developers developed the subdivision over a period of years in multiple phases, periodically recording plats depicting additional lots on the property. That the covenants contemplate a gradual development in multiple phases is borne out by a provision defining "Claremont Subdivision" as the property "shown on plats filed or to be filed," and by a provision declaring the covenants to be binding upon the property identified by "plats of Claremont Subdivision (whether now or hereafter recorded)." On 3 March 1993, and again on 5 January 1994, the developers recorded plats with the Henderson County Register of Deeds depicting Lots 109 and 110 as two separate lots situated side by side facing Claremont Drive. Subsequent to filing these plats, the developers paid road maintenance fees to plaintiff for Lots 109 and 110 individually. On 15 August 1995, these plats were amended by a plat which depicts Lot 120 as a combination of former Lots 109 and 110. However, despite combining the lots, the developers continued to pay two individual road maintenance fees for this property.

Lot 120 was then conveyed by the developers to defendant Myron Steppe on 13 March 1996. Since that time, plaintiff has attempted to assess and collect from Steppe road maintenance fees for two lots. However, Steppe has refused to pay fees for two lots, contending that he is obligated to pay fees for only one lot.

On 8 February 1999, plaintiff filed a complaint seeking a declaratory judgment as to (1) whether the developers have the right to combine previously platted lots in Claremont Subdivision for the purpose of reducing the annual road maintenance fees, and (2) whether the developers have the right to amend the covenants and to create new rights of way in the subdivision. The trial court's judgment, entered 30 August 1999, sets forth three conclusions "as a matter of law":

> 1. Although the Restrictive Covenants do not address the issue of whether or not after a lot is platted, the Developer without the permission of other land owners may combine two lots into one, and reduce the obligation to pay road assessments, it appears to the undersigned that the intention of the Developer at the time the restrictions were filed was to establish lots with obligations at the time of the filing and thereafter, to pay road assessments. Otherwise, he would not have contained the provision within the

restrictions by which the Developer himself pays the road assessments per lot until the lot is sold.

2. Purchasers of lots from the plats as filed had a right to assume that they would be paying a certain proportion of the road maintenance costs as shown by the plat, and to assume that the owners of each and every other lot on said plat would pay an equal sum pursuant to the plan of road maintenance as contained in the restrictive covenants.

3. Since lots had been sold from the plats enumerating Lots 109 and 110 as separate lots prior to the amended plat combining them, it would be inequitable to the purchasers of other lots to allow the road assessments for Lots 109 and 110 to be reduced without their permission.

We note that the trial court's judgment does not address the developers' right to amend the covenants, and defendants do not assign error to the trial court's failure to address this issue. Thus, although the law is clear on this issue, *see Smith v. Butler Mtn. Estates Property Owners Assoc.*, 324 N.C. 80, 85, 375 S.E.2d 905, 908 (1989) (holding that, in the absence of a provision in the covenants to the contrary, restrictive covenants running with the land in a subdivision may be modified or repealed only by a release or agreement executed by all of the property owners in the subdivision), the issue is not before us on appeal, *see* N.C.R. App. P. 10(a).

II.

On appeal, defendants do not assign error to the six findings in the judgment denominated factual findings by the trial court. Defendants' assignments of error pertain only to the three findings denominated conclusions of law recited above. However, the trial court's first purported conclusion of law is a finding as to the intent of the developers with regard to the covenants. Our Supreme Court has held that when the language of an instrument is ambiguous, and when the effect of the instrument must be resolved by determining the intent of the parties, the question of the parties' intent is one of fact to be determined by the court. *See Runyon v. Paley*, 331 N.C. 293, 305, 416 S.E.2d 177, 186 (1992). Thus, although denominated a legal conclusion, the trial court's finding pertaining to the developers' intent is actually a finding of fact. Therefore, we must determine (1) whether this challenged finding of fact is supported by any competent evidence, and (2) whether the remaining legal conclusions are

supported by the factual findings. *See, e.g., Smith v. Butler Mtn. Estates Property Owners Assoc.*, 90 N.C. App. 40, 43, 367 S.E.2d 401, 405 (1988), *aff'd*, 324 N.C. 80, 375 S.E.2d 905 (1989).

III.

The issue in the instant case is whether Steppe, having purchased Lot 120, which is a combination of Lots 109 and 110, is required by the covenants to pay road maintenance fees for one lot or two. Our Supreme Court has explained in considerable detail the applicable principles where restrictive covenants are imposed upon individual lots in a subdivision:

> [T]he principle upon which these restrictive burdens on the use of lands within a real estate subdivision are enforceable is that they are servitudes imposed on the various lots or parcels for the benefit of the area affected. . . . These servitudes . . . are usually imposed by restrictive covenants between the developer and the initial purchasers and become seated in the chain of title . . . thus fixing it so each lot in a legal sense owes to all the rest of the lots in the subdivision the burden of observing the covenant, and each of the rest of the lots is invested with the benefits imposed by the burdens. Accordingly, in legal contemplation the servitude imposed on each lot runs to and attaches itself to each of the rest of the lots in the restricted area, thus forming a network of cross-easements or cross-servitudes, the aggregate effect of which is to impose and confer on each lot reciprocal and mutual burdens and benefits appurtenant to the lots, so as to run with the land and follow each lot upon its devolution and transfer. Therefore, where land within a given area is developed in accordance with a general plan or uniform scheme of restriction, ordinarily any one purchasing in reliance on such restriction may sue and enforce the restriction against any other lot owner taking with record notice, and this is so regardless of when each purchased; and similarly, a prior taker may sue a latter taker.

Craven County v. Trust Co., 237 N.C. 502, 512-13, 75 S.E.2d 620, 628 (1953) (citations omitted).

The covenant at issue is an affirmative obligation to pay road maintenance fees. An affirmative obligation to pay assessments is considered to be a real covenant, or servitude, that runs with the land where: (1) the instrument creating the covenants reveals such an intent; (2) there is privity of estate between the party enforcing the

covenant and the party against whom the covenant is being enforced; and (3) the assessments are for the maintenance of property that is located within the subdivision for the benefit of the lot owners. *See Homeowners Assoc. v. Sellers and Homeowners Assoc. v. Simpson*, 62 N.C. App. 205, 210-11, 302 S.E.2d 848, 852-53, *cert. denied*, 309 N.C. 461, 307 S.E.2d 364 (1983). There is no dispute in the instant case as to the existence of these three elements. Thus, the affirmative obligation to pay road maintenance fees is clearly a real covenant that runs with the land. As the Supreme Court explained in *Craven County*, servitudes imposed by restrictive covenants on a subdivision that is "developed in accordance with a general plan or uniform scheme of restriction" run with the land and attach to each lot in the subdivision individually, forming a network of "cross-servitudes." *Craven County*, 237 N.C. at 513, 75 S.E.2d at 628. We believe the affirmative obligation to pay road maintenance fees in the instant case is a real covenant that attached to Lots 109 and 110 individually upon the filing of the original plat establishing these lots. Furthermore, we believe the act of combining Lots 109 and 110 to form Lot 120 did not alter or negate the real covenants that had previously attached to each lot. Therefore, despite the fact that the property was conveyed to Steppe as a single lot, it remains subject to an obligation to pay road maintenance fees as if it were two lots.

The holding in *Ingle v. Stubbins*, 240 N.C. 382, 82 S.E.2d 388 (1954), supports this conclusion. In *Ingle*, the restrictive covenants of a subdivision prohibited any building on a particular lot from being located nearer that 50 feet from the "front line" of that lot, or nearer than 10 feet from the "side street line" of that lot. *Id.* at 384, 82 S.E.2d at 390. Lots 10 and 11 were originally platted as adjacent, rectangular lots, with front lines on the western boundary of the property facing Bueno Street, which was considered a main street and which ran north and south. *See id.* Lot 10 was directly north of Lot 11, and was situated on the corner of Bueno Street and Plaid Street. *See id.* Thus, the northern side of Lot 10 faced Plaid Street, which was considered a side street and which ran east and west.

The owner of Lots 10 and 11 re-divided the property to form three adjacent, rectangular lots, facing the northern boundary of the property and Plaid Street. *See id.* at 385, 82 S.E.2d at 390-91. The defendant purchased the most westerly of the three lots on the corner of Bueno and Plaid Streets and began to construct a house facing Plaid Street. *See id.* at 386, 82 S.E.2d at 392. The front of the defendant's house was to be 50 feet from Plaid Street, and the side was to be 31

feet from Bueno Street. *See id.* at 387, 82 S.E.2d at 393. Thus, what had once been considered the "front line" of the property was now being used by the defendant as the side line of the property, and vice versa.

The plaintiffs, who owned Lot 12, situated directly south of what had previously been Lot 11, instituted an action to enjoin the defendant from building the house, contending that the house would violate the restrictive covenants. The Court held that the restrictive covenants established the minimum building set-back lines for both "front" and "side" lines, and that these terms were to be interpreted as referring to the "front" and "side" lines as each existed at the time the restrictive covenants were executed. *Id.* at 389, 82 S.E.2d at 394. Thus, the Court concluded that the defendant's building would violate the covenants because the side of the building would be less than 50 feet from what was originally considered the "front" line of the property. *Id.* at 389-90, 82 S.E.2d at 395.

From the Court's holding in *Ingle*, we derive two principles. First, the servitudes imposed by the restrictive covenants of a subdivision attach to each individual lot at the moment the subdivision becomes subject to the covenants. This may occur upon the execution of the covenants if the subdivision is already complete, or, as in the instant case, it may occur upon the filing of a new plat of lots if the plat is intended to be subject to covenants already in existence.

Second, any ambiguous terms in the covenants must be interpreted according to what they meant at the time the servitudes attached to the individual lots. Thus, Paragraph 16A, which provides that "[t]he maintenance cost paid by the owner of each lot, for that lot, shall be the total cost of maintenance of said roads divided by the total number of lots served by said roads," must be interpreted according to what the term "lot" meant at the time the property became subject to the covenants. At that time, the division of lots on the original plat depicted Lots 109 and 110 as two individual lots. Therefore, the servitudes in the covenants, including the obligation to pay road maintenance fees, attached to Lots 109 and 110 individually. This is not to suggest that lots may not be combined or re-subdivided. As in *Ingle*, the property may be combined or re-subdivided into different lots for purposes of ownership or convenience, but, absent a provision in the covenants to the contrary, the property must always conform to the servitudes created by the covenants as they originally attached to the property. *See Callaham v. Arenson*, 239 N.C. 619, 80 S.E.2d 619 (1954) (holding that the owner of four lots in a subdivision

could re-subdivide the property into eight lots provided that the property continued to conform to the restrictive covenants).

Furthermore, the extrinsic evidence tends to support the trial court's finding that the developers intended to fix the lot divisions according to the original plat for purposes of applying the covenants. Where restrictive covenants are ambiguous, their meaning must be construed by determining the intent of the parties, and the intent of the parties must be gathered from an examination of all the covenants contained in the instrument as well as an examination of the surrounding circumstances. *See Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238-39 (1967).

The other restrictions set forth in the covenants support the conclusion that although the developers intended to allow the combining of lots, they also intended that the road maintenance fee obligation would attach to each lot upon creation of the lot by recorded plat, and that the combining of lots would not alter these fee obligations. Paragraph 2D expressly allows the owner of two or more adjoining lots to combine the lots in order to satisfy the three acre requirement for erecting a guest house pursuant to Paragraph 2B. The covenants do not contain an analogous provision allowing lot owners to combine lots to reduce road maintenance fees. Furthermore, Paragraph 16A provides that the developers shall pay road maintenance fees on the same basis as any other lot owner so long as they own any lots in the subdivision. Thus, if the subdivision contained 100 lots, with 90 lots already purchased by individual owners and 10 still owned by the developers, paragraph 16A would require the developers to pay approximately one tenth of the total road maintenance costs. If, however, an owner were allowed to combine multiple lots to form a single lot for purposes of calculating road maintenance fees, the developers could, in this hypothetical situation, combine the 10 lots to form one single lot, and, as a result, pay a significantly smaller fraction of the total costs. That such a result would undermine the intended scheme for paying road maintenance fees is obvious. This supports the conclusion that the system created by the covenants does not contemplate treating property resulting from the combination of multiple lots as a single lot for purposes of calculating road maintenance fees.

In addition to examining the covenants themselves, intent may be gleaned from actions undertaken by the developers, both prior to and subsequent to the execution of the covenants. *See id.* at 274, 156

S.E.2d at 243 (holding that developers' intent to prohibit the building of additional roads over lots in a subdivision could be inferred from the fact that developers believed it was necessary to amend the covenants to allow for the building of a particular road over a particular lot). In the instant case, the developers continued to pay road maintenance fees for two lots subsequent to combining Lots 109 and 110 and prior to the conveyance of Lot 120 to Steppe. Thus, it appears the developers believed that, despite combining two lots into one, the road maintenance fees were to be assessed according to the division of lots as established by the original plat.

For the reasons set forth herein, we hold that there is competent evidence in the record to support the trial court's finding that "the intention of the Developer at the time the restrictions were filed was to establish lots with obligations at the time of the filing and thereafter, to pay road assessments." Furthermore, we hold that the findings support the legal conclusion that road maintenance costs should be calculated according to the division of lots appearing in the original plat, and that defendant Steppe is, therefore, obligated to pay road maintenance fees for two lots.

Affirmed.

Chief Judge EAGLES and Judge SMITH concur.

GRASSY CREEK NEIGHBORHOOD ALLIANCE, INC. AND JACK LoCICERO, PLAINTIFFS v. CITY OF WINSTON-SALEM, NORTH CAROLINA MUNICIPAL LEASING CORPORATION, THE WINSTON-SALEM/FORSYTH COUNTY UTILITY COMMISSION, DEFENDANTS

No. COA00-280

(Filed 20 February 2001)

1. Zoning— rezoning land for use as sanitary landfill— approval and selection prior to effective date of statute

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' challenge of the city's rezoning and development of two tracts of city-owned land for use as a sanitary landfill even though defendants failed to comply with N.C.G.S. § 160A-325 because the actions of the Aldermen were sufficient to constitute a selection or approval of the site for land-

fill expansion prior to the effective date of N.C.G.S. § 160A-325 of 22 July 1992.

2. Zoning— rezoning land for use as sanitary landfill—compliance with one condition okay for exemption

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' challenge of the city's rezoning and development of two tracts of city-owned land for use as a sanitary landfill when defendants complied with only one condition of the exemption enacted with N.C.G.S. § 160A-325 because compliance with either condition compels exemption.

Appeal by plaintiffs from grant of summary judgment in favor of defendants by the Honorable Larry G. Ford on 30 November 1999. Heard in the Court of Appeals 23 January 2001.

Blanco, Tackabery, Combs, & Matamoros, P.A., by Reginald F. Combs, Bowen C. Houff, and Jeffrey D. Patton, for Plaintiffs-Appellants.

Winston-Salem City Attorney's Office, by Ronald G. Seeber and Charles C. Green, Jr.; and Womble, Carlyle, Sandridge, & Rice, PLLC, by Roddey M. Ligon, Jr. and Gusti W. Frankel, for Defendants-Appellees.

TYSON, Judge.

Plaintiffs challenge Winston-Salem's rezoning and development of two tracts of city-owned land ("Property") for use as a sanitary landfill. Plaintiff, Grassy Creek Alliance, Inc. ("Alliance"), is an incorporated, nonprofit association of property owners living in the vicinity of the Property. Plaintiff, Joseph LoCicero ("LoCicero"), is a member of the Alliance and owns property in the vicinity of the Property.

Winston-Salem/Forsyth County Utility Commission

N.C.G.S. § 160A-461 allows "any unit of local government" to enter into a contract or agreement with any one or more units of local government "to execute any undertaking." Water, sewer, and solid waste management are authorized undertakings of local governments. N.C.G.S. § 160A-311 (2), (3), (6). N.C.G.S. § 160A-462(a) allows units of local government to create "joint agencies" to carry out their joint undertaking:

> Units agreeing to an undertaking may establish a joint agency charged with any or all of the responsibility for the undertaking. The units may confer on the joint agency any power, duty, right, or function needed for the execution of the undertaking . . .

On 20 April 1976, the City of Winston-Salem ("City") and Forsyth County ("County") entered into an agreement, pursuant to N.C.G.S. § 160A-462, consolidating their previously separate water and sewer systems ("Agreement"). The Agreement created the Winston-Salem/Forsyth County Utility Commission ("Utility Commission"), a joint agency comprised of members appointed by the City Board of Aldermen ("Aldermen") and the County Commission. The Agreement provides:

> The Utility Commission shall be the policy making board for all water and sewerage facilities operated by the City, having the same authority and responsibility as the City or the County to fix rates, charges and assessments, and to provide for improvements and extensions to such facilities . . .

On 3 May 1990, the City and County amended the Agreement and added solid waste management to the Utility Commission's areas of responsibility. The 1990 Amendment provides:

> The Commission will provide solid waste management and disposal, and through a ranked course of action, a source reduction and recycling program. Solid Waste Management and Disposal shall include, but not be limited to composting, landfilling and all other measures necessary to comply with all requirements of G.S. 130A as amended and other applicable state and federal laws and regulations . . .
>
> Except as expressly stated herein to the contrary, the 1976 Agreement between the parties shall remain in full force and effect with regard to water and sewer service, and shall apply to solid waste disposal service.

The interlocal agreement, amended in 1990, provides that solid waste management be operated by the Utility Commission. This authority includes providing for "improvements and extensions to such facilities." The interlocal agreement provides "the Utility Commission shall have no authority to issue bonds or to incur any debt without prior approval of the Winston-Salem Board of Alderman."

Selection or Approval of the Landfill Expansion Site

On 12 August 1991, the Utility Commission recommended approval of the acquisition of eight parcels of land ("Tract I"), to be used for the expansion of the existing Hanes Mill Road Landfill ("Landfill"). On 9 September 1991, the Finance Committee of the Aldermen recommended approval of a financing-lease agreement ("lease") for Tract I. Under the terms of the lease, defendant, North Carolina Municipal Leasing Corporation ("NCMLC"), would purchase and lease Tract I to the City. Tract I would be conveyed to the City upon payment of the full purchase price. On 16 September 1991, the Aldermen approved the lease.

The City paid the debt incurred by NCMLC to purchase the Property. On 29 April 1999, NCMLC conveyed the Property to the City.

Consolidated Foods Corporation donated an adjoining tract of land ("Tract II") to the City in 1983. The Aldermen accepted Tract II for sanitary landfill purposes by resolution adopted 3 October 1983.

On 7 June 1999, the City rezoned Tracts I and II for use as a landfill. The Alliance and LoCicero contend that the defendants violated N.C.G.S. § 160A-325 and are entitled to summary judgment.

Issues

The first issue presented by this appeal is whether the Aldermen selected or approved the property for use as expansion of the landfill prior to the effective date of N.C.G.S. § 160A-325, exempting defendants' actions pursuant to Session Laws 1991 (Reg. Sess., 1992), c. 1013, s.9 ("exemption"), and excusing defendants from compliance with N.C.G.S. § 160A-325. The second issue is whether the city was required to meet all the applicable conditions of the exemption, or whether compliance with one condition was sufficient. We hold that the Aldermen did select or approve the site for landfill expansion prior to the effective date of N.C.G.S. § 160A-325, and affirm summary judgment in favor of defendants.

Selection or approval by the Aldermen

[1] Locations of solid waste landfills are controversial and impact nearby property owners. N.C.G.S. § 160A-325, effective 22 July 1992, establishes certain prerequisites which must be satisfied prior to the selection or approval of certain landfill sites.

§ 160A-325. Selection or approval of sites for certain sanitary landfills; solid waste defined.

(a) The governing board of a city shall consider alternative sites and socioeconomic and demographic data and shall hold a public hearing prior to selecting or approving a site for a new sanitary landfill that receives residential solid waste that is located within one mile of an existing sanitary landfill within the State. The distance between an existing and a proposed site shall be determined by measurement between the closest points on the outer boundary of each site. The definitions set out in G.S. § 160A-390 apply to this subsection:

(1) "Approving a site" refers to prior approval of a site under G.S. §130A-294(a)(4).

(2) "Existing sanitary landfill" means a sanitary landfill that is in operation or that has been in operation within the five year period immediately prior to the date on which an application for a permit is submitted.

(3) "New sanitary landfill" means a sanitary landfill that includes areas not within the legal description of an existing sanitary landfill as set out in the permit for the existing sanitary landfill . . .

It is uncontested that the expansion of the landfill constitutes a "new sanitary landfill" under N.C.G.S. § 160A-325, since rezoning the property was required prior to its use as a landfill. The parties stipulate that defendants have not met the requirements of N.C.G.S. § 160A-325 in selecting or approving the Property as a landfill. Defendants argue that they are excused from compliance because of an exemption enacted with N.C.G.S. § 160A-325, which provides in pertinent part:

. . . G.S. § 160A-325 . . . shall not apply to the selection **or** approval of a site for a new sanitary landfill if, prior to the effective date of this statute [July 22, 1992]:

(1) The site was selected **or** approved by the board of commissioners of a county **or** the governing board of a city;

(2) A public hearing on the selection **or** approval of the site has been held;

(3) A long-term contract was approved by the Department of Environment, Health, and Natural Resources under Part 4 of Article 15 of Chapter 153A of the General Statutes; **or**

> (4) An application for a permit for a sanitary landfill to be located on the site has been submitted to the Department of Environment, Health and Natural Resources. (emphasis supplied)

Session Laws 1991 (Reg. Sess., 1992), c.1013, s.9.

Defendants contend that the actions of the Aldermen constituted selection or approval of the landfill expansion site, and that such selection or approval occurred prior to 22 July 1992, the effective date of N.C.G.S. § 160A-325. We agree.

On 12 August 1991, the Utility Commission unanimously approved a resolution to expand the landfill. The resolution stated that Tract I was to be used as an "addition to Hanes Mill Road Landfill." The resolution also created access restrictions and buffer requirements for the site. Tract I was identified by tax lots and block numbers. The Utility Commission stated that the approximate price of the landfill expansion would be $3,915,000.00, based on acreage price and subject to final survey. The Utility Commission further resolved that the City should undertake to acquire Tract I for the amount recommended by the Finance Committee and the Assistant City Manager for Public Works.

On 9 September 1991, the Finance Committee of the Aldermen voted to approve a resolution entitled "RESOLUTION OF THE CITY OF WINSTON-SALEM, NORTH CAROLINA APPROVING THE LEASE AGREEMENT WITH NORTH CAROLINA MUNICIPAL LEASING CORPORATION AND RELATED MATTERS." The transcript of the Finance Committee meeting indicates the lease included "$3.9 million to acquire 325 acres for landfill, solid waste disposal, land." The Finance Committee attached a "Board of Aldermen-Action Request Form" to the resolution stating that the lease was, in part, for the acquisition of "land for future solid waste disposal."

On 16 September 1991, this Resolution and Action-Request Form was brought before the Aldermen, which approved the Resolution. The Resolution stated that

> the Mayor, the City Manager, the City Secretary, and the Director of Finance of the City are hereby authorized, empowered and directed to do any and all other acts and to execute any and all other documents, which they in their discretion, deem necessary and appropriate in order to consummate the transactions contemplated by (I) this Resolution, (ii) the Lease, and (iii) the documents presented to this meeting . . .

On 9 October 1991, the City, as lessee, entered into a lease with NCMLC, as lessor. The property description in the lease identified "Land—Solid Waste disposal" with a price of "$3,900,000.00" as part of the leased property. It is undisputed that this was the only landfill agenda item before the City in 1991. In October and December 1991, NCMLC acquired title to the site.

Plaintiffs contend that the Aldermen did not sufficiently identify the property. Based on these sequence of events, and after a thorough review of the record, we hold that the land referred to in the Resolution, Action Request form, transcripts of the proceedings, lease, and deed is Tract I.

Plaintiffs argue that the Utility Commission selected the landfill expansion site, hence the selection was not by the "governing board of the city" as required by N.C.G.S. § 160A-325. Plaintiffs contend that the Legislature specifically intended that such decisions could only be made by the "governing board of the city," which is stipulated to be the Aldermen.

Subsection (1) of the exemption unambiguously states that the site must have been "selected **or** approved by the governing board of a city." Session Laws 1991 (Reg. Sess., 1992), c.1013, s.9 (emphasis supplied). If the Alderman selected **or** approved the landfill site prior to 22 July 1992, defendants complied with the first requirement of the exemption. "Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. 'or'), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them." *Davis v. N.C. Granite*, 259 N.C. 672, 675, 131 S.E.2d 335, 337 (1963).

We hold that the actions of the Aldermen were sufficient to constitute a selection or approval of the landfill expansion site by that body on 16 September 1991. The selection or approval occurred prior to 22 July 1992, the effective date of N.C.G.S. § 160A-325. Condition (1) of the exemption found in Session Laws 1991 (Reg. Sess., 1992), c.1013, s.9 applies and has been met.

Requirements of the Exemption

[2] The second issue is whether defendants were required to comply with all applicable sections of the exemption. The exemption provides that the city or county need not comply with the requirements of N.C.G.S. § 160A-325, if prior to the effective date of 22 July 1992:

(1) The site was selected **or** approved by the board of commissioners of a county **or** the governing board of a city;

(2) A public hearing on the selection **or** approval of the site has been held;

(3) A long-term contract was approved by the Department of Environment, Health, and Natural Resources under Part 4 of Article 15 of Chapter 153A of the General Statutes; **or**

(4) An application for a permit for a sanitary landfill to be located on the site has been submitted to the Department of Environment, Health and Natural Resources. (emphasis supplied)

This identical exemption applies to both N.C.G.S. § 160A-325 and § 153A-136. N.C.G.S. § 153A-136 and N.C.G.S. § 160A-325 were adopted in the same Senate bill. N.C.G.S. § 153A-136 contains the identical requirements for landfill expansion sites in counties which N.C.G.S. § 160A-325 requires for municipalities.

A statute's words should be given their natural and ordinary meaning, *Hyler v. GTE Products Co.*, 333 N.C. 258, 425 S.E.2d 698 (1993), and need not be interpreted when they speak for themselves. *Abeyounis v. Town of Wrightsville Beach*, 102 N.C. App. 341, 401 S.E.2d 847 (1991). Where a statute contains two clauses which prescribe its applicability and clauses are connected by the disjunctive "or", application of the statute is not limited to cases falling within both clauses but applies to cases falling within either one of them. *Davis*, supra; *Patrick v. Beatty*, 202 N.C. 454, 163 S.E.2d 572 (1932). "In its elementary sense the word "or", as used in a statute, is a disjunctive particle indicating that the various members of the sentence are to be taken separately . . . When in the enumeration of persons or things in a statute, the conjunction is placed immediately before the last of the series, the same connective is understood between the previous members." 73 Am.Jur. 2d, *Statutes* § 241 (1974).

In *Smith v. Bumgarner*, 115 N.C. App. 149, 443 S.E.2d 744 (1994), our Court interpreted a statute which listed persons who may bring an action to determine paternity. In that statute, the persons who may bring such an action were specifically enumerated in the statute and separated by commas and the word "or." *Id.* This Court held that the "provision is not ambiguous and its natural and ordinary meaning indicates that either of the listed persons may bring an action." *Id.* at 152, 443 S.E.2d at 746.

Here, the statutory scheme is the same as in *Bumgarner*. The defendants met the requirements of subsection (1) of the exemption. Since compliance with either condition compels exemption, we need not address whether any of the other three subsections of the exemption were met.

No genuine issue of material fact exists. Therefore summary judgment in favor of defendants is

Affirmed.

Judges GREENE and HORTON concur.

Judge HORTON concurred in this opinion prior to 8 February 2001.

STATE OF NORTH CAROLINA v. DESTRY RICCARD

No. COA99-1494

(Filed 20 February 2001)

Evidence— prior inconsistent statement—impeachment

The trial court did not err in an assault and robbery prosecution by allowing the State to impeach two of its witnesses with prior statements to an officer where both witnesses admitted making the prior statements, one of them testified that certain parts of his statement were inaccurate and that he did not remember making parts of his statement, and the facts indicate good faith and an absence of subterfuge.

Appeal by defendant from judgment entered 24 August 1999 by Judge F. Donald Bridges in Gaston County Superior Court. Heard in the Court of Appeals 8 January 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Daniel P. O'Brien, for the State.

Charles L. Alston, Jr., for defendant-appellant.

EAGLES, Chief Judge.

Defendant Destry Riccard was tried and found guilty of assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a dangerous weapon in Gaston County Superior Court on 23 August 1999. He was sentenced to 110 to 141 months for assault with a deadly weapon with intent to kill inflicting serious injury and 77 to 102 months for robbery with a dangerous weapon. Defendant appeals. After careful review, we hold defendant received a fair trial free from prejudicial error.

At trial, Leon Henderson (victim) testified that on the night of 4 July 1998, he went to a car wash on Bessemer City Road in Gastonia. The victim testified that immediately before he began washing his car, he was poked in the back with a shotgun. He then testified that he turned around and was face to face with his assailant. The victim later identified this person in a photographic lineup, as well as at trial, as defendant. According to the victim, defendant pointed the shotgun in his face and demanded all the victim's money. The victim gave defendant approximately thirty dollars, after which defendant shot him in the left leg.

Derek Barnes (Barnes), defendant's cousin, testified on behalf of the State. Barnes testified that on the night of 4 July 1998, he went "riding" with defendant, Trey Reid (Reid) and Travis Watson (Watson) in a Ford Escort. Barnes testified that at approximately 11:00 p.m., the four men stopped at a car wash on Bessemer City Road to use the pay phone. According to Barnes, when he and Watson left the car to use the pay phone, they heard a gunshot and ran back to the car. Barnes then denied that he was aware defendant had a shotgun.

Barnes next testified that on 7 July 1998, he initiated a conversation with Detective Tony Wilson (Wilson) at the Gastonia Police Department. At this point, the State began to treat Barnes as a hostile witness, asking him leading questions. Defense counsel objected to the leading questions. Out of the presence of the jury, the State explained to the court that Barnes had testified to the events at issue differently on the stand than he had described them to Wilson on 7 July. The State then asked for permission to impeach Barnes with his prior statement to Wilson.

The State gave Barnes a copy of his statement to refresh his recollection. The following exchange then occurred:

THE COURT: Did you tell the police, "While we were on the phone, [defendant] got out of the vehicle's back seat and walked over to the next stall and shot a guy in the leg with a shotgun, then got back in the vehicle, and said, 'We have to go.' "?

A: See that's the part I was speaking of I didn't agree with because in order—

THE COURT: No. My question is did you tell that to the police?

A: I don't recall. Some of that statement I did say that stuff—some of the statement, but I never said that he got—I never—I didn't never say the part that he got back into the car and said, "Let's go," because he was in the car when I got there; but I did see him out of the car. That's what I'm saying.

THE COURT: All right. Did you say, "While we were on the phone, [defendant] got out of the vehicle's back seat and walked over to the next stall and shot a guy in the leg with a shotgun"?

A: No, because I never saw a shotgun. In order for me to say that I saw him go and shoot somebody with a shotgun, I would have to have seen the shotgun.

After hearing arguments, the trial court overruled defendant's objection to the State impeaching Barnes with his prior statement.

At the conclusion of the *voir dire* hearing, in the presence of the jury, the State asked Barnes, over objection, whether he recalled telling Wilson:

> "While we were on the phone, [defendant] got out of the vehicle's back seat and walked over to the next stall and shot a guy in the leg with a shotgun, then got back in the vehicle and said, 'We have to go.' "

Again Barnes admitted to speaking with Detective Wilson, but denied having made portions of that statement and reiterated his earlier testimony.

Following Barnes' testimony, the State called Reid, whose sister is defendant's first cousin, to testify. Like Barnes, Reid testified to many of the details leading up to the shooting. Reid testified that on 4 July 1998, he watched a fireworks display with defendant, Barnes and Watson, and then the four men went "riding around." Reid then testified that they ended up at a car wash on Bessemer City Road to

use the pay phone. According to Reid, once they were at the car wash, Barnes and Watson used the pay phone, while he stayed in the car with defendant. Reid further testified that defendant left the car briefly, and that perhaps defendant had used the bathroom, but that he returned before Barnes and Watson came back to the car.

The State then asked Reid about a statement he made to Wilson, presented Reid with the statement, and asked him whether it fairly reflected what he told Wilson on 7 July 1998. Reid responded that there were "one or two lines in there [he] did not agree to." The State then asked Reid, over objection,

> isn't it true that you told Detective Wilson that [defendant] got out and walked over to the car in the next stall and shot the person, then came back, and got back in the vehicle saying we needed to go?

Reid answered, "[n]o sir."

Later, the State called Detective Wilson to the stand. Before allowing Wilson to testify as to the statements made to him by Barnes and Reid on 7 July 1998, the trial court gave the following instruction to the jury:

> Members of the jury . . . this testimony is offered for purposes of corroboration or lack of corroboration of the prior testimony of Mr. Barnes and Mr. Reid. You may consider it for that purpose only.

Detective Wilson then proceeded to relate the statements made to him by Barnes and Reid in which both men implicated defendant in the shooting of the victim. Wilson further testified that based on their statements, he included defendant's photograph in a lineup from which the victim immediately picked out defendant as his assailant.

Both defendant and Watson testified on behalf of defendant. Watson testified that defendant was not in possession of a shotgun on 4 July 1998. Watson additionally testified that when he heard gunshots at the car wash, he and Barnes ran back to the car, where Reid and defendant were waiting.

Defendant testified that while Barnes and Watson used the pay phone at the car wash, he and Reid cleaned out their car, and then he used the restroom. Defendant then testified that when they heard gunshots he and Reid got in the car, then Barnes and Watson ran up

and got in the car, and the men drove off. Defendant denied that he was in possession of a shotgun on 4 July 1998, and denied robbing or shooting the victim.

On appeal, defendant contends that the trial court committed reversible error by allowing the State to impeach Barnes and Reid on a collateral matter with extrinsic evidence. We are not persuaded.

"Under certain circumstances a witness may be impeached by proof of prior conduct or statements which are inconsistent with the witness's testimony." *State v. Whitley*, 311 N.C. 656, 663, 319 S.E.2d 584, 589 (1984). Such statements are admissible under North Carolina Rule of Evidence 607 for the purpose of shedding light on a witness's credibility. *Id.* In *State v. Williams*, 322 N.C. 452, 368 S.E.2d 624 (1988), our Supreme Court set out the basic principle of this area of evidence:

> A witness may be cross-examined by confronting him with prior statements inconsistent with any part of his testimony, but where such questions concern matters collateral to the issues, the witness's answers on cross-examination are conclusive, and the party who draws out such answers will not be permitted to contradict them by other testimony.

Id. at 455, 368 S.E.2d at 626 (quoting *State v. Green*, 296 N.C. 183, 192, 250 S.E.2d 197, 203 (1978)). Thus, under *Williams*, "it is clear a prior inconsistent statement may not be used to impeach a witness if the questions concern matters which are only collateral to the central issues." *State v. Najewicz*, 112 N.C. App. 280, 288, 436 S.E.2d 132, 137 (1993); *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989); *State v. Jerrells*, 98 N.C. App. 318, 390 S.E.2d 722 (1990). What is sometimes unclear, however, is what is "material" and what is "collateral." *Najewiczi*, 112 N.C. App. at 289, 436 S.E.2d at 138. Generally speaking, "material facts involve those matters which are pertinent and material to the pending inquiry," while "collateral" matters are those which are irrelevant or immaterial to the issues before the court. *Whitley*, 311 N.C. at 663, 319 S.E.2d at 589; *Najewiczi*, 112 N.C. App. at 289, 436 S.E.2d at 138.

Here, defendant relies upon *State v. Williams*, *State v. Hunt* and *State v. Jerrells* to support his argument that Barnes and Reid were improperly impeached on collateral matters with extrinsic evidence. In each of the three cases relied upon by defendant our courts held

"that once a witness denies having made a prior statement, the State may not impeach that denial by introducing evidence of the prior statement." *State v. Wilson*, 135 N.C. App. 504, 507, 521 S.E.2d 263, 264-65 (1999); *State v. Minter*, 111 N.C. App. 40, 48-49, 432 S.E.2d 146, 151 (1993). The rationale behind these holdings is that "once the witness *denies* having made a prior inconsistent statement . . . the prior statement concerns only a *collateral matter*, *i.e.*, whether the statement was ever made." *Najewiczi*, 112 N.C. App. at 289, 436 S.E.2d at 138. Here, unlike the situations presented in *Williams*, *Hunt* and *Jerrells*, both Barnes and Reid admitted making statements to Wilson on 7 July. Accordingly, these cases are inapposite.

Where the witness admits having made the prior statement, impeachment by that statement has been held to be permissible. In *State v. Wilson*, 135 N.C. App. 504, 521 S.E.2d 263 (1999) two witnesses testified as to the events of the night of 22 February 1997 when defendant was involved in an assault. Both witnesses also admitted making statements to the police regarding the assault. Over defendant's objection, the State was permitted to examine these witnesses about their prior inconsistent statements to the police. *Id.* at 506, 521 S.E.2d at 264. On appeal we held that "[s]ince neither [witness] denied making the prior statements, their introduction was not collateral and therefore the trial court properly allowed the State to use these witnesses' prior statements for impeachment purposes." *Id.* at 507, 521 S.E.2d at 265.

Likewise, where there is testimony that a witness fails to remember having made certain parts of a prior statement, denies having made certain parts of a prior statement, or contends that certain parts of the prior statement are false, our courts have allowed the witness to be impeached with the prior inconsistent statement. In *State v. Whitley*, 311 N.C. 656, 319 S.E.2d 584 (1984) the witness testified that she did not remember making specific statements to the police which tended to inculpate defendant, and then denied having made those specific statements. Our Supreme Court held that because "the prior statement with which [the witness] was impeached was inconsistent in part with her testimony and material in that it related to events immediately leading to the shooting," the witness could be impeached concerning the inconsistencies in her prior statement. *Id.* at 663, 319 S.E.2d at 589. Moreover, in *State v. Minter*, 111 N.C. App. 40, 432 S.E.2d 146 (1993) where the witness denied making certain statements before the grand jury and also claimed that some statements he made to the grand jury were false,

we held it permissible for the State to impeach the witness with his prior inconsistent statements.

At trial both Barnes and Reid admitted making statements to Wilson in which they discussed details of the robbery and assault of the victim and implicated defendant. Barnes, however, testified that certain parts of his statement were inaccurate, and that he did not remember making certain parts of his statement. Reid also testified that certain parts of his statement were inaccurate. Thus, we conclude that under *Whitley*, *Wilson* and *Minter* the trial court did not err in allowing Barnes and Reid to be impeached concerning the inconsistencies in their prior statements.

Finally, we note that while North Carolina Rule of Evidence 607 allows a party to impeach its own witness on a material matter with a prior inconsistent statement, impeachment is impermissible where it is used as a mere subterfuge to get evidence before the jury which is otherwise inadmissible. *State v. Hunt*, 324 N.C. 343, 349, 378 S.E.2d 754, 757 (1989); *State v. Price*, 118 N.C. App. 212, 216, 454 S.E.2d 820, 822-23 (1995). "Circumstances indicating good faith and the absence of subterfuge . . . have included the facts that the witness's testimony was extensive and vital to the government's case . . . ; that the party calling the witness was genuinely surprised by his reversal . . . ; or that the trial court followed the introduction of the statement with an effective limiting instruction . . . ." *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758 (citations omitted).

Here, the facts indicate "good faith and an absence of subterfuge." *Id.* at 350, 378 S.E.2d at 757. The testimony of Barnes and Reid was extensive and vital to the State's case. Both witnesses testified to the events of 4 July 1998 leading up to the robbery and assault of the victim. Both witnesses testified that they watched a fireworks display and attended a party, and later went "riding" in a Ford Escort. Both Barnes and Reid testified that they stopped at the car wash on Bessemer City Road to use the pay phone around 11:00 p.m., and that defendant was out of their sight for a sufficient time to have committed these crimes. Moreover, there is no indication that the State anticipated that Barnes and Reid would contradict the statements they had given to Wilson on 7 July. Finally, upon defendant's request, the trial court gave an effective limiting instruction to the jury before Wilson's testimony was elicited. Under the circumstances here, we cannot conclude that the impeachment of Barnes and Reid was "used as a mere subterfuge to get evidence before the jury which is otherwise inadmissible." *Id.* Accordingly, this assignment of error fails.

No error.

Judges HUDSON and SMITH concur.

PHILLIP A. TERRELL, EMPLOYEE, PLAINTIFF v. TERMINIX SERVICES, INCORPORATED, EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA99-1428

(Filed 20 February 2001)

Workers' Compensation— jurisdiction—occupational disease—time for filing complaint

The Industrial Commission properly exercised jurisdiction in a workers' compensation case when it concluded that plaintiff employee timely filed his claim for an occupational disease under N.C.G.S. § 97-58 even though plaintiff was disabled as of 20 September 1992 but was not advised by a competent medical authority that his disease was a result of his occupation until April 1994, three months after plaintiff filed his claim, because: (1) N.C.G.S. § 97-58 provides that the two-year period within which claims for benefits for an occupational disease must be filed begins running when an employee has suffered from an occupational disease which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, and the employee is informed by competent medical authority of the nature and work-related cause of the disease; and (2) the statutory period was not triggered since no testimony was offered that any of plaintiff's doctors informed plaintiff that his job was causing his disease until after plaintiff filed his claim with the Commission.

Appeal by defendants from opinion and award of the North Carolina Industrial Commission filed 5 August 1999. Heard in the Court of Appeals 8 January 2001.

Coward, Hicks & Siler, P.A., by Orville D. Coward, for the plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Dale A. Curriden, for the defendant-appellants.

EAGLES, Chief Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission holding that plaintiff suffers from a compensable occupational disease. Defendants argue that plaintiff failed to notify his employer of his occupational disease within the two-year period prescribed by statute. Because plaintiff gave notice to his employer in ample time, we affirm the decision of the commission.

Plaintiff began working for defendants in 1973. Until 1983 when plaintiff became a supervisor, plaintiff primarily worked in the field. His duties included visiting with customers to explain services; pouring, spraying and applying pesticides in and around customer homes or buildings; hauling and mixing chemicals for use in pest control; and inspecting fumigated premises. As a result of plaintiff's duties at work, he was exposed to approximately 39 different toxic chemicals. When plaintiff was promoted to supervisor in 1983, plaintiff was less frequently directly exposed to the chemicals, although he continued to be exposed 2-3 times a week.

In 1990 plaintiff began to develop headaches and difficulty catching his breath. Plaintiff was initially diagnosed by his internal medicine specialist as having allergic asthma. Plaintiff began missing time from work due to these problems. Later that year, plaintiff was referred to two specialists, one with a subspecialty in allergy, asthma, and immunology. In October 1991, plaintiff had a severe flare-up of his asthma requiring a seven day hospitalization. Plaintiff's condition deteriorated and plaintiff was required to see his physicians more frequently. In 1992, Dr. Benjamin Douglas performed functional endoscopic sinus surgery on plaintiff.

Plaintiff continued to work although his condition was progressively becoming worse. In 1992, plaintiff was hospitalized for 3-5 days on 3 separate occasions. On 20 September 1992 plaintiff became totally incapable of earning wages and resigned his job. Dr. Troxler communicated with the Social Security Administration, stating that plaintiff was totally incapacitated by his asthma. On 24 January 1994 plaintiff filed a Form 18 claim for compensation.

The Commission held that the 24 January 1994 claim was timely filed. Plaintiff was not informed by competent medical authority that there was a probable causal connection between his employment and his disabling asthma until April 1994 when his doctors advised him.

However, plaintiff was notified in June of 1992 that his doctors believed there may be a causal relationship between his employment and his asthma. Dr. Russell opined that a number of chemicals that plaintiff was in contact with could cause plaintiff's respiratory difficulties. Many of them contained organophosphates which are blamed for 5 to 20% of asthmatics' respiratory problems. The doctors opined that plaintiff is temporarily totally disabled from working in any job in the competitive market.

Although defendants present several assignments of error in the record on appeal, they argue only one issue in their appellate brief. Therefore the remaining assignments of error are abandoned. *See* N.C. R. App. P. 28(b)(5). The only issue on appeal is whether plaintiff timely filed his claim.

Whether the claim for an occupational disease was filed timely is an issue of jurisdiction for the commission. "[T]he finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding." *Lucas v. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976). The reviewing courts are obliged to make independent findings of jurisdictional facts based upon consideration of the entire record. *Lawson v. Cone Mills Corp.*, 68 N.C. App. 402, 404, 315 S.E.2d 103, 105 (1984); *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 705, 304 S.E.2d 215, 218 (1983). N.C.G.S. § 97-58 prescribes a time limit for filing claims for occupational disease.

> (b) The report and notice to the employer as required by G.S. 97-22 shall apply in all cases of occupational disease except in case of asbestosis, silicosis, or lead poisoning. **The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.**
>
> (c) The right to compensation for occupational disease shall be barred unless a claim be **filed with the Industrial Commission within two years after death, disability, or disablement as the case may be**. Provided, however, that the right to compensation for radiation injury, disability or death shall be barred unless a claim is filed within two years after the date upon which the employee first suffered incapacity from the exposure to radiation and either knew or in the exercise of reasonable diligence should have known that the occupational disease was caused by his present or prior employment.

N.C.G.S. § 97-58(b) and (c) (1999) (emphasis added). In *Taylor v. Stevens & Co.*, our Supreme Court held that sections (b) and (c) of N.C.G.S. § 97-58 must be read *in pari materia*. *Taylor*, 300 N.C. 94, 265 S.E.2d 144 (1980). The two year period within which claims for benefits for an occupational disease must be filed begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, **and** the employee is informed by competent medical authority of the nature and work-related cause of the disease. *Id.*

Since the cause of plaintiff's disease is not at issue, we address the timeliness of plaintiff's claim. This Court in *Meadows v. N.C. Department of Transportation*, 140 N.C. App. 183, 535 S.E.2d 895 (2000) addressed a similar issue. In *Meadows*, this Court held that to "trigger the running of the statutory time limit, the employee first 'must be informed clearly, simply and directly that [h]e has an occupational disease and that the illness is work-related.' " *Id.* at 190, 535 S.E.2d at 900; *Lawson*, 68 N.C. App. at 403, 315 S.E.2d at 104. The law does not require an employee to diagnose himself or file a claim based on his own suspicions. *Duncan v. Carpenter*, 233 N.C. 422, 427, 64 S.E.2d 410, 414 (1951), *overruled on other grounds*, 300 N.C. 94, 265 S.E.2d 144 (1980).

Here the plaintiff was not notified that he had an occupational disease until April of 1994, some three months after his Form 18 was filed. The doctors testified that they had shared suspicions with each other of a causal relationship between plaintiff's work and health. However, no testimony was offered that any of those doctors informed the plaintiff that his job was causing his disease.

Plaintiff became aware that he was disabled on 30 September 1992 when Dr. Troxler wrote the Social Security Administration notifying them that plaintiff was disabled and totally unable to work. North Carolina's Workers' Compensation Act N.C.G.S. § 97-2 (9) provides, "[t]he 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." *Id.*

Until 20 September 1994, plaintiff had been able to maintain his position with Terminix although he had missed some days. Terminix argues that according to *Dowdy*, plaintiff was unable to earn wages as early as the first hospitalization in 1991. In *Dowdy*, the plaintiff frequently could not work a forty hour week. *Id.*, 308 N.C. at 709, 304

S.E.2d at 220. After reviewing the record in *Dowdy*, our Supreme Court noted that although plaintiff was able to work a few full weeks over the course of 1974, 1975, and 1976, plaintiff was unable to earn wages at the same rate since 1974. *Id.* Further, defendants' reliance on *Dowdy* is misplaced since the plaintiff in that case was informed by a doctor that he had a work-related lung disease more than two years before he filed his claim. *Id.* at 710, 304 S.E.2d at 221.

Here, plaintiff was hospitalized on four separate occasions for one week or less beginning in 1991. He was not "advised by a competent medical authority" that his work was causing his disease until later. Until 20 September 1992 when his doctor declared him disabled, plaintiff was able to work at the same rate as he had been working. Although the evidence shows that plaintiff was not advised of the relationship between his work and his disease as required by N.C.G.S. § 92-58 until 1994, plaintiff was disabled as of 1992. "[D]isability or disablement is one of the triggering factors which begins the running of the two year limitation on filing claims." *Dowdy*, 308 N.C. at 714, 304 S.E.2d at 223.

The question presented here, is much closer to the question presented by *Lawson.* In *Lawson* we concluded that although the plaintiff was told by a doctor that he had a lung disease, the statutory period was not triggered since the evidence also showed that he was not told that his disease was caused by conditions on his job. *Id.*, 68 N.C. App. at 410, 315 S.E.2d at 108; *McCubbins v. Fieldcrest Mills, Inc.*, 79 N.C. App. 409, 413, 339 S.E.2d 497, 499 (1986). In *McCubbins* the record shows it was not until several months after plaintiff's claim was filed, that plaintiff was advised by a doctor that her lung disease was related to her work. *Id.* Here, the record shows that plaintiff was not advised clearly that his work and his disease were related until after plaintiff filed his claim with the commission. Although plaintiff and one of his doctors had shared a suspicion that his work **may** be affecting his asthma; we hold that on this record, sharing a suspicion is not sufficient notice by a competent medical authority.

After reviewing the record, we hold that the statutory factors necessary to start the running of the two year limitation on filing of claims were not in existence until April of 1994. Plaintiff was disabled as of 20 September 1992, but was not advised by a competent medical authority that his disease was a result of his occupation until April 1994. Accordingly, we conclude that the Industrial Commission prop-

erly exercised jurisdiction over plaintiff's claim. Accordingly, the opinion and award of the Commission is hereby affirmed.

Affirmed.

Judges HUDSON and SMITH concur.

STEVE THOMAS AND THE STATE OF NORTH CAROLINA, EX REL. STEVE THOMAS, PLAINTIFFS v. JAMES SELLERS, SHERIFF OF ANSON COUNTY, IN HIS OFFICIAL CAPACITY, DEPUTY SHERIFF DAVID MORTON, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, AND FIDELITY AND DEPOSIT CO. OF MARYLAND, AS SURETY, DEFENDANTS

No. COA00-337

(Filed 20 February 2001)

1. Police Officers— execution of court order—good faith—no individual liability

The trial court properly granted summary judgment for Deputy Morton in his individual capacity on claims arising from plaintiff's arrest where Deputy Morton testified that he acted in good faith and without malice, there is no contrary evidence in the record, and both plaintiff and Deputy Morton testified that plaintiff effectively prevented officers from removing equipment subject to an order of seizure in claim and delivery, that Deputy Morton repeatedly urged plaintiff to remove the obstacles plaintiff had placed in front of the equipment, and that Deputy Morton warned plaintiff at least ten times that he would be arrested if he did not comply. Officers are not expected to go behind the face of a valid order and Deputy Morton's attempt to execute the order of seizure cannot in itself be deemed malicious.

2. Immunity— governmental—sheriff—surety

While the general rule is that suits against public officials are barred by governmental immunity where the official is performing a governmental function, N.C.G.S. § 58-76-5 removes a sheriff from governmental immunity where the surety is added as a party to the action.

3. Malicious Prosecution— malice—summary judgment

The trial court properly granted summary judgment for a deputy sheriff, the sheriff, and their surety in their official

capacity on a malicious prosecution claim where plaintiff failed to show a genuine issue of material fact as to whether the deputy acted with malice in executing an order of seizure against equipment.

4. Assault— arising from arrest—summary judgment

The trial court properly granted summary judgment in a civil assault action against a deputy, the sheriff, and their surety on a civil assault claim arising from an arrest where plaintiff testified in a deposition that the deputy had asked him to assume the position, patted him down, handcuffed him, and walked him to a car.

5. False Arrest— preventing execution of court order—reasonable officer

The trial court did not err by granting summary judgment for defendant deputy sheriff on plaintiff's claim for false arrest where plaintiff admitted that the deputy possessed an order to seize equipment, that the deputy told plaintiff he had the right to remove the property from plaintiff's premises, that plaintiff blocked access to the equipment with other machinery, and that plaintiff refused to move that machinery despite numerous requests and warnings that he would be arrested if he did not do so. Plaintiff's continued refusal to remove the machinery effectively prevented execution of a court order and would induce a reasonable police officer to arrest him.

Appeal by plaintiff from order entered 10 November 1999 by Judge Michael E. Beale in Anson County Superior Court. Heard in the Court of Appeals 25 January 2001.

Drake and Pleasant, by Henry T. Drake for plaintiff-appellant.

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

MARTIN, Judge.

Plaintiff appeals from the entry of summary judgment in favor of defendants, dismissing plaintiff's claims for malicious prosecution, assault, and false imprisonment. The pleadings, depositions, and affidavits before the trial court at the summary judgment hearing tended to show that ancillary to litigation pending in the Superior Court of Anson County between Edwards Timber Company, Inc., and Jerry

Wayne Flake, the Clerk of Superior Court issued, on 1 July 1997, an Order of Seizure In Claim And Delivery directing the Sheriff of Anson County to seize certain property belonging to Mr. Flake, including a 711 E Hydro-Axe with 20" Koehring saw (hereinafter "Hydro-Axe"). The Hydro-Axe was located at a repair shop owned by plaintiff Steve Thomas, which was located adjacent to his residence. On 7 July 1997, Deputy Sheriff David Morton went to plaintiff's home to seize the Hydro-Axe. Deputy Morton first spoke with plaintiff's wife, Saundra, who told him that her husband's lawyer had informed them that the police could not lawfully seize the Hydro-Axe. Mrs. Thomas told Deputy Morton that plaintiff was on his way home and warned him that plaintiff had a violent temper. Deputy Morton called for assistance.

When plaintiff arrived at his shop, he told Deputy Morton that he had performed repair work on the Hydro-Axe, possessed a mechanic's lien on the equipment, and that the officer had no right to seize the Hydro-Axe because removal of it from plaintiff's possession would abolish the lien. When Deputy Morton responded that the order gave him the right to seize the Hydro-Axe regardless of the mechanic's lien, plaintiff moved a tandem dump truck and a track loader next to the Hydro-Axe to prevent the officer from removing it. Plaintiff refused to move the truck and track loader despite Morton's repeated requests. Shortly thereafter, numerous other law enforcement officers arrived and Deputy Morton warned plaintiff that he would arrest him for resisting, delaying and obstructing a police officer if he did not move the equipment that was blocking the Hydro-Axe. When plaintiff did not comply despite at least ten such warnings, Morton arrested him. Plaintiff was patted down and handcuffed; the keys to the truck and track loader were taken from his pockets and were used to move the vehicles away from the Hydro-Axe. Plaintiff was transported to the Anson County sheriff's office, where a magistrate judge issued an arrest warrant charging him with resisting, obstructing and delaying a public officer. After a hearing in district court, however, the charges against plaintiff were dismissed.

Plaintiff's single assignment of error is to the order granting summary judgment in favor of defendants. In ruling on a motion for summary judgment, the court must "view the pleadings, affidavits and discovery materials available in the light most favorable to the non-moving party to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as

a matter of law." *Pine Knoll Ass'n, Inc. v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448, *disc. review denied*, 347 N.C. 138, 492 S.E.2d 26 (1997); N.C.R. Civ. P. 56 (2000).

I.

[1] Plaintiff asserted claims against Deputy Morton both individually and in his official capacity. "In order to hold an officer personally liable in his individual capacity, a plaintiff must make a prima facie showing that the officer's conduct is malicious, corrupt, or outside the scope of his official authority." *McCarn v. Beach*, 128 N.C. App. 435, 437, 496 S.E.2d 402, 404, *disc. review denied*, 348 N.C. 73, 505 S.E.2d 874 (1998). Plaintiff contends Deputy Morton is liable individually because he acted with malice when he arrested plaintiff for resisting, obstructing and delaying a public officer in the performance of his duties.

"A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). In this case, Deputy Morton testified by affidavit that he acted in good faith and without malice; there is no contrary evidence in the record before us which would sustain a finding that Morton acted in a manner which he should have known would be contrary to his duty or that he intended to prejudice or injure plaintiff. Both plaintiff and Deputy Morton testified that plaintiff effectively prevented the officers from removing the Hydro-Axe, and that Deputy Morton repeatedly urged plaintiff to remove the obstacles, warning him at least ten times that he would be arrested if he did not comply.

Moreover, "officers cannot be deemed to act maliciously when they enforce a court order that is valid on its face. They are not expected to go behind the face of the order." *Jacobs v. Sherard*, 36 N.C. App. 60, 65, 243 S.E.2d 184, 188, *disc. review denied*, 295 N.C. 466, 246 S.E.2d 12 (1978). Officer Morton's attempt to execute the order of seizure in claim and delivery, therefore, cannot in itself be deemed malicious. Even when the evidence is viewed in the light most favorable to plaintiff, plaintiff has not shown any genuine issue of material fact as to his claims against Deputy Morton in his individual capacity and defendants' motion for summary judgment as to those claims was properly granted.

II.

[2] Plaintiff also asserted claims against Deputy Morton and Sheriff Sellers in their official capacities and against Fidelity Deposit Company as surety. The general rule is that suits against public officials are barred by the doctrine of governmental immunity where the official is performing a governmental function, such as providing police services. *Messick v. Catawba County*, 110 N.C. App. 707, 431 S.E.2d 489, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). However, G.S. § 58-76-5 provides that a sheriff and his officers can be sued in their official capacities.

> Every person injured by the neglect, misconduct, or misbehavior in office of any . . . sheriff, . . . or other officer, may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the State, without any assignment thereof . . . .

N.C. Gen. Stat. § 58-76-5. This statute removes the sheriff and officer "from the protective embrace of governmental immunity" where, as here, the surety is added as a party to the action. *Messick*, 110 N.C. App. at 715, 431 S.E.2d at 494. Thus, we must determine whether a genuine issue of material fact exists with regard to plaintiff's tort claims against defendants in their official capacities.

A. Malicious Prosecution

[3] "[T]o maintain an action for malicious prosecution, the plaintiff must demonstrate that the defendant '(1) instituted, procured or participated in the criminal proceeding against [the] plaintiff; (2) without probable cause; (3) with malice; and (4) [that] the prior proceeding terminated in favor of [the] plaintiff.' " *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (quoting *Williams v. Kuppenheimer Manufacturing Co.*, 105 N.C. App. 198, 200, 412 S.E.2d 897, 899 (1992)). Since plaintiff failed to show the existence of any genuine issue of material fact regarding whether Deputy Morton acted with malice, he has failed to make the requisite showing to sustain an action for malicious prosecution. Accordingly, defendants' motion for summary judgment as to the malicious prosecution claim was properly granted.

B. Assault

[4] Plaintiff next alleges that Deputy Morton assaulted plaintiff by threatening to arrest him if he did not comply and by "plac[ing] his hands upon the plaintiff" at the time of the arrest. "[A] civil action for damages for assault and battery is available at common law against one who, for the accomplishment of a legitimate purpose, such as justifiable arrest, uses force which is excessive under the given circumstances." *Myrick v. Cooley*, 91 N.C. App. 209, 215, 371 S.E.2d 492, 496 (1988). Even viewing the evidence in the light most favorable to plaintiff, no genuine issue of material fact exists regarding whether defendant Morton used excessive force. In his deposition, plaintiff described the arrest as follows: "he asked me to assume the position;" later he stated "he patted me down, handcuffed me and Bradshaw walked me to the car." This testimony provides no evidence of excessive force. Defendants' motion for summary judgment as to plaintiff's assault claim was properly granted.

C. False Imprisonment

[5] Finally, plaintiff argues that the court erred in granting summary judgment as to his claim for false imprisonment. Plaintiff was arrested without a warrant for committing an offense in the presence of the arresting officers. This issue is governed by G.S. § 15A-401(b)(1), which provides:

> [a]n officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence.

The dispositive issue, therefore, is whether Deputy Morton had probable cause to believe plaintiff obstructed, resisted and delayed him in carrying out his duties. "The test for whether probable cause exists is an objective one—whether the facts and circumstances, known at the time, were such as to induce a reasonable police officer to arrest, imprison, and/or prosecute another." *Moore*, 124 N.C. App. at 43, 476 S.E.2d at 422 (emphasis omitted). "If the facts are admitted or established [probable cause] is a question of law for the court." *Id.* (quoting *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978)).

The facts as to this issue are not in dispute. Plaintiff admits that Deputy Morton possessed an order to seize the Hydro-Axe and that the deputy told plaintiff he had the right to remove the property from plaintiff's premises. Plaintiff further admits that he blocked the offi-

cers' access to the Hydro-Axe with two pieces of machinery and refused to move them despite Morton's numerous requests and warnings that he would be arrested if he did not do so. We believe plaintiff's continued refusal to remove the machinery, which effectively prevented Officer Morton from executing the court's order, would induce a reasonable police officer to arrest him. Accordingly, we hold Officer Morton had probable cause to make the arrest, and the trial court did not err in granting summary judgment dismissing plaintiff's claim for false imprisonment.

Affirmed.

Judges TIMMONS-GOODSON and THOMAS concur.

FRANKLIN WARREN v. GENERAL MOTORS CORPORATION, HENRY CLIFTON BALDWIN, INDIVIDUALLY, AND LINDA HAYWORTH HYATT, INDIVIDUALLY

No. COA00-155

(Filed 20 February 2001)

1. **Insurance— automobile—unnamed UIM insurer—right to participate in trial**

The trial court did not err in a negligence case arising out of an automobile accident by permitting the unnamed UIM insurance company to participate in the trial when the insurance company had earlier said it would not participate in the pretrial conference or trial, because: (1) N.C.G.S. § 20-279.21(b)(4) provides that a UIM insurer has the right to participate in a trial without being named if application is made and approved by the presiding judge; (2) the insurance company's counsel filed a notice of appearance which the trial court recognized; and (3) even though N.C.G.S. § 1A-1, Rule 16 precludes a party from participating in a trial if that party elects not to participate in the pretrial conference, there is no evidence the insurance company failed to participate in the pretrial conference.

2. **Pleadings— amendment to answer—no prejudicial error**

The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by allowing the unnamed UIM insurance company and defendant driver to amend

their answers on the first day of trial, because there was no prejudicial error when the jury found for plaintiff on those issues.

3. Evidence— automobile accident—unnamed insurance company's original answer

The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by refusing to permit plaintiff to offer the unnamed UIM insurance company's original answer as evidence in the case, because: (1) the trial court found the probative value of the answers were substantially outweighed by the danger of prejudice under N.C.G.S. § 8C-1, Rule 403; and (2) it is generally not permissible in negligence cases to introduce evidence of liability insurance or to make any reference of its existence in the presence of the jury.

4. Evidence— automobile accident—loss of services—expert testimony not required

The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by refusing to permit plaintiff to offer evidence of loss of his own services through the testimony of an expert witness under N.C.G.S. § 8C-1, Rule 702(a), because the jury was capable of rendering a decision on the value of a person's services to himself based on common knowledge.

5. Damages and Remedies— motion for new trial—alleged low amount—controverted damages

The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by refusing to grant a new trial under N.C.G.S. § 1A-1, Rule 59(a)(6) when the jury award was allegedly low, because: (1) plaintiff's damages were contested by two defendants; and (2) plaintiff's own witness testified that many of plaintiff's injuries did not result from the accident at issue.

Appeal by plaintiff from judgment entered on 28 May 1999 by Judge Mark E. Klass in Guilford County Superior Court. Heard in the Court of Appeals 11 January 2001.

Twiggs, Abrams, Strickland & Trehy, by Douglas B. Abrams for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, by Stephen G. Teague for defendant-appellee Hyatt.

Burton & Sue, by Walter K. Burton and James D. Secor, III for unnamed defendant-appellee Allstate.

THOMAS, Judge.

Plaintiff appeals from a jury verdict of $6,000.00 in a personal injury action and sets forth six assignments of error. For reasons discussed herein, we hold the trial court committed no error.

The facts surrounding the car accident are not in dispute. Plaintiff was driving south on Randleman Road in Guilford County when the rear of his vehicle was struck by a vehicle operated by defendant Henry Baldwin. Baldwin's vehicle was then struck by a vehicle driven by defendant Linda Hyatt. Plaintiff brought suit against both Baldwin and Hyatt alleging multiple injuries. Initially, Hyatt denied liability in her answer to plaintiff's complaint while unnamed defendant Allstate (the underinsured motorist insurer) admitted liability. Just before trial began, plaintiff reached a settlement with Baldwin. Allstate then amended its answer to deny negligence and Hyatt amended her answer to allege contributory negligence against plaintiff. The case went to trial during the week of 26 April 1999 and the jury returned a verdict for plaintiff in the amount of $6,000.00. Plaintiff filed a motion for a new trial, which was denied. Plaintiff filed notice of appeal on 24 June 1999.

[1] By plaintiff's first assignment of error, he argues the trial court erred in permitting Allstate to participate in the trial when it earlier had said it would not participate in the pre-trial conference or trial. We disagree.

By statute, a UIM insurer has the right to participate in a trial without being named if application is made and approved by the presiding trial judge. N.C. Gen. Stat. § 20-279.21(b)(4) (1999). Allstate's counsel filed a notice of appearance on 27 April 1999, which the court recognized in an order *in limine* filed on 28 April 1999. Plaintiff argues the North Carolina Rules of Civil Procedure preclude a party from participating in a trial if that party elects not to participate in the pre-trial conference. N.C. Rules of Civ. Proc., Rule 16 (1999). However, there is no evidence Allstate failed to participate in the pre-trial conference. There is evidence the pre-trial conference actually occurred after Walter Burton appeared before the court as counsel for Allstate. Thus, this assignment of error is rejected.

[2] By plaintiff's second and third assignments of error, he argues the trial court committed reversible error in allowing Allstate and Hyatt to amend their answers on the first day of trial. We disagree.

A motion to amend pleadings is addressed to the sound discretion of the trial court; the trial court's ruling is not reviewable absent a showing of an abuse of discretion. *Haas v. Kelso*, 76 N.C.App. 77, 80, 331 S.E.2d 759, 761 (1985); *see also* N.C. Gen. Stat. § 1A-1, Rule 15 (1999). "An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.' " *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C.App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). No abuse of discretion has been shown.

Additionally, reversible error occurs when the defendant shows that but for the error a different result would have been reached. N.C. Gen. Stat. § 15A-1443(a) (1999). The jury found for plaintiff on those issues. By prevailing, even if there were error, and we conclude there was not, it was not prejudicial and is rendered moot.

[3] By plaintiff's fourth assignment of error, he argues the trial court erred in refusing to permit plaintiff to offer Allstate's original answer as evidence in the case. We disagree.

The trial court denied plaintiff's motion *in limine*, which sought to offer both the original and amended answers into evidence. A motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial; its determination will not be reversed absent a showing of an abuse of the trial court's discretion. *Nunnery v. Baucom*, 135 N.C.App. 556, 521 S.E.2d 479 (1999). The trial judge found the probative value of the answers was substantially outweighed by the danger of prejudice and confusion of the issues by the jury, pursuant to Rule 403 of the N.C. Rules of Evidence. Moreover, in negligence cases, it is not generally permissible to introduce evidence of liability insurance or to make any reference of its existence in the presence of the jury. *Carolina Timber Management Co. v. Bell*, 21 N.C.App. 143, 203 S.E.2d 339, *cert. denied*, 285 N.C. 376, 205 S.E.2d 97 (1974). As with assignments of error three and four, plaintiff prevailed on those issues at trial. Thus, there is no prejudicial error.

[4] By plaintiff's fifth assignment of error, he argues the trial court erred in refusing to permit plaintiff to offer evidence of loss of services to himself. We disagree.

Plaintiff attempted to use an economist as his expert witness to show the value of the plaintiff's loss of his own services. An expert witness is qualified to testify if "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. Gen. Stat. § 8C-1, Rule 702(a) (1999); *State v. Jones*, 337 N.C. 198, 209, 446 S.E.2d 32, 39 (1994). The trial court correctly concluded the jury was capable of rendering a decision on the value of a person's services to himself because such is a matter of common knowledge. No abuse of the trial court's discretion has been shown and, accordingly, we find no error.

[5] By plaintiff's sixth and final assignment of error, he argues the trial court erred in refusing to grant a new trial because the jury award was improperly low. We disagree.

The relevant statute provides that a new trial may be granted due to "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) (1999). "A motion for a new trial on the grounds of inadequate damages is addressed to the sound discretion of the trial court[.]" *Estate of Smith v. Underwood*, 127 N.C.App. 1, 12, 487 S.E.2d 807, 814, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997) (quoting *Pelzer v. United Parcel Service*, 126 N.C.App. 305, 484 S.E.2d 849, 853, *disc. review denied*, 346 N.C. 549, 488 S.E.2d 808 (1997)). The plaintiff relies on *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1971), which held that uncontroverted damages cannot be arbitrarily ignored by the jury. However, in the instant case, plaintiff's damages were contested by defendants Hyatt and Allstate. Plaintiff's own witness, Dr. Arthur Carter, testified that many of plaintiff's injuries did not result from the accident at issue. Plaintiff has not shown an abuse of the trial court's discretion; thus the assignment of error is rejected.

For the reasons stated herein, we find no error.

NO ERROR.

Judges MARTIN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. JOSHUA MICHAEL MORTIMER

No. COA00-131

(Filed 20 February 2001)

Crimes, Other— communicating threats—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of communicating threats under N.C.G.S. § 14-277.1 based on defendant's action of placing a screen saver on a school computer stating "the end is near" when the school was in a state of fear over the recent tragedy at another school and local rumors of bomb threats, because: (1) the statement "the end is near" does not constitute a threat to injure a person or damage property when the meaning of the statement is impossible to ascertain; (2) defendant was never connected with any of the alleged bomb threats at the school; and (3) there was no evidence defendant had any plans to physically injure anyone or damage school property.

Appeal by defendant from judgment entered 29 September 1999 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 22 January 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Ted R. Williams, for the State.

Sofie W. Hosford for defendant-appellant.

Seth H. Jaffe and Deborah K. Ross for the American Civil Liberties Union of North Carolina Legal Foundation, Inc., amicus curiae.

HUDSON, Judge.

Defendant appeals his conviction of the crime of communicating threats. He primarily contends the trial court erred in denying his motion to dismiss the charge for insufficiency of evidence. We agree.

Facts surrounding the case are as follows: on 20 April 1999, two students at Columbine High School near Littleton, Colorado, went on a shooting and bombing rampage, killing twelve fellow students, a teacher, and finally themselves. After this tragedy, school officials, students, and parents across the nation were afraid that copycat

crimes would occur in their own schools. Hoggard High School in New Hanover County, North Carolina, was no exception.

Shortly after the killings at Columbine, rumors began to circulate throughout the student body that Hoggard High School was to be bombed on 4 May 1999. Principal Wright Anderson asked parents to come to school and patrol the halls on that day to help students feel safe. Still, on May 4th, over 500 students were absent from the 2500-person school, which had a normal absentee rate of about 120.

On the morning of May 4th, a student in Mr. Ostrowski's keyboarding class discovered a screen saver on one computer which stated, "The end is near." Mr. Ostrowski contacted the police officer assigned to work with Hoggard High School. Police investigators discovered the screen saver had been created by student Joshua Mortimer, the defendant. Detective Leon Kerr testified at trial that defendant admitted having written the message and that defendant said he "didn't mean anything by it. He put it on there for the meaning of the end of the school year or the end of time, or whatever." Detective Kerr testified he knew the screen saver was a prank; however, he subsequently charged defendant with the crime of communicating a threat.

At the close of the State's evidence at trial, and again at the close of all the evidence, defendant made motions to dismiss the charge, which motions were denied. The jury found defendant guilty as charged. Defendant appealed his conviction to this Court 29 September 1999.

In ruling on a motion to dismiss, the trial court must decide whether there is substantial evidence as to each essential element of the offense charged, and that the defendant was the person who committed the offense. *See State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980). Moreover, the evidence is to be viewed in the light most favorable to the State. *See State v. Bright*, 301 N.C. 243, 271 S.E.2d 368 (1980).

The crime of communicating threats was set forth at N.C.G.S. § 14-277.1 during the relevant time period as follows (it has since been amended):

> (a) A person is guilty of a Class 1 misdemeanor if without lawful authority:

(1) He willfully threatens to physically injure the person or damage the property of another;

(2) The threat is communicated to the other person, orally, in writing, or by any other means;

(3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and

(4) The person threatened believes that the threat will be carried out.

Defendant contends the State failed to produce sufficient evidence of any of the above four elements to enable a jury to convict him. First, defendant argues the statement "the end is near" does not constitute a threat to injure a person or damage property. We agree.

The meaning of the statement "the end is near" is impossible to ascertain. The end of *what* is near? Who will bring about the "end" and how? Numerous state witnesses testified at defendant's trial that they did not know what the statement meant. Given the context in which the statement was written—Hoggard High School was in a state of fear over the tragedy at Columbine and local rumors of bomb threats—one possible interpretation of "the end is near" is that the writer intended to bomb the school. However, the leap to such a conclusion beyond a reasonable doubt is extremely speculative and, we think, not a reasonable inference.

Given the context, the students and teacher who read the screen saver were justifiedly afraid about what it *could* mean. However, of the principal, teacher, school police officer, and four students who testified they read the screen saver, only one person could articulate what he or she thought the statement actually threatened. Student Adam Horne testified, "I thought it was about the bomb." Even Horne's explanation begs the question of what the message meant. Horne did not say he thought the writer intended to bomb the school. Rather, his testimony could as easily have meant he thought the screen saver author was a student expressing his fear that some *other* person was going to bomb the school.

Moreover, it is significant that defendant was never connected with any of the alleged bomb threats at the school. There was no evidence defendant had any plans to physically injure anyone or damage

school property. He had exhibited good behavior at the school prior to this incident. The arresting officer testified he determined the message written on the computer was "a prank."

In contrast to the present situation, past reported decisions upholding the crime of communicating threats have involved threats clearly stating what the speaker intended to do. For example, in *State v. Roberson*, 37 N.C. App. 714, 715, 247 S.E.2d 8, 9 (1978), the defendant picked up a rock and told her neighbor, "If you come any closer, I will hit you with it." In *State v. Evans*, 40 N.C. App. 730, 731, 253 S.E.2d 590, 591, *appeal dismissed*, 297 N.C. 456, 256 S.E.2d 809 (1979), the defendant pointed a gun at someone and said, "I'm going to kill you." *See also State v. Cunningham*, 344 N.C. 341, 360, 474 S.E.2d 772, 781 (1996) ("Hit me with that flashlight and I'll cut you a flip."); *State v. Elledge*, 80 N.C. App. 714, 715, 343 S.E.2d 549, 550 (1986) ("I had better get that man out of my bed or he was going to come down and blow my brains out."); *State v. Dixon*, 77 N.C. App. 27, 29, 334 S.E.2d 433, 435 (1985) ("Don't move. I'll blow your fucking brains out."); *State v. Zigler*, 42 N.C. App. 148, 151, 256 S.E.2d 479, 481 (1979) ("There are two of you dudes that need killing . . . Someone is going to have to do you in, and I decided that it was going to be me . . . .").

In *Roberson*, this Court found significant that "the terms of the threat . . . indicate[d] an intention to carry out the threat." 37 N.C. App. at 716, 247 S.E.2d at 10. Such an indication is absent from the present case. The statement "the end is near" does not indicate what, if *anything*, the speaker intends to do.

In conclusion, we agree with defendant that the State failed to present substantial evidence of the first element of the crime of communicating threats—that defendant willfully threatened to physically injure the person or damage the property of another. Without proving this element, the State could not meet its burden, and the trial court should have granted defendant's motion to dismiss the charge.

Since we are able to resolve this case by examining only the first element of the crime of communicating threats, we decline to address defendant's argument that the State did not produce sufficient evidence of any of the remaining elements. Furthermore, we need not address defendant's additional assignments of error, including whether certain evidence was improperly admitted under N.C.R. Evid. 404(b) and whether defendant's constitutional right to free speech was violated.

Reversed and vacated.

Chief Judge EAGLES and Judge SMITH concur.

EDWARD FURR, PLAINTIFF v. K-MART CORPORATION, DEFENDANT

No. COA00-257

(Filed 20 February 2001)

Premises Liability— slip and fall—detergent on floor

The trial court erred by granting summary judgment for defendant department store in a slip and fall action where plaintiff presented evidence that the liquid on which he slipped was detergent that had leaked from a container onto a shelf, down the side of the shelving structure, and onto the floor, and that the liquid on the tops and sides of the shelves had already dried and become pink at the time of plaintiff's fall. This evidence is sufficient to raise an inference that the detergent had been leaking for such a length of time that defendant should have known of its existence.

Appeal by Plaintiff from order entered 19 October 1999 by Judge Claude Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 January 2001.

George Hamo & Associates, by George R. Hamo, for plaintff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Allen C. Smith and C. J. Childers, for defendant-appellee.

HUDSON, Judge.

On 30 November 1996, plaintiff allegedly slipped and fell while shopping in a K-Mart store. Plaintiff filed a complaint on 7 August 1998, alleging that defendant's negligence caused his fall. Following discovery, defendant moved for summary judgment. The trial court granted defendant's motion and dismissed the complaint. Plaintiff appeals from this order.

Plaintiff's evidence tended to show that as he rounded the corner of an aisle in defendant's store, he slipped on some clear liquid that was on the floor in front of a column of shelves holding Wisk detergent containers. Above the liquid there was a pink, dried substance on the tops and sides of the shelves holding the Wisk containers, as well as on the base structure between the lowest shelf and the floor. When plaintiff tried to stand up, the seat of his pants and his shirt were wet, and his hands slipped in the liquid.

Plaintiff presented photographs of the accident area which had been taken approximately four days after he fell. These photographs show a pink substance on the tops and sides of the lowest two shelves holding the Wisk containers. Plaintiff testified that the amount of dried soap on the shelves at the time of the accident was greater than the amount that appears in the photographs. A Customer Accident Worksheet, which had been filled out by a K-Mart employee subsequent to plaintiff's fall, states that, upon inspecting the scene, the employee "found Wisk on the floor" and saw that "there was a trail" of Wisk on the floor.

In a premises liability case involving injury to a store customer, the owner of the premises has a duty to exercise "ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision." *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963). "But when an unsafe condition is created by third parties or an independent agency it must be shown that it had existed for such a length of time that defendant knew or by the exercise of reasonable care should have known of its existence, in time to have removed the danger or given proper warning of its presence." *Powell v. Deifells, Inc.*, 251 N.C. 596, 600, 112 S.E.2d 56, 58 (1960). Thus, to prove a breach of the duty of care the plaintiff is required to show that the defendant either "(1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43 (1992).

On appeal, plaintiff contends the trial court erred in granting defendant's motion for summary judgment. A defendant is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that [defendant] is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1999). When a trial court rules on a motion for summary judgment, "the evidence is viewed in the light most favorable to the non-moving party," *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986), and "[a]ll inferences of fact must be drawn against the movant and in favor of the nonmovant," *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342. In a negligence action, summary judgment is rarely appropriate. *See, e.g., Durham v. Vine*, 40 N.C. App. 564, 566, 253 S.E.2d 316, 319 (1979). Specifically, a defendant is entitled to summary judgment in a slip and fall case if the plaintiff is unable to provide a forecast of evidence to support an essential element of the claim. *See Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342.

Defendant argues that summary judgment was proper in the case at bar because plaintiff failed to produce evidence that defendant knew or should have known of the dangerous condition. It is well-established that evidence presented by a plaintiff tending to show that the condition causing a slip and fall existed for some period of time prior to the fall may raise an inference of constructive notice sufficient to withstand a motion for summary judgment. For example, in *Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 488 S.E.2d 608 (1997), *aff'd*, 347 N.C. 666, 496 S.E.2d 379 (1998), the defendant presented evidence to show that none of its employees was aware of the water or grape on the floor which had caused the plaintiff's slip and fall, *id.* at 241, 488 S.E.2d at 612. The plaintiff presented evidence that the grape was brown, raising an 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. This Court reversed the entry of summary judgment, holding that such evidence raised an inference that the defendant had constructive notice of the condition which caused the plaintiff's fall. *Id.* at 241, 488 S.E.2d at 612-13.

In *Mizell v. K-Mart Corp.*, 103 N.C. App. 570, 406 S.E.2d 310 (1991), *aff'd*, 331 N.C. 115, 413 S.E.2d 799 (1992), the plaintiff presented the affidavit of a witness who had been sitting approximately 20 feet from where the plaintiff had fallen for approximately 20 minutes prior to the plaintiff's fall, *id.* at 574, 406 S.E.2d at 312. The witness testified that he had an unobstructed view of patrons walking through that area of the store and that nothing had been spilled there during that period of time. *Id.* The Court held that this evidence was

sufficient to survive a summary judgment motion. *Id.* Similarly, in *Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App. 163, 336 S.E.2d 699 (1985), this Court reversed an entry of summary judgment, holding that the plaintiff's testimony that human waste on the floor was dried and had footprints in it at the time she slipped on it was sufficient to raise an inference that defendant had constructive notice of the hazard, *id.* at 165-66, 336 S.E.2d at 701-02.

In the instant case, plaintiff presented evidence that the liquid on which he slipped was detergent that had leaked from a container onto a shelf, down the side of the shelving structure, and onto the floor. Furthermore, plaintiff presented evidence that the liquid on the tops and sides of the shelves had already dried and become pink at the time of his fall. This evidence is sufficient to raise an inference that the liquid detergent had been leaking for such a length of time that defendant should have known of its existence in time to have removed the danger or to have given proper warning of its presence. Thus, we hold that the evidence, when viewed in the light most favorable to plaintiff, raises a genuine issue of material fact. Accordingly, we reverse the entry of summary judgment and remand for trial.

Reversed and remanded.

Chief Judge EAGLES and Judge SMITH concur.

RONG TEAT YANG D/B/A GOLDEN STATE SILK FLOWERS, PLAINTIFF-APPELLEE v. THREE SPRINGS, INC. D/B/A WHOLESALE ALLEY, DEFENDANT-APPELLANT AND JAMES HSAING D/B/A SHINY, INC., PLAINTIFF-APPELLEE v. THREE SPRINGS, INC. D/B/A WHOLESALE ALLEY, DEFENDANT-APPELLANT

Nos. COA00-513
COA00-514

(Filed 20 February 2001)

Appeal and Error— appealability—order setting aside dismissal

An appeal was dismissed as interlocutory where defendant obtained a dismissal as a result of plaintiffs' failure to respond to interrogatories, plaintiffs' motion for reconsideration was granted, the orders of dismissal were rescinded, and defendant appealed. The avoidance of trial is not a substantial right; defendant's rights may be adequately protected by timely exception and

subsequent assignment of error upon the entry of final judgment in the trial court.

Appeal by defendant from orders entered 8 February 2000 by Judge Sanford L. Steelman, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 5 February 2001.

Cranfill, Sumner & Hartzog, L.L.P., by Samuel H. Poole, Jr. and S. Mujeeb Shah-Khan, for plaintiff-appellees.

Brinkley Walser, PLLC, by Charles H. McGirt, for defendant-appellant.

JOHN, Judge.

Three Springs, Inc., d/b/a Wholesale Alley, defendant in each of these two related cases, appeals the trial court's 8 February 2000 order rescinding its earlier 16 November 1999 order dismissing the respective complaints of plaintiffs Rong Teat Yang d/b/a Golden State Silk Flowers and James Hsaing d/b/a Shiny, Inc. We dismiss defendant's appeals as interlocutory.

The procedural history of the instant appeals may be summarized as follows: On 20 September 1999, the trial court entered an order directing plaintiffs to respond to interrogatories submitted by defendant. Due to plaintiffs' non-compliance with the court's order, defendant moved for sanctions pursuant to N.C.G.S. § 1A-1, Rule 37(b)(2) (1999). By orders entered 16 November 1999, the trial court allowed defendant's motions and, upon considering "the entire range of possible sanctions," determined in its discretion that dismissal of plaintiffs' complaints constituted "the appropriate sanction" in each case.

Plaintiffs filed a consolidated motion for reconsideration on 30 November 1999 and a verified motion for relief from judgment on 14 December 1999. On the latter date, plaintiffs also noticed appeal of the 16 November 1999 orders of dismissal. After considering the verified motions and affidavits submitted by plaintiffs and the arguments of counsel, the trial court entered orders (the Orders) on 8 February 2000 determining that the 16 November 1999 rulings should be "reconsidered and modified" and thereupon "rescind[ing]" those orders which had dismissed plaintiffs' actions. Defendant timely noticed appeal. On or about 2 March 2000, plaintiffs withdrew their 14 December 1999 appeals of the 16 November 1999 orders.

Although the interlocutory nature of the instant appeals has not been raised by the parties, this Court recently reiterated that "[i]f there is no right of appeal, it is the duty of an appellate court to dismiss the appeal on its own motion." *Stafford v. Stafford*, 133 N.C. App. 163, 164, 515 S.E.2d 43, 44 (citation omitted), *aff'd per curiam*, 351 N.C. 94, 520 S.E.2d 785 (1999). We reemphasized that this rule

> "prevent[s] fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts."

Id. (quoting *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218 (1985)).

An order that " 'does not finally dispose of the case and requires further action by the trial court,' " is interlocutory. *Horne v. Nobility Homes, Inc.*, 88 N.C. App. 476, 477, 363 S.E.2d 642, 643 (1988) (quoting *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980)).

> No appeal lies from an interlocutory order unless it affects a substantial right and will result in injury if not reviewed before final judgment.

Id. (citations omitted). Further, if an appellant's rights may

> be fully and adequately protected by an exception to the order that could then be assigned as error on appeal after final judgment,

Bailey, 301 N.C. at 210, 270 S.E.2d at 434, there is no right to immediate appellate review, *see id.* Finally, it is well settled, in the instant context, that "[a]voidance of a trial, . . . is not a 'substantial right.' " *Id.* (citations omitted); *see also Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 336, 299 S.E.2d 777, 780 (1983) (avoidance of trial or administrative hearing not a substantial right entitling a party to immediate appellate review).

Although it does not appear that our courts have previously addressed the appealability of an order setting aside or rescinding an order of dismissal issued pursuant to G.S. § 1A-1, Rule 37(b)(2), the foregoing rules and analogous cases prompt the conclusion that the Orders are interlocutory and not immediately appealable. In *GMC Trucks v. Smith*, for example, our Supreme Court equated an order

setting aside a judgment of nonsuit (or dismissal) to denial of a motion for nonsuit, and concluded neither was immediately appealable. *GMC Trucks v. Smith*, 249 N.C. 764, 766, 107 S.E.2d 746, 748-49 (1959); *see also Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 164, 519 S.E.2d 540, 544 (1999) ("order denying a motion to dismiss 'do[es] not determine even one claim, but simply require[s] subsequent trial of the fact issues underlying that claim, [and is] generally not appealable' " (alterations in original) (citation omitted.)), *disc. review denied*, 351 N.C. 352, —— S.E.2d —— (2000). Significantly, in so ruling, the Court pointed out that upon the trial court's refusal to dismiss an action,

> [t]he movant may note an exception, allow the case to proceed, and then, if dissatisfied with the final result, the matter may be considered on the appeal from the final judgment.

GMC Trucks, 249 N.C. at 766, 107 S.E.2d at 749.

In the case *sub judice*, the Orders "rescinded" the 16 November 1999 order of dismissal, effectively returning plaintiffs' previously dismissed actions to the court docket for subsequent trial. In *GMC Trucks* and *Country Club*, the actions at issue similarly remained for " 'further action by the trial court.' " *Horne*, 88 N.C. App. at 477, 363 S.E.2d at 643 (citation omitted); *see GMC Trucks*, 249 N.C. at 767, 107 S.E.2d at 749; *Country Club*, 135 N.C. App. at 164, 519 S.E.2d at 544.

In short, the Orders are interlocutory and defendant is not entitled to immediate appellate review as its rights may be adequately protected by timely exception and subsequent assignment of error thereto upon the entry of final judgment in the trial court. Accordingly, defendant's appeal in each case is dismissed as interlocutory.

Appeals dismissed.

Judges GREENE and WALKER concur.

STATE OF NORTH CAROLINA v. VIRGIL JAY BROWN

No. COA00-526

(Filed 20 February 2001)

Search and Seizure— anonymous tip—illegal stop and frisk

The trial court should have granted a motion to suppress in a narcotics prosecution where a detective received a call from the 911 center that a "concerned citizen" had called to complain that two black males were rolling marijuana cigarettes and selling crack on the porch of a vacant house under construction; the clothing of the two black males was described; officers proceeded to the area and found a vacant house under construction, but with no black males on the porch; three black males and one black female were sitting on the porch of the house next door; two of the males wore clothing fitting the description given by the caller; officers approached the group; the three men denied having drugs; officers patted them down; defendant tried to pull away and was arrested for hindering an officer; and crack was recovered from defendant's boots in a search incident to arrest. The tip in this case lacked minimal corroboration and failed to exhibit sufficient reliability to provide the detective with reasonable suspicion that defendant was engaged in criminal activity. The subsequent arrest and search resulted from an illegal stop and frisk.

Appeal by defendant from judgment entered 27 October 1999 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 5 February 2001.

Attorney General Michael F. Easley, by Assistant Attorney General William B. Crumpler, for the State.

Hall, Cashwell & Sullivan, L.L.P., by Dennis H. Sullivan, Jr. and Patrick J. Mulligan, IV, for defendant-appellant.

JOHN, Judge.

Defendant appeals the trial court's order denying his motion to suppress. Following denial of the motion, defendant pled guilty to felony possession of cocaine and was sentenced to a five month minimum and six month maximum term of imprisonment. The sentence was suspended and defendant placed on supervised probation for eighteen months.

The sole question raised on appeal is the propriety of the trial court's denial of defendant's motion to suppress. At issue is whether an anonymous tip contained sufficient indicia of reliability to permit law enforcement officers to stop and frisk defendant. For the reasons that follow, we reverse the trial court's order, vacate the judgment, and remand so as to allow defendant to withdraw his guilty plea.

Evidence at the suppression hearing indicated that at approximately 3:45 p.m. on 27 January 1999, Detective Donna Brown (Brown), a member of the City-County Vice and Narcotics Unit in Wilmington, received a call from the 911 Center stating a "concerned citizen" had telephoned to complain that two black males were rolling marijuana cigarettes and selling crack cocaine on the porch of a vacant house under construction at the corner of Eighth and Ann Streets. According to the citizen, one of the black males was wearing a grey t-shirt and jeans while the other was wearing a black t-shirt and jeans.

Having received prior complaints of drug activity on Ann Street, Brown and two other officers, Detective Oaks (Oaks) and Detective Blackmon, proceeded to the area where they observed a vacant house under construction but no black males on the porch. However, the officers did see three black males and a black female sitting on the porch of a house next door. Two of the males wore clothing fitting the description given by the caller. However, defendant, the third male, was wearing a black pullover shirt and camouflage pants.

The officers approached the group and related the complaint they had received. The three men denied having any drugs, and the officers patted them down in search of weapons. As Oaks neared defendant's boots while conducting the search, defendant asked why he was being searched and attempted to pull away from Oaks. Defendant was placed under arrest for hindering and delaying a law enforcement officer in the performance of his duties. Incident to this arrest, Oaks searched defendant's boots and recovered a substance appearing to be crack cocaine.

The trial court entered findings of fact consistent with the foregoing evidence and concluded Oaks had a reasonable suspicion that criminal activity might be underfoot and that defendant might be armed and dangerous, thereby permitting Oaks to conduct a warrantless patdown search. The court also concluded Oaks possessed probable cause to arrest defendant for hindering and delaying a law

enforcement officer in the performance of his duties and that Oaks conducted a lawful search of defendant incident to that arrest.

With admirable candor, the State concedes it is unable to distinguish the instant case from the recent United States Supreme Court decision in *Florida v. J.L.*, 529 U.S. 266, 146 L. Ed. 2d 254 (2000) and that it

> is therefore unable to make a good faith argument in opposition to defendant's claim of error from the denial of his motion to suppress.

We are compelled to agree with the State's determination.

In *J.L.*, two police officers responded to an anonymous tip that a young black male wearing a plaid shirt and standing at a specific bus stop was carrying a gun. Upon arriving at the location, the officers observed three black males standing at the bus stop. One, defendant J.L., was wearing a plaid shirt. An officer conducted a stop and frisk search of J.L. and discovered a concealed weapon on his person. J.L., a juvenile, was subsequently charged and convicted of carrying a concealed weapon and possessing a weapon in violation of Florida law.

On J.L.'s ultimate appeal, the United States Supreme Court held that the anonymous tip lacked sufficient indicia of reliability to justify the stop and frisk of J.L.:

> Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity[.]"

Id. at ——, 146 L. Ed. 2d at 260 (citing *Adams v. Williams*, 407 U.S. 143, 146-47, 32 L. Ed. 2d 612 (1972) and quoting *Alabama v. White*, 496 U.S. 325, 329, 110 L. Ed. 2d 301, 308 (1990)).

The Court acknowledged the existence of situations in which anonymous tips, if suitably corroborated, might contain sufficient indicia of reliability to permit an investigatory stop, such as when a tipster provides information regarding an individual's future movements and activities. However, the Court continued, while an accurate description of a subject's appearance and location may be of some value, such information standing alone does not indicate the tipster possessed reliable knowledge of some illegal activity. Finally, the Court concluded,

> [a]ll the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L.

Id. at ——, 146 L. Ed. 2d at 260-61.

Similarly, in the case *sub judice*, "all the police had to go on" was a report from an anonymous citizen who supplied no information as to how the informant came upon the information nor any other basis for the asserted report. Indeed, defendant herein failed to meet the description given by the anonymous caller, and the officers did not locate two black males on the porch of the house identified by the caller. The tip at issue thus lacked the minimal corroboration present in *J.L.* and failed to exhibit sufficient reliability so as to provide Oaks with a reasonable suspicion that defendant was engaged in criminal activity.

Because the subsequent arrest and search of defendant's person resulted from an illegal stop and frisk under *J.L.*, the evidence seized as a result must be suppressed.

> When evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the "fruit" of that unlawful conduct should be suppressed.

State v. Pope, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992) (citations omitted). The order of the trial court is therefore reversed, its judgment vacated, and this matter remanded to the trial court to allow defendant to withdraw his guilty plea.

Reversed, judgment vacated, and case remanded.

Judges GREENE and WALKER concur.

HAROLD P. LAING, PLAINTIFF v. G. C. LEWIS, DEFENDANT

No. COA00-269

(Filed 20 February 2001)

Compromise and Settlement— breach of lease—alteration of terms of settlement agreement

The trial court erred by altering the terms of a settlement agreement reached by the parties involving a breach of lease during a mediated settlement conference on 27 June 1997 because: (1) the agreement constituted a valid and binding oral agreement as of that date; and (2) the court was without authority to alter those terms.

Appeal by Plaintiff from order entered 3 November 1999 by Judge James C. Davis in New Hanover County Superior Court. Heard in the Court of Appeals 22 January 2001.

J.L. Rhinehart for plaintiff-appellant.

Stephen E. Culbreth for defendant-appellee.

HUDSON, Judge.

The background in the instant case is substantially set forth in this Court's earlier opinion in the matter. *See Laing v. Lewis*, 133 N.C. App. 172, 515 S.E.2d 40 (1999). To briefly reiterate, plaintiff filed a complaint alleging defendant's breach of a lease agreement by non-payment of rent, and seeking a judgment for past-due rent and possession of certain real property. Settlement was reached by the parties during a non-binding mediation conference. Following the conference, defendant's counsel drafted a document entitled "Memorandum of Settlement Agreement" and submitted the memorandum to plaintiff's counsel for approval. Plaintiff and his counsel signed the memorandum and returned it to defendant's counsel, but defendant refused to sign. Upon a motion by plaintiff, the trial court entered an order to enforce the agreement, containing terms identical to the memorandum of settlement with the exception of two paragraphs. In these two paragraphs, the trial court altered three specific deadlines for performance of the agreement, setting the deadlines at future dates rather than the dates appearing in the original memorandum. Plaintiff appealed from this order, arguing that the terms were materially different from the terms in the original settlement

agreement. This Court agreed with plaintiff, and we vacated the order and remanded the case "for entry of judgment in accordance with the terms agreed upon by the parties and set forth in the memorandum of settlement." *Id.* at 176, 515 S.E.2d at 43.

Following our decision, plaintiff filed a motion requesting the trial court to enter an order of specific performance in accordance with the memorandum of settlement. Apparently, at a hearing held on 6 July 1999, the trial court instructed the parties to draw an order. However, the parties were unable to agree upon the terms of the order, and an additional hearing was held on 1 November 1999. At this hearing, the trial court heard testimony regarding various issues, including the fair market rental value of the real property in question. On 3 November 1999, the trial court entered an order with terms identical to the memorandum of settlement, with two exceptions: (1) plaintiff was awarded $1,000 per month in unpaid rent for the months of July, 1998 through October, 1999, and $2,000 per month for the months of November, 1999 through January, 2000, rather than $750 per month as set forth in the memorandum of settlement; and (2) defendant was given a deadline of 31 January 2000 to vacate the property, rather than the 1 July 1998 deadline set forth in the memorandum of settlement.

There appears to have been a misunderstanding of our earlier holding. In that opinion, we explained that "the record before us reflects that the parties orally entered into a valid mediated settlement agreement, the terms of which are not in dispute, and defendant's failure to sign the agreement does not preclude its enforcement where defendant failed to properly avail himself of the statute of frauds." *Id.* In other words, we held that the agreement reached by the parties during the mediated settlement conference on 27 June 1997 constituted a valid and binding oral agreement as of that date, and we instructed the trial court to enter an order to embody and enforce that agreement. We further held that the trial court erred in entering an order that altered the terms to which the parties had agreed because "the court was without authority to alter those terms." *Id.*

Because the trial court's most recent order again alters the terms of the original agreement, we must again vacate that order and remand for entry of an order enforcing the agreement in accordance with the terms set forth in the "Memorandum of Settlement Agreement." The trial court is instructed not to consider any additional evidence or testimony prior to entering this order, and is fur-

ther instructed not to alter the terms of the original agreement in any way. We also believe it would be prudent for the trial court to draft the order itself, rather than requesting that the parties draft the order, since the parties have manifested a reluctance to comply with such a request.

We recognize that this order will contain provisions declaring that the parties shall undertake certain acts by dates which are now long since past (such as the provision that defendant shall vacate the real property "on or before July 1, 1998"). It is precisely our intention to hold that, as a matter of law, the terms of the original agreement have been binding upon the parties since the agreement was reached on 27 June 1997. Any alleged failure by either party to comply with these terms, as well as any additional issues or related disputes that have arisen since 27 June 1997, may not be considered by the trial court in entering its order enforcing the settlement agreement. Such matters must be addressed separately and only after the trial court has entered an order enforcing the terms of the original agreement.

The order of the trial court is vacated and the case is remanded so that the trial court may enter an order enforcing the settlement agreement reached by the parties precisely as that agreement appears in the "Memorandum of Settlement Agreement."

Vacated and remanded.

Chief Judge EAGLES and Judge SMITH concur.

MARY HEDGEPETH, PETITIONER v. NORTH CAROLINA DIVISION OF SERVICES FOR THE BLIND, RESPONDENT

No COA99-1240

(Filed 6 March 2001)

1. Appeal and Error— appealability—jurisdiction to review final agency decision—not waived

The question of whether the superior court had jurisdiction over a final agency decision involving the Division of Services for the Blind was reviewable even though it was raised for the first

time on appeal. Objections to jurisdiction can be raised at any time, even on appeal or by a court sua sponte.

2. Administrative Law— review of final agency decision— Division of Services for Blind—federal Rehabilitation Act

The superior court had jurisdiction to review a final agency decision from the Division of Services for the Blind under the federal Rehabilitation Act even though the Act did not then provide for judicial review of final agency decisions because neither the Act's statutory provisions nor federal cases expressly prohibited judicial review and the Department of Health and Human Services and its Division of Services for the Blind are not fully exempt from the North Carolina Administrative Procedure Act. Individuals aggrieved pursuant to the Rehabilitation Act are not required to seek administrative review in a contested case hearing before the OAH via the contested case hearing provisions of the NCAPA. Respondent here established procedures for internal review of agency decisions and petitioner utilized the procedures mandated by the Rehabilitation Act and the State administrative code.

3. Administrative Law— review of final agency decision— standard of review not stated for each separate issue

A trial court review of a final agency decision of the Division of Services for the Blind was reversed and remanded where the trial court stated the proper standards of review (both de novo and whole record) but failed to delineate which standard the court utilized in resolving each separate issue raised. Moreover, the confusion inherent in the trial court's order is compounded by the lack of a transcript or other record of proceedings before the Superior Court.

Appeal by petitioner from order entered 1 July 1999 by Judge Frank R. Brown in Superior Court, Nash County. Heard in the Court of Appeals 25 August 2000.

Eastern Carolina Legal Services, by Hazel Mack-Hilliard, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Diane Martin Pomper, for respondent-appellee.

TIMMONS-GOODSON, Judge.

Mary Hedgepeth ("petitioner") appeals an order by the Superior Court affirming the decision of the Division of Services for the Blind ("respondent") to deny petitioner additional benefits under the Rehabilitation Act of 1973 (the "Rehabilitation Act" or "Act"), 29 U.S.C. § 701, *et seq.* (1994). For the reasons stated herein, we reverse the trial court's order and remand the matter for entry of a new order in accordance with this opinion.

Under the Rehabilitation Act, the federal government administers grants to states for the provision of services "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." 29 U.S.C. § 701(b)(1); 34 C.F.R. § 361.1 (1997). States, such as North Carolina, choosing to accept federal grants as provided for by the Act, must comply with the Act's guidelines and regulations. *Buchanan v. Ives*, 793 F. Supp. 361, 363 (D. Me. 1991) (citation omitted).

In 1985, respondent, a division of the agency charged with administering the federal program in our State, *see* N.C. Gen. Stat. § 143-546.1 (1999), deemed petitioner eligible for services and benefits under the Act, due to a loss of vision she experienced as a junior college student. The Act requires that those eligible for the program, such as petitioner, jointly develop with respondent a particularized plan to fit the individual's vocational rehabilitative needs, an "individualized written rehabilitation plan" ("IWRP"). 29 U.S.C. § 722(b)(1)(A) (1994); 34 C.F.R. § 361.45. To that end, in 1986, petitioner and respondent developed an IWRP, which included the goal of "occupations in business" and provided for a variety of services assisting petitioner in achieving her vocational goal. In 1988, petitioner received a two-year associate degree in "Business Administration."

Petitioner's IWRP was amended on four occasions between 1989 and 1995. The amendments to the IWRP reflected a variety of vocational goals to be achieved by a specified date, and further provided for services and financial aid.

Pursuant to an amended IWRP formulated in 1995, petitioner received a two-year associate degree in "Social Work" in 1997. Upon earning her degree, petitioner was accepted into a four-year psychology program at a private college. In September 1997, petitioner met with her rehabilitation counselor, Patricia Tessnear, Tessnear's

supervisor, and a job placement specialist. During the meeting, petitioner requested that respondent amend her IWRP to include a four-year college degree program as part of her vocational goals. Tessnear informed petitioner that respondent had provided adequate services to remove impediments to her educational and employment objectives and, therefore, she would no longer receive educational assistance. Instead, respondent offered petitioner only job placement services.

In December 1997, petitioner requested an amendment to her IWRP, reflecting the goal of "Licensed Professional Counselor." Respondent denied petitioner's request and advised her of her right to appeal its decision, which she did on 11 January 1998. Following a 3 April 1998 hearing, an agency hearing officer recommended that respondent's decision be affirmed, and respondent's director adopted the hearing officer's recommendation as the "final agency decision" on 18 May 1998. Petitioner petitioned for judicial review of the agency's final decision in Superior Court, Nash County. The Superior Court affirmed the final agency decision, and petitioner now appeals.

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[1] We first address respondent's contention that the Superior Court did not have subject matter jurisdiction to review the final agency decision in the case *sub judice*. As a preliminary issue, we note that respondent first raised the aforementioned issue on appeal. Nonetheless, it is well established that objections to a court's jurisdiction can be raised at any time, even for the first time on appeal and even by a court *sua sponte*. *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882 (citations omitted) ("A party may not waive jurisdiction, and a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking."), *disc. review denied*, 352 N.C. 676, — S.E.2d — (2000). We therefore address respondent's arguments and determine whether the Superior Court had jurisdiction over the present case.

[2] Respondent first asserts that the Superior Court did not have jurisdiction to review the final agency decision because the Rehabilitation Act, including amendments applicable to petitioner, did not provide for judicial review of the decision. In support of its argument, respondent cites several federal court cases finding there was no private right of action under the Act.

The Rehabilitation Act, as amended in 1998, currently provides for judicial review of agency decisions. *See* 29 U.S.C.A. § 722(c)(5)(J)(i) (West 2000) (providing that aggrieved parties "may bring a civil action" in state or federal court for review of final agency decisions). However, the current version of the Act took effect on 7 August 1998, prior to the agency's final decision and is, therefore, inapplicable to petitioner. Respondent is correct in that the Rehabilitation Act applicable to petitioner, as amended in 1993, did not provide for judicial review of final agency decisions. However, the Act's statutory provisions did not expressly prohibit judicial review, and neither do the federal cases cited by respondent. *See Mallet v. Wisconsin Div. of Vocational Rehab.*, 130 F.3d 1245 (7th Cir. 1997) (finding no private right of action); *McGuire v. Switzer*, 734 F. Supp. 99 (S.D.N.Y. 1990) (same); *Ryans v. New Jersey Comm'n for the Blind & Visually Impaired*, 542 F. Supp. 841 (D.N.J. 1982) (same). *But see Marshall v. Switzer*, 10 F.3d 925, 929 (2d Cir. 1993) (finding that Congress did not intend to foreclose enforcement of Act under 42 U.S.C. § 1983 (1994)); *Scott v. Parham*, 422 F. Supp. 111 (N.D. Ga. 1976) (same). These cases simply conclude that there is no private right of action, implied or otherwise, under the Act, but do not speak to a trial court's judicial review of an agency decision. We therefore find the cases cited by respondent unpersuasive.

Moreover, many states provided for judicial review of agency decisions based on the Act's guidelines and regulations prior to the statute's express provision for civil actions and judicial review. *See e.g., Dolon v. Family and Soc. Servs. Admin. Div. of Disability, Aging and Rehab. Servs.*, 715 N.E.2d 917 (Ind. Ct. App. 1999); *In the Matter of Wenger*, 504 N.W.2d 794 (Minn. Ct. App. 1993); *Murphy v. Office of Vocational and Educ. Servs. for Individuals with Disabilities*, 705 N.E.2d 1180 (N.Y. Ct. App. 1998); *Brooks v. Office of Vocational Rehab.*, 682 A.2d 850 (Pa. Commw. Ct. 1996); *Zingher v. Dep't of Aging and Disabilities*, 664 A.2d 256 (Vt. 1995). We therefore conclude that although the Rehabilitation Act applicable to petitioner may not have provided for review of an agency's final decision, nothing in the Act itself or the cases cited by respondent precludes judicial review.

Our examination of the issue of jurisdiction does not end there, however. "No appeal lies from an order or decision of an administrative agency of the State or from judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute." *In re Assessment*

of Sales Tax, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963). As noted *supra*, the Rehabilitation Act did not grant petitioner a right of review of the agency's final decision and therefore, if she has such a right, it is by and through North Carolina Administrative Procedure Act ("NCAPA").

The NCAPA, codified at Chapter 150B of the General Statutes, "establishes a uniform system of administrative rule making and adjudicatory procedures for agencies" and "applies to every agency," unless an agency is expressly exempt from its provisions. N.C. Gen. Stat. § 150B-1(a), (c) (1995); *Vass v. Bd. of Trustees of State Employees' Medical Plan*, 324 N.C. 402, 407, 379 S.E.2d 26, 29 (1989) ("the General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the [NCAPA] be excused in any way from the Act's requirements and, even in those instances, that the exemption apply only to the extent specified by the General Assembly").

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision . . . , unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute.

N.C. Gen. Stat. § 150B-43 (1995). Neither the Department of Health and Human Services nor its Division of Services for the Blind are fully exempt from the NCAPA. Respondent's proceedings, at least in part, are therefore subject to the provisions of the NCAPA.

Respondent acknowledges that petitioner may have had the right to judicial review pursuant to Chapter 150B, but points out that petitioner did not seek a contested case hearing before the State Office of Administrative Hearings ("OAH"). Respondent asserts that only individuals who seek hearings through the OAH have a right to judicial review under the NCAPA. Respondent argues that the NCAPA only allows judicial review in "contested cases" and that "[a] contested case is an action heard in the [OAH]." We disagree.

It is well established that "the superior court is without jurisdiction to conduct a judicial review of an agency decision sought by an aggrieved party, pursuant to [section] 150B-43, who has not first had *the administrative hearing to which he is entitled.*" *Deep River Citizens Coalition v. N.C. Dept. of E.H.N.R.*, 119 N.C. App. 232, 234,

457 S.E.2d 772, 774 (1995) (emphasis added). The NCAPA states, in pertinent part:

> The contested case provisions of [Chapter 150B of the North Carolina General Statutes] apply to all agencies and all proceedings not expressly exempted . . . . The contested case provisions of this Chapter do not apply to the following:
>
> . . . .
>
> (5) Hearings required pursuant to the Rehabilitation Act . . . , as amended and federal regulations promulgated thereunder.

N.C. Gen. Stat. § 150B-1(e)(5).

Considering the aforementioned statutory provision, we conclude that individuals aggrieved pursuant to the Rehabilitation Act are not required to seek administrative review in a contested case hearing before the OAH via the contested case hearing provisions of the NCAPA. Rather, they are entitled to a hearing governed by procedures established by the Rehabilitation Act. The Act and its corresponding federal regulations mandate that directors of state agencies administering services under the Act "shall establish procedures for the review of determinations made by the rehabilitation counsel" in which an aggrieved individual shall be "provid[ed] an opportunity . . . for the submission of additional evidence and information to an impartial hearing officer." 29 U.S.C. § 722(c); 34 C.F.R. § 361.57. In accordance with the aforementioned guidelines, respondent established procedures for internal review of agency decisions pursuant to the Act. 10 N.C. Admin. Code 19G.0801 -.0823 (June 1998).

Under section 150B-2 of our General Statutes, a "contested case" is "an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges." N.C. Gen. Stat. § 150B-2(2) (1995). This Court has previously stated that a "contested case" includes "*any agency proceeding*, by whatever name called, wherein the legal rights, duties and privileges of a party are required by law to be determined by an agency after . . . an adjudicatory hearing." *Community Psychiatric Ctrs. v. N.C. Dept. of Human Resources*, 103 N.C. App. 514, 515, 405 S.E.2d 769, 770 (1991) (emphasis added) (citations omitted); *see also Charlotte-Mecklenburg Hosp. Authority v. N.C. Dept. of Human Resources*, 83 N.C. App. 122, 349 S.E.2d 291 (1986); *In re Construction of Health Care Facility*, 55 N.C. App. 313,

285 S.E.2d 626 (1982). Moreover, this Court has concluded that judicial review of agency decisions in Superior Court, pursuant to section 150B-43, was proper in at least two cases where no proceedings were held before the OAH. *See Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 112 N.C. App. 566, 572, 436 S.E.2d 594, 598 (1993) (citations omitted) ("although there was no hearing before an ALJ, there was an agency proceeding . . . determining the rights of a party"), *rev'd on other grounds*, 337 N.C. 569, 447 S.E.2d 768 (1994); *Charlotte Truck Driver Training School v. N.C. DMV*, 95 N.C. App. 209, 212, 381 S.E.2d 861, 862-63 (1989) (finding that interview and investigation by agency hearing officer is contested case); *see also* 10 Admin. Code 19G.0827 (June 1998).

In the case *sub judice*, petitioner did not seek review through the OAH, but utilized procedures mandated by the Rehabilitation Act and our State's administrative code. In fact, according to the NCAPA, petitioner was not entitled to seek review through the OAH. Although the petitioner's claims were not heard by an Administrative Law Judge, they were heard by an agency hearing officer, at a proceeding in which petitioner and respondent were allowed to submit and cross-examine evidence. Respondent's director reviewed and affirmed the hearing officer's decision, in accordance with its own regulations. *See* 10 N.C. Admin. Code 19G.0823. The director's decision, therefore, became the final agency decision. 10 N.C. Admin. Code 19G.0823(d).

We find the aforementioned proceeding sufficient to constitute a "contested case" for the purpose of judicial review under section 150B-43 of our General Statutes. Therefore, we conclude that the Superior Court had jurisdiction over the petition submitted below.

[3] As in any case, we must next determine the scope of our review. The NCAPA mandates the scope of the Superior Court's review of final agency decisions in section 150B-51 of our General Statutes. N.C. Gen. Stat. § 150B-51 (1995). Hearings conducted under the Rehabilitation Act are partially exempt from section 150B-51. Trial courts reviewing final agency decisions pursuant to the Rehabilitation Act are not required to determine whether the agency heard new evidence in making its final decision, nor are they required to determine whether the agency specifically stated its reasons for failing to adopt an ALJ's decision. N.C. Gen. Stat. §§ 150B-51(a) and 150B-1(e)(5) ("Hearings required pursuant to [the Act]" are exempt from the NCAPA's contested case provisions, and "[N.C.]G.S. 150B-51(a) is considered a contested case hearing provision that does not apply to

these hearings"). However, final agency decisions pursuant to the Rehabilitation Act are not exempt from review under section 150B-50(b), which states, in pertinent part:

> [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b).

The petitioner's "characterization of the alleged error on appeal 'dictates' the method or scope of review." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118 (1994) (quoting *Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 580, 281 S.E.2d 24, 29 (1981)). However, "more than one method may be utilized 'if the nature of the issues raised so requires.' " *Id.* (quoting *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) (citation omitted)).

If the petitioner alleges that the agency decision is based on an error of law, the proper review is *de novo* review. In contrast, if petitioner "questions (1) whether the agency's decision was supported by the evidence or (2) whether the agency's decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test." *McCrary*, 112 N.C. App. at 165, 435 S.E.2d at 363 (citation omitted). "Because " '[*d*]*e novo*" review requires a court to consider a question anew, as if not considered or decided by the agency' previously, the trial court must make its own findings of fact and conclusions of law and cannot defer to the agency its duty to do so." *Jordan v. Civil Serv. Bd. of Charlotte*, 137 N.C. App. 575, 577, 528 S.E.2d 927,

929 (2000) (emphasis added) (citation omitted). However, in conducting "whole record review," the trial court must "examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118.

This Court has struggled to define the proper appellate standard for reviewing superior court orders examining agency decisions, often with divergent results. *See generally Amanini*, 114 N.C. App. at 675-76, 443 S.E.2d at 118-19. However, our Supreme Court has recently confirmed that the proper scope of our review is as follows:

> "the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly."

ACT-UP Triangle v. Commission for Health Services, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation omitted); *see also Amanini*, 114 N.C. App. at 676, 443 S.E.2d at 119 ("the statutory provisions for judicial review . . . at the trial court level would appear to lack purpose if that court's determination is to be given no consideration at the appellate level"). As such, "[t]he trial court, when sitting as an appellate court to review [an agency decision], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 342 (1999).

We therefore examine the Superior Court's order to determine whether it conducted the appropriate scope of review and whether it conducted that review properly. In so doing, we find the case of *In Re Appeal of Willis*, 129 N.C. App. 499, 500 S.E.2d 723 (1998), particularly instructive.

In *Willis*, the petitioners sought a writ of certiorari and declaratory judgment in Superior Court, asserting that a city board of adjustment ("the Board") erroneously found the petitioner in violation of an ordinance. The Superior Court reversed the Board's decision, and the Board appealed to this Court.

Our Court found that review of the Superior Court's decision was analogous to our review of superior court orders examining agency decisions. *Id.* at 500-01, 500 S.E.2d at 725-26. In their briefs to the trial

court, the petitioners asserted in separate arguments that the Board's decision was not supported by the evidence, that the Board's decision was arbitrary and capricious, and that the Board's decision was based on errors of law. *Id.* at 502, 500 S.E.2d at 725. In support of its order setting aside the Board's decision, the trial court cited a "lack of 'defined criteria or objective standards' within the record to support the Board's 'erroneous' and 'arbitrary' conclusions." *Id.* The trial court further stated that its decision was " '[b]ased upon [the court's] review of the stipulated record in this matter,' indicating the court employed the whole record test in reaching its decision." *Id.* (alterations in original) (citation omitted). "[T]he trial court's order also asserted its right to 'substitute its judgment [for that of the Board] as to conclusions of law,' suggesting it may also have applied *de novo* review." *Id.* (alterations in original) (citation omitted).

In reversing the trial court's judgment and remanding the case for a new order, this Court stated:

> [W]hile the court's order in effect set out the applicable standards of review, it failed to delineate which standard the court utilized in resolving each separate issue raised by the parties. Moreover, while the court may have disagreed with the parties' characterization of the issues, it failed to specify its own "determin[ation of] the actual nature of the contended error" before proceeding with its review. *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118. As a result of these omissions, this Court is unable to make the requisite threshold determination that the trial court "exercised the appropriate scope of review," *id.* at 675, 443 S.E.2d at 118-19, and we decline to speculate in that regard. It follows that we likewise are unable to determine whether the court properly conducted its review. *See Act-Up*, 345 N.C. at 706, 483 S.E.2d at 392.

Id. at 503, 500 S.E.2d at 726-27 (alteration in original); *Jordan*, 137 N.C. App. at 578, 528 S.E.2d at 930; *see also Sutton*, 132 N.C. App. 387, 511 S.E.2d 340 (vacating and remanding for new order where original order was silent as to scope of review).

In the case *sub judice*, petitioner raised and enumerated several distinct, alleged errors below, asserting that certain findings of fact made by the hearing officer were "unsupported by substantial evidence in view of the entire record" and that many of his conclusions of law were "erroneous." Petitioner further asserts that one of the hearing officer's conclusions of law was arbitrary and capricious. The

Superior Court should have, therefore, reviewed petitioner's alleged errors *de novo* and in accordance with the "whole record" test, depending upon the specific enumerated error.

In its order affirming the final agency decision, the Superior Court did not examine each distinct error or delineate a *de novo* review of the conclusions of law that petitioner argued were erroneous. Rather, in affirming the agency decision, the court noted the following:

> Petitioner sought both "whole record" and *de novo* review of a final agency decision of [respondent]. Having concluded *that* review, the Court finds that the decision was based on substantial evidence, was not arbitrary or capricious and was not affected by error of law. (Emphasis added.)

Like the Superior Court in *Willis*, the trial court in the case *sub judice* stated the proper standards of review sought by petitioner. However, it too "failed to delineate which standard the court utilized in resolving each separate issue raised." *Willis*, 129 N.C. App. at 503, 500 S.E.2d at 727. Furthermore, it is difficult to discern whether the trial court actually conducted both a "whole record" and *de novo* review. Although, as noted *supra*, the court set out both types of review sought by petitioner, it did not expressly state that both reviews were conducted, only that it conducted "that" review. We are left to question whether "that" referred to only a "whole record" review, *de novo* review, or both. Moreover, the confusion inherent in the trial court's order is compounded by the lack of a transcript or other record of the proceedings, if any, before the Superior Court in the record on appeal. Given the nature of the trial court's order, we find ourselves unable to conduct our necessary threshold review. And, like the *Willis* court, "we decline to speculate in that regard." *Id.*

Accordingly, we reverse the trial court's order and remand this matter for a new order in accordance with our opinion. We direct the trial court to (1) advance its own characterization of the issues presented by petitioner and (2) clearly delineate the standards of review, detailing the standards used to resolve each distinct issue raised.

Reversed and remanded.

Judges WYNN and McGEE concur.

MARTHA FALLS CLARK, EMPLOYEE, PLAINTIFF v. THE SANGER CLINIC, P.A., EMPLOYER; ITT HARTFORD INSURANCE CO., CARRIER; DEFENDANTS

No. COA00-153

(Filed 6 March 2001)

1. **Workers' Compensation— Form 21 agreement—no challenge unless fraud, misrepresentation, undue influence, or mutual mistake**

Ordinarily, a party that enters into a Form 21 agreement for compensation cannot challenge any provision of the agreement unless it appears to the satisfaction of the Industrial Commission that there had been error due to fraud, misrepresentation, undue influence, or mutual mistake.

2. **Workers' Compensation— maximum weekly benefit—date of calculation**

The Industrial Commission did not err by concluding that plaintiff employee was entitled to weekly compensation at the maximum compensation rate for the year 1993 at the rate of $442.00 and continuing for the remainder of her life, because: (1) plaintiff sustained her compensable injury on 16 April 1993, and N.C.G.S. § 97-29 provides that the maximum weekly benefit calculated 1 July 1992 took effect on 1 January 1993; and (2) the express language of N.C.G.S. § 97-29 provides that the maximum benefit calculated 1 July 1993 took effect 1 January 1994, and plaintiff's claim did not originate on or after 1 January 1994.

3. **Workers' Compensation— maximum weekly benefit—failure to adjust annually—due process—equal protection**

N.C.G.S. § 97-29 does not violate the due process and equal protection clauses of the constitution although it fails to adjust a disabled employee's compensation rate to equal the maximum weekly benefit computed annually, because: (1) N.C.G.S. § 97-29 neither burdens a suspect class, nor affects a fundamental class since it is purely economic regulation and thus only needs to satisfy the rational basis level of scrutiny; and (2) the application of N.C.G.S. § 97-29 bears a rational relationship to a legitimate state interest since limiting applicability of the maximum rate based on the year of injury enables insurance providers to project future exposure and calculate premiums accordingly.

4. Appeal and Error— preservation of issues—failure to include reference in record on appeal

Although plaintiff contends in a workers' compensation case that N.C.G.S. § 97-29 violates the Americans with Disabilities Act (ADA) under 42 U.S.C. § 1201 et seq., plaintiff did not preserve this issue because she failed to include any reference to the ADA in the record on appeal as required by N.C. R. App. P. 10(c)(1).

5. Workers' Compensation— motion for approval of additional medical providers and treatment—reasons for Commission's ruling required

The Industrial Commission's decision to deny plaintiff employee's motion under N.C.G.S. § 97-25 for approval of additional medical providers and treatment related to her stomach reduction surgery and the resulting complications in a workers' compensation case is reversed and remanded, because it is unclear whether the Commission abused its discretion when it did not state any reason for its ruling.

Appeal by plaintiff from opinion and award entered 4 October 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 January 2001.

Seth M. Bernanke for plaintiff-appellant.

John F. Morris and Mark D. Gustafson for defendants-appellees.

TIMMONS-GOODSON, Judge.

Martha Falls Clark ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ordering plaintiff's former employer, the Sanger Clinic ("defendant-employer"), and its insurance carrier, ITT Hartford Insurance Company, (collectively, "defendants") to "pay plaintiff permanent total disability compensation at the rate of $442.00 per week continuing for the remainder of her life." Plaintiff's position is that her rate of compensation should increase annually with the maximum benefit calculated in accordance with section 97-29 of the North Carolina General Statutes. For the reasons that follow, we conclude that the rate and duration of the compensation as awarded by the Commission comports with the provisions of section 97-29.

The facts relevant to the issues raised on appeal are summarized as follows: Plaintiff, a registered nurse, began working for defendant-

employer in 1977 as the Director of the Pacemaker Clinic, a position usually held by a physician. In her capacity as director, plaintiff assumed responsibility for thousands of pacemaker and fibrillator patients. Her duties included tending to the patients' wounds, monitoring their medication, and programming their devices. Plaintiff typically worked fourteen to eighteen hours per day, and she was on-call seven days per week, twenty-four hours per day. At the time of her injury, plaintiff earned an average weekly wage that entitled her to the maximum compensation rate for the year 1993. Plaintiff was forty-eight years old when her claim for disability benefits was heard.

Plaintiff was injured on 16 April 1993 while pushing a cart transporting 600 to 800 pounds of equipment into an elevator. The wheel of the cart became wedged in the threshold of the elevator, and in her attempt to dislodge the wheel, plaintiff suffered an admittedly compensable injury to her back. Plaintiff subsequently underwent an extensive course of treatment, the specifics of which are not pertinent to this appeal. Then, in February 1994, plaintiff's treating physician recommended that she pursue a formal weight loss program to improve her condition by alleviating some of the pressure on her back. For treatment of her weight problem, plaintiff visited Dr. Carol Jean Smith of the Bariatric Medical Center in Asheville, North Carolina. Dr. Smith referred plaintiff to Dr. Martin Fischer for gastric bypass surgery, which he performed on 8 January 1998 at St. Luke's Hospital in Tryon, North Carolina. Following the procedure, plaintiff developed a blood infection and pulmonary abnormalities. She was, therefore, transferred to Memorial Mission Hospital in Asheville, where she received emergency medical attention. Because plaintiff's condition proved to be beyond the expertise of her attending physicians at Memorial Mission, she was again transferred to North Carolina Baptist Hospital in Winston-Salem. There, she remained until her discharge on 29 June 1998.

Plaintiff requested a hearing before the Commission on 14 November 1996, alleging that she was entitled to payment of attorneys fees and yearly increases in compensation based on the maximum calculated under section 97-29 of the General Statutes. Plaintiff's claim was heard, and the deputy commissioner awarded her "permanent total disability compensation at the rate of $442.00 per week continuing for the remainder of her life." Plaintiff appealed this decision to the Full Commission and moved, pursuant to section 97-25 of the General Statutes, for authorization of the addi-

tional medical treatment provided in connection with her stomach reduction surgery and the resulting complications. The Full Commission conducted a review and entered an opinion and award denying plaintiff's motion for authorization and affirming the ruling of the deputy commissioner. From the decision of the Full Commission, plaintiff now appeals.

Plaintiff's leading argument is that the rate at which she is compensated should increase each year with the maximum weekly benefit computed under section 97-29 of our General Statutes. Plaintiff takes the position that the current practice of the Industrial Commission—to establish a permanent compensation rate for disabled workers based on the date of their injury—is an erroneous application of the statute. Further, plaintiff contends that the existing practice is inconsistent with the spirit and purpose of the Workers' Compensation Act, which is to protect the injured worker.

[1] At the outset, we consider whether plaintiff has properly preserved the right to challenge her rate of compensation. The record reveals that the parties executed a Form 21 Agreement for Compensation, pursuant to which defendants undertook to compensate plaintiff at a rate of $442.00 per week, "beginning [5 June 1995] and continuing for necessary weeks." The Commission approved the agreement on 23 January 1996, at which time the agreement became binding on the parties and assumed the force and effect of a ruling by the Commission. *See Pruitt v. Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976) (acknowledging that a Form 21 Agreement as approved by the Commission "becomes an award enforceable, if necessary, by a court decree"). Thereupon, neither party was in a position to challenge any provision of the agreement, "unless it [was] made to appear to the satisfaction of the Commission 'that there [had] been error due to fraud, misrepresentation, undue influence or mutual mistake.' " *Id.* at 259, 221 S.E.2d at 358 (N.C. Gen. Stat. § 97-17 (1972)).

According to the record, plaintiff entered into the Form 21 Agreement, thereby accepting a weekly rate of compensation at $442.00, on 11 July 1995, more than two years after her 16 April 1993 injury. In the interim between the injury date and the date of the agreement, the maximum weekly benefit was re-computed under section 97-29 of the General Statutes three times. Yet, nowhere in the agreement is there a provision that plaintiff's compensation be adjusted upward to reflect the maximum rate determined annually.

Rather, it appears that plaintiff first asserted a right to yearly increases on 14 November 1996, when she filed a request for a hearing on her claim.

Furthermore, at no time during these proceedings has plaintiff sought to have the Form 21 Agreement set aside. Neither has she demonstrated " 'error due to fraud, misrepresentation, undue influence or mutual mistake.' " *See id.* (quoting N.C. Gen. Stat. § 97-17 (1972)). Therefore, plaintiff remains bound by the agreement and, due to her conduct, has waived any right to challenge the compensation received thereunder. Nevertheless, because plaintiff raises an issue of first impression, we exercise our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure and consider the merits of plaintiff's argument. *See* N.C.R. App. P. 2 (permitting this Court, on its own initiative, to suspend requirements or provisions of Appellate Rules). Thus, we turn to the issue presented, which involves the interpretation of section 97-29 of the General Statutes.

[2] It is well recognized that the goal of statutory construction is to give effect to the intent of the Legislature, *Austin v. Continental General Tire*, 141 N.C. App. 397, 540 S.E.2d 824 (2000), and to this end, the courts must refer primarily to the language of the enactment itself. *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 306 S.E.2d 435 (1983). A statute that " '*is free from ambiguity, explicit in terms and plain of meaning*' " must be enforced as written, without resort to judicial construction. *Andrews v. Nu-Woods, Inc.*, 299 N.C. 723, 726, 264 S.E.2d 99, 101 (1980) (alteration in original) (quoting *School Commissioners v. Alderman*, 158 N.C. 191, 196, 73 S.E. 905, 907 (1912)). " '[S]ignificance and effect should, if possible, . . . be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word.' " *Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991) (quoting *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975)).

In pertinent part, section 97-29 of the General Statutes provides as follows:

> Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of his

average weekly wages, but not more than the amount established annually to be effective October 1 as provided herein, nor less than thirty dollars ($30.00) per week.

In cases of total and permanent disability, compensation, including medical compensation, shall be paid for by the employer during the lifetime of the injured employee. . . .

. . . .

Notwithstanding any other provision of this Article, on July 1 of each year, a maximum weekly benefit amount shall be computed. The amount of this maximum weekly benefit shall be derived by obtaining the average weekly insured wage in accordance with G.S. 96-8(22), by multiplying such average weekly insured wage by 1.10, and by rounding such figure to its nearest multiple of two dollars ($2.00), and this said maximum weekly benefit shall be applicable to all injuries and claims arising on and after January 1 following such computation. Such maximum weekly benefit shall apply to all provisions of this Chapter and shall be adjusted July 1 and effective January 1 of each year as herein provided.

N.C. Gen. Stat. § 97-29 (1999). The "average weekly insured wage" used to compute the maximum weekly benefit is:

the quotient obtained by dividing the total of the wages, as defined in G.S. 96-8(12) and (13), reported by all insured employers by the monthly average in insured employment under this Chapter during the immediately preceding calender year and further dividing the quotient obtained by 52 to obtain a weekly rate. (For this computation the data as released annually in the Employment Security Commission's publication "North Carolina Insured Employment and Wage Payment" shall be used.) The quotient thus obtained shall be deemed to be the average weekly wage for such year.

N.C. Gen. Stat. § 96-8(22) (1999).

Plaintiff argues that an ambiguity exists concerning the clause of section 97-29 stating that "said maximum weekly benefit shall be applicable to all injuries and claims arising on and after January 1 following such computation." N.C. Gen. Stat. § 97-29. Plaintiff concedes that the language could naturally be read to mean that "all claims arising on or after January 1 will be limited by the maximum rate

effective for that year." Plaintiff, nonetheless, offers the following as a reasonable alternate construction:

> [T]he limiting clause should be read as an attempt [by the legislature] to dispel any confusion that cases arising on or after July 1 do not obtain the benefit of the new rate calculated as of that date. Instead, the date of application of the new rate, though "adjusted" on July 1, is January 1 of the subsequent year.

When determining the meaning of a provision, however, the courts assume "that the legislature inserted every part of a provision for a purpose and that no part is redundant." *Hall*, 329 N.C. at 784, 407 S.E.2d at 818. Plaintiff's latter interpretation of the limiting language departs from this presumption, in that the legislature inserted the following provision, effectively disposing of any confusion regarding the effective date of the new rate: "Such maximum weekly benefit shall apply to all provisions of this Chapter and shall be adjusted July 1 and effective January 1 of each year as herein provided." N.C. Gen. Stat. § 97-29. Accordingly, we reject plaintiff's argument that the limiting language of section 97-29 is ambiguous. Instead, we conclude that section 97-29 is clear and explicit on its face, compelling its enforcement as written. *See Nu-Woods*, 299 N.C. at 726, 264 S.E.2d at 101.

As previously noted, section 97-29 expressly limits application of the newly derived maximum weekly benefit "to all injuries and claims *arising on and after January 1 following such computation*." *Id.* (emphasis added). Our courts have said that " '[n]othing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning.' " *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) (quoting *In re McLean Trucking Co.*, 281 N.C. 242, 252, 188 S.E.2d 452, 458 (1972)). Absent a contextual definition, the courts may infer the ordinary meaning of a word from its dictionary definition. *Id.*

In view of the dictionary definitions of "arise," we understand the term "arising," as it is used in the limiting clause of section 97-29, to mean "originating," "resulting," or "proceeding." *See Black's Law Dictionary* 102-03 (7th ed. 1999); *The American Heritage Dictionary* 45 (3rd ed. 1994). In the instant case, plaintiff sustained the compensable injury on 16 April 1993; thus, both her injury and her workers' compensation claim originated or arose after 1 January 1993. Consequently, the maximum weekly benefit calculated 1 July 1992, which amount became effective 1 January 1993, is the rate applicable to plaintiff's claim. Moreover, under the express language

of the statute, the maximum benefit calculated 1 July 1993 to take effect 1 January 1994 does not apply to plaintiff's claim, since the claim did not originate or arise on or after 1 January 1994.

Plaintiff, however, would have us rewrite the statute to provide that the maximum weekly benefit calculated 1 July "shall be applicable to all injuries and claims *existing* and arising on and after January 1 following such computation." This we cannot and will not do. Accordingly, we hold that pursuant to the terms of section 97-29 of the General Statutes, plaintiff is not entitled to yearly increases commensurate with the maximum rate calculated *per annum*. Hence, the Commission was correct in concluding that "[p]laintiff [was] entitled to weekly compensation at the maximum compensation rate for the year 1993 at the rate of $442.00 and continuing for the remainder of her life."

[3] Nevertheless, plaintiff maintains that section 97-29 as applied violates the Due Process and Equal Protection Clauses of the United States and North Carolina Constitutions. Plaintiff asserts that failing to adjust a disabled employee's compensation rate to equal the maximum weekly benefit computed annually infringes on what she describes as one's fundamental right to "enjoy[] the fruits of one's labor." Plaintiff additionally contends that the practice of fixing a claimant's maximum compensation rate based on the year of injury treats workers injured in later years more favorably than those injured in earlier years.

We initially point out that plaintiff's argument is flawed, insofar as it is based on the premise that the maximum weekly benefit will invariably increase every year. Generally speaking, the trend has been for the rate to increase from year to year. However, in a failing economy, the average weekly wage would likely drop, and so too would the maximum weekly benefit calculated under section 97-29.

As to the constitutionality of section 97-29, we note that the United States Supreme Court developed a two-tiered test for determining whether a statute violates substantive due process:

> [I]f the right infringed upon is a "fundamental" right, then the law will be viewed with strict scrutiny and the party seeking to apply the law must demonstrate a compelling state interest for the law to survive a constitutional attack; if the right infringed upon is not a fundamental right, then the party applying the law need

only demonstrate that the statute is rationally related to a legitimate state interest.

Dixon v. Peters, 63 N.C. App. 592, 598, 306 S.E.2d 477, 481 (1983). A similar test is employed where the statute is challenged as violating the Equal Protection Clauses of the state and federal constitutions:

> [A] statute is subjected to the highest level of review, or "strict scrutiny," "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." For a statute to survive this level of constitutional review, the government must demonstrate that the classification created by the statute is "necessary to promote a compelling government interest."
>
> Where a statutory classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the government need only show the classification in the challenged statute has some rational basis. A statutory classification survives this analysis if it bears "some rational relationship to a conceivable legitimate interest of government." Statutes subjected to this level of scrutiny come before the Court with a presumption of validity."

In re Assessment of Taxes Against Village Publishing Corp., 312 N.C. 211, 221, 322 S.E.2d 155, 162 (1984) (citations omitted). To prevail against reasonable scrutiny, the legislation at issue " 'need not be the best resolution of a particular problem.' " *American Nat'l Ins. Co. v. Ingram*, 63 N.C. App. 38, 47, 303 S.E.2d 649, 654 (1983) (quoting *Prudential Property and Casualty Co. v. Ins. Commission, et al.*, 534 F. Supp. 571, 576 (C.D.S.C. 1982), *aff'd*, 699 F.2d 690 (4th Cir. 1983)). Even if the legislation is "seriously flawed and result[s] in substantial inequality," it will be upheld if it is reasonably related to a permissible state objective. *Id.* (quoting *Prudential*, 534 F. Supp. at 576).

The statute at issue here, section 97-29 of the General Statutes, neither burdens a suspect class, nor affects a fundamental right. It is a purely economic regulation. As such, the provision need only satisfy the rational basis level of scrutiny to withstand both the due process and equal protection challenges.

Per our earlier discussion, under section 97-29, the maximum weekly benefit is computed 1 July and is applied to all injuries and

claims arising on or after 1 January of the following year. We conclude that limiting applicability of the maximum rate based on the year of injury enables insurance providers to project future exposure and calculate premiums accordingly. As defendants persuasively argue,

> Because [the maximum weekly benefit] is tied to the economic condition of the workers in this State, it is difficult to predict what the maximum compensation rate will be in [future years]. . . . The current system allows carriers and employers to assess their worse [sic] case scenario for the coming year in July of the current year.

Thus, the application of section 97-29 appears to bear a rational relationship to a legitimate state interest. Accordingly, we hold that section 97-29 of the General Statutes is not constitutionally infirm.

[4] Plaintiff further contends that section 97-29 violates the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* (1994). Plaintiff's assignment of error in the record on appeal, however, fails to include any reference to the ADA. *See* N.C.R. App. P. 10(c)(1) (requiring assignments of error in the record on appeal "to state plainly, concisely and without argumentation the legal basis upon which error is assigned.") Therefore, we conclude that this argument is not properly before us and decline to address its merits. Moreover, in light of the preceding analysis concerning the construction of section 97-29, we summarily overrule plaintiff's alternative claim that she is at least entitled to receive the maximum rate as of the date the Commission determined her to be totally disabled.

[5] As a final matter, plaintiff argues that the Commission abused its discretion in denying her motion, pursuant to section 97-25 of the General Statutes, for approval of the additional medical providers and treatment related to her stomach reduction surgery and the resulting complications.

> Section 97-25 of the General Statutes pertinently provides that:
>
> In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

> The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

N.C. Gen. Stat. § 97-25 (1999). Whether to authorize supplemental medical treatment under section 97-25 is a matter firmly within the Commission's discretion. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 207, 472 S.E.2d 382, 387 (1996). A discretionary ruling will be upheld on appeal, provided that the decision was reasonable and was not whimsical or ill-considered. *Carrier v. Starnes*, 120 N.C. App. 513, 520, 463 S.E.2d 393, 397 (1995).

In the present case, the Commission denied authorization of the medical treatment related to plaintiff's stomach reduction procedure without stating any reason for its ruling. Absent findings of fact or some other clear indication of the basis upon which the Commission denied the request, we cannot determine whether the decision was an appropriate exercise of the Commission's discretion. Therefore, we reverse the order denying plaintiff's motion under section 97-25 of the General Statutes and remand this matter for entry of an order setting forth findings of fact revealing the basis of the Commission's ruling.

In sum, the opinion and award of the North Carolina Industrial Commission is affirmed in part, reversed in part, and remanded for further appropriate action.

Affirmed in part, reversed in part, and remanded.

Judges MARTIN and THOMAS concur.

STATE OF NORTH CAROLINA v. ELLIS WILLIAM FRAZIER

No. COA00-232

(Filed 6 March 2001)

1. Drugs— keeping dwelling for selling drugs—sufficiency of evidence

The trial court did not err by not dismissing a charge of intentionally keeping or maintaining a dwelling used for the keeping and/or selling of a controlled substance for insufficient evidence where Sloan (who identified herself as defendant's girlfriend) told Rogers (the owner of a motel) that she and defendant would stay in room 9; defendant sometimes paid the rent during the weeks they were there; defendant did not work regular business hours and was seen in the room around the middle of the day; Rogers and her husband received an anonymous letter stating that drugs were being sold in the room; defendant neither confirmed nor denied the allegations when confronted; defendant was found by officers in the bathroom, with his hands in the ceiling tiles where five rocks of crack cocaine were later found; a homemade crack pipe, a leather wallet containing $1,493 in cash, and a number of pagers were found in room 9; and defendant acted suspiciously on the day of the arrest.

2. Drugs— constructive possession—evidence sufficient

The trial court did not err by not dismissing a charge of possession of crack cocaine with intent to sell and deliver where the evidence was sufficient to support constructive possession. There was substantial evidence that defendant and his girlfriend shared possession of the motel room where the drugs were located and other incriminating evidence included defendant's lunge into the bathroom when officers entered the motel room and defendant placing his hands into the bathroom ceiling where the drugs were later found.

3. Constitutional Law— effective assistance of counsel—failure to object or move for continuance

The actions of defense counsel in a prosecution for intentionally keeping or maintaining a dwelling used for the keeping and/or selling of a controlled substance did not amount to ineffective assistance of counsel where defendant pointed to his counsel's failure to suppress drugs seized in a warrantless search,

but probable cause and exigent circumstances existed and the evidence was admissible; defense counsel's failure to object to the admissibility of defendant's statement concerning other drugs in his room did not amount to deficient representation because the statement was spontaneous and admissible despite the absence of Miranda warnings; and there was no indication of how the failure to move for a continuance impacted preparation for trial where defendant was arraigned and tried in the same week.

Appeal by defendant from judgments dated 4 November 1999 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 30 January 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General W. Dale Talbert, for the State.

Ligon & Hinton, by Lemuel W. Hinton, for defendant-appellant.

GREENE, Judge.

Ellis William Frazier (Defendant) appeals from judgments entered after a jury rendered verdicts finding him guilty of intentionally keeping or maintaining a dwelling used for the keeping and/or selling of a controlled substance and possession with intent to sell or deliver cocaine.

Defendant's case was called for trial on 3 November 1999. At that time, Defendant's counsel, John Oates (Oates), informed the trial court Defendant wished to be formally arraigned. Prior to arraignment, Defendant stated he was "physically unable to stand trial" because he had not spoken with his attorney concerning his case. Defendant was formally arraigned and given an opportunity to speak with Oates. After Defendant spoke with Oates, Oates stated he was ready to proceed and jury selection began on 3 November 1999. The State began presenting its evidence on 4 November 1999.

The State's evidence shows Selene Sloan (Sloan) entered the Roger's Motel (the Motel) in Cary on 26 January 1999 and requested to rent a room. Sloan told Barbara Rogers (Rogers), the owner of the Motel, she and her boyfriend, Defendant, were in the process of relocating to Cary and would stay at the Motel until they found an apartment. Sloan and Defendant were the only people staying in room 9 of the Motel (room 9) and neither appeared to work regular business

hours. Both Defendant and Sloan were seen in room 9 and around the Motel frequently at noontime. Sloan and Defendant stayed at the Motel approximately six or seven weeks and "[s]ometimes [Sloan] paid [the rent]. Sometimes a money order was dropped in. And on an occasion or two, [Defendant] paid [the rent]."

At some point during the stay of Defendant and Sloan at the Motel, Rogers and her husband received an anonymous letter indicating drugs were being sold in room 9. Rogers immediately called the Cary Police Department and an investigator came to the Motel and spoke with Rogers and her husband. Rogers and her husband later spoke with Defendant and informed him of the letter. Defendant neither denied nor confirmed he was selling drugs.

At trial, Detective Tracy Barker (Barker), of the Cary Police Department, testified he spoke with Rogers and her husband on 17 March 1999. Barker decided he would do a "knock and talk investigation," where he would "go up to [the] door, knock on [the] door, and ask the people in the . . . [motel] room . . . if [he could] come in and talk with them." Sloan allowed Barker to enter her motel room. As Barker entered room 9, he noticed Defendant lying on the bed. Defendant proceeded to get off of the bed and walk toward the bathroom. Barker asked Defendant if he had a problem with Barker "coming in and talking with them." Defendant did not respond, but continued walking toward the bathroom. Barker repeated himself and Defendant told Barker he could come into the room. As Defendant continued walking away from Barker, Defendant looked back at Barker in what Barker felt was "a suspicious sort of look." Barker asked Defendant to stop, however, Defendant continued walking and made a "lunge" behind a wall and shut the bathroom door. Barker "had an immediate feeling of fear . . . for [his] safety and the officers that were with [him]." Barker forced the bathroom door open and found Defendant "between the door and the tub . . . . He had his hands up in the ceiling tiles." Barker grabbed Defendant's arms, laid "him on the bed and secured him" and then secured Sloan.

After Defendant and Sloan were secured by Barker, Barker retrieved a step ladder and went into the bathroom to search it. Barker found a sandwich-sized plastic bag containing five individually wrapped rocks of crack cocaine located in the bathroom ceiling tiles. Barker conducted a "cursory search" of room 9 for weapons or contraband. Barker and other officers confiscated: "a homemade crack pipe"; a "crisp $20 bill that was folded lengthwise in half"; "a

number of pagers"; two cellular phones; and a leather wallet containing $1,493.00 in cash found on the side of the bed Defendant had lay on.

The State asked Barker if Defendant made any other statements while in room 9. Oates objected and the trial court excused the jury. Oates stated his objection was based on Barker's report that Defendant made "a statement saying . . . there were no other drugs in the room." Oates contended Defendant was in custody and, thus, Barker's questioning of Defendant was a violation of Defendant's Miranda rights. Oates attempted to conduct a *voir dire* examination of Barker, but the trial court interrupted Oates. The trial court inquired if Oates was attempting to make a motion to suppress and Oates answered in the affirmative. The trial court informed Oates "[N.C. Gen. Stat. §] 15A requires a written motion unless [Oates was] not aware that this evidence was in existence. And . . . assuming from [Oates'] comments . . . [he] had the report prior to trial." Oates indicated he did have the report prior to trial and he had the opportunity to file a written motion to suppress. The State moved to deny the motion to suppress and the trial court denied Defendant's motion to suppress.

Barker was permitted to testify Defendant advised Barker there were no other drugs in room 9. On cross-examination, Barker testified Sloan "appeared to be living or at least staying in the room at the time [Barker] came into [room 9]."

Officer Kenneth S. Quinlan (Quinlan) testified he went with Barker on 17 March 1999 because Barker "had a safety concern [and] . . . wanted an additional officer to back him up." As Defendant walked toward the bathroom, Defendant was looking at Barker and Quinlan in an "awkward" manner and Quinlan became concerned for their safety.

At the close of the State's evidence, Defendant made motions to dismiss both charges for insufficiency of the evidence, however, the motions were denied. Defendant presented no evidence at trial.

The issues are whether: (I) the State presented substantial evidence Defendant kept or maintained a place used for the keeping and/or selling of a controlled substance; (II) the State presented substantial evidence Defendant possessed cocaine; and (III) Oates provided Defendant with ineffective assistance of counsel.

I

[1] Defendant contends the trial court erred in failing to dismiss the charge of intentionally keeping or maintaining a dwelling used for the keeping and/or selling of a controlled substance because there was insufficient evidence Defendant kept or maintained room 9 for the purpose of keeping or selling a controlled substance. We disagree.

A motion to dismiss must be denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that [the] defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

To obtain a conviction for knowingly and intentionally maintaining a place used for keeping and/or selling controlled substances under N.C. Gen. Stat. § 90-108(a)(7), the State has the burden of proving the defendant: (1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance. N.C.G.S. § 90-108(a)(7) (1999); *State v. Allen*, 102 N.C. App. 598, 608, 403 S.E.2d 907, 913-14 (1991), *rev'd on other grounds*, 332 N.C. 123, 418 S.E.2d 225 (1992).

A

Keep or maintain a place

Whether a person "keep[s] or maintain[s]" a place, within the meaning of N.C. Gen. Stat. § 90-108(a)(7), requires consideration of several factors, none of which are dispositive. *See Allen*, 102 N.C. App. at 608-09, 403 S.E.2d at 913-14. Those factors include: occupancy of the property; payment of rent; possession over a duration of time; possession of a key used to enter or exit the property; and payment of utility or repair expenses. *See id; see also State v. Rich*, 87 N.C. App. 380, 384, 361 S.E.2d 321, 324 (1987); *State v. Kelly*, 120 N.C. App. 821, 826, 463 S.E.2d 812, 815 (1995).

In this case, Sloan told Rogers that both she and Defendant would stay in room 9. During the six or seven weeks Defendant

stayed at the Motel, he sometimes paid the rent. Defendant did not work regular business hours and was seen in room 9 and around the Motel in the middle of the day. This evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" Defendant kept or maintained room 9.

B

Used for keeping and/or selling a controlled substance

The determination of whether a building or other place is used for keeping or selling a controlled substance "will depend on the totality of the circumstances." *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994). Factors to be considered in determining whether a particular place is used to "keep or sell" controlled substances include: a large amount of cash being found in the place; a defendant admitting to selling controlled substances; and the place containing numerous amounts of drug paraphernalia. *See id.*; *see also State v. Bright*, 78 N.C. App. 239, 240, 337 S.E.2d 87, 87-88 (1985), *disc. review denied*, 315 N.C. 591, 341 S.E.2d 31 (1986); *Rich*, 87 N.C. App. at 384, 361 S.E.2d at 322.

In this case, Rogers and her husband received an anonymous letter stating drugs were being sold in room 9. When Defendant was confronted with these allegations, he neither denied nor confirmed them. Defendant was found in the bathroom, with his hands in the ceiling tiles where five rocks of crack cocaine were later found. In addition, a homemade crack pipe, a leather wallet containing $1,493.00 in cash and a number of pagers were found in room 9. These circumstances, along with Defendant's suspicious behavior on the day of the arrest, "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" room 9 was used for keeping or selling drugs. Accordingly, Defendant's motion to dismiss the charge of maintaining a dwelling used for the keeping and/or selling of a controlled substance was properly denied.

II

[2] Defendant was charged with possession with the intent to sell or deliver cocaine in violation of N.C. Gen. Stat. § 90-95(a)(1). Under this statute the State has the burden of proving: (1) the defendant possessed the controlled substance; and (2) with the intent to sell or distribute it. *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 72-73 (1996).

Defendant contends the trial court erred in failing to dismiss this charge because there is no evidence he possessed the drugs found in the dwelling. We disagree.

Possession may be either actual or constructive. *State v. Broome*, 136 N.C. App. 82, 87, 523 S.E.2d 448, 452 (1999), *disc. review denied*, 351 N.C. 362, 543 S.E.2d 136 (2000). "Constructive possession exists when a person," although not having actual possession of the controlled substance, "has the intent and capability to maintain control and dominion over [the] controlled substance." *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993). Constructive possession of drugs is often shown by evidence the defendant has exclusive possession of the property in which the drugs are located. *State v. Alston*, 91 N.C. App. 707, 710, 373 S.E.2d 306, 309 (1988). It can also be shown with evidence the defendant has nonexclusive possession of the property where the drugs are located; provided, there is other incriminating evidence connecting the defendant with the drugs. *Id.*

In this case, there is substantial evidence Defendant, along with Sloan, shared possession of the room where the drugs were located. Other incriminating evidence, connecting Defendant with the drugs, includes his "lunge" into the bathroom and the placing of his hands into the bathroom ceiling, where the drugs were later found. This evidence is therefore sufficient to support the conclusion Defendant had constructive possession of the drugs in question. Accordingly, Defendant's motion to dismiss the charge of possession with intent to sell or deliver cocaine was properly denied.

III

[3] Defendant argues in his brief to this Court that Oates' actions amounted to ineffective assistance of counsel. Defendant cites Oates' failure to: (1) move to suppress the drugs seized from room 9; (2) move to suppress statements made by Defendant prior to trial; and (3) assert Defendant's right not to be tried during the same week of arraignment.

A strong presumption exists that a counsel's conduct falls within the range of reasonable professional assistance. *State v. Mason*, 337 N.C. 165, 177-78, 446 S.E.2d 58, 65 (1994). In order to substantiate a claim for ineffective assistance of counsel, a defendant must show that "his counsel's representation was deficient and that there is a reasonable possibility that, but for counsel's inadequate representa-

tion, there would have been a different result." *State v. Piche*, 102 N.C. App. 630, 638, 403 S.E.2d 559, 564 (1991). If this 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," we do not determine if counsel's performance was actually deficient. *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). A counsel's failure to object to evidence which is in fact admissible does not amount to deficient representation. *See State v. Lee*, 348 N.C. 474, 492-93, 501 S.E.2d 334, 346 (1998).

A

Failure to suppress evidence

Defendant argues the warrantless search of room 9 violated his constitutional rights and, thus, his counsel's failure to move to suppress the drugs amounted to ineffective assistance of counsel. We disagree.

A warrantless search may be conducted if "probable cause exists to search and the exigencies of the situation make search without a warrant necessary." *State v. Mills*, 104 N.C. App. 724, 730, 411 S.E.2d 193, 196 (1991). Probable cause to search for controlled substances is established if "a reasonable person acting in good faith could reasonably believe that a search of the defendant would reveal the controlled substances sought which would aid in his conviction." *Id.* at 730, 411 S.E.2d at 196. This Court, in reviewing whether probable cause exists, may consider the following nonexclusive factors: the defendant's suspicious behavior; flight from the officer or the area; and the officer's knowledge of defendant's past criminal conduct. *See id.* at 729, 411 S.E.2d at 196 (factors to consider to determine if probable cause exists to arrest).[1] In addition, an exigent circumstance is found to exist in the "presence of an emergency or dangerous situation," *State v. Guevara*, 349 N.C. 243, 250, 506 S.E.2d 711, 716 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999), and may include: a suspect's fleeing or seeking to escape, *id.*; possible destruction of a controlled substance, *see Mills*, 104 N.C. App. at 731, 411 S.E.2d at 197; and "the degree of probable cause to believe the sus-

1. In considering whether evidence is present to create probable cause, "none of these factors alone would be sufficient to establish probable cause." *Mills*, 104 N.C. App. at 729, 411 S.E.2d at 196. These factors must be considered in their totality, "based upon the practical considerations of everyday life." *Id.*

pect committed the crime involved," *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979).

In this case, the evidence prior to the search of room 9 shows: as the officers entered the room, Defendant proceeded to get off of the bed and walk away from the officers; Defendant did not respond to Barker's inquiry of whether or not Defendant had a problem with Barker coming into room 9 and talking with him and Sloan, until Barker asked Defendant a second time; and Defendant gave Barker "a suspicious sort of look" and then made a "lunge" behind a wall and shut the bathroom door. This evidence establishes probable cause to search Defendant because a reasonable person, acting in good faith, could believe a search of Defendant would reveal the presence of a controlled substance.[2] Likewise, exigent circumstances also existed in this case. Defendant tried to flee from the officers, there was a danger the controlled substance could be destroyed, and there was probable cause to believe Defendant committed a crime. Accordingly, probable cause and exigent circumstances existed sufficient to conduct a warrantless search of Defendant, and, thus, because the evidence was admissible, Oates' failure to move to suppress the evidence did not amount to deficient representation.

B

Defendant's statement

Defendant argues his statement there were no other drugs in room 9 was made during a custodial interrogation in violation of his Miranda rights. We disagree.

A defendant must be given Miranda warnings before he is subjected to custodial interrogation.[3] *State v. Lipford*, 81 N.C. App. 464, 468, 344 S.E.2d 307, 310 (1986). "Spontaneous statements made by an individual while in custody are admissible despite the absence of *Miranda* warnings." *Id.*

2. The anonymous letter, standing alone, without some other "indicia" of reliability or form of corroboration, is not a sufficient basis to establish probable cause in this case. *See Florida v. J.L.*, 529 U.S. 266, 269, 146 L. Ed. 2d 254, 259 (2000) ("[a]nonymous tips . . . are generally less reliable than tips from known informants and can form the basis for reasonable suspicion only if accompanied by specific indicia of reliability"); *see also State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000) ("an anonymous tip can form the basis of reasonable suspicion as long as there is sufficient indicia of reliability either from the tip alone or after police corroboration").

3. Because the State concedes in its brief to this Court Defendant was in custody for purposes of Miranda, we need only address whether Defendant's statement was made as the result of an "interrogation."

In this case, Defendant stated, after he had been secured and after the officers had conducted a search of the room, that there were no other drugs in room 9. There is no evidence from the record Defendant's statement was made in response to any question posed by the officers. Accordingly, Defendant's statement appeared to be a spontaneous statement, not made in response to the officers' prompting, and, thus, is admissible despite the absence of Miranda warnings. Because Defendant's statement is in fact admissible, Oates' failure to object to the admissibility of the statement does not amount to deficient representation.

C

Arraignment

"When a defendant pleads not guilty at an arraignment[,] . . . he may not be tried without his consent in the week in which he is arraigned." N.C.G.S. § 15A-943(b) (1999). "[I]t is a general rule that a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert [the benefit] in apt time, or by conduct inconsistent with a purpose to insist upon [the benefit]." *State v. Gaiten*, 277 N.C. 236, 239, 176 S.E.2d 778, 781 (1970). If a defendant fails to assert the right guaranteed by N.C. Gen. Stat. § 15A-943(b) by seeking a continuance of his trial, "he waive[s] his statutory right not to be tried the week in which he was arraigned." *State v. Styles*, 93 N.C. App. 596, 602, 379 S.E.2d 255, 259 (1989).

Defendant argues Oates' failure to move for a continuance in his case resulted in Defendant waiving his statutory right under section 15A-943(b), and, thus, amounted to ineffective assistance of counsel. Defendant contends additional time would have aided in his preparation for trial and "would have enabled counsel to competently advise [D]efendant with regard to his options," including moving to suppress Defendant's statement and moving to suppress the controlled substance. We disagree. Defendant has not indicated to this Court in what manner he was unprepared for trial, how additional time would have aided in his preparation, or what options Oates failed to explain to Defendant. Absent some indication of how the failure to move for a continuance impacted Defendant's preparation at trial, there is no reasonable possibility there would have been a different result at trial. Likewise, because we have held in Parts III (A) and (B) of this opinion that Oates' failure to move to suppress the evidence seized from room 9 and to suppress Defendant's statement did not amount to deficient representation, there is no reasonable possibility, absent

Oates' failure to request a continuance and then make motions to suppress, a different result would have been reached at trial.

No error.

Judges TYSON and JOHN concur.

BYRD'S LAWN & LANDSCAPING, INC., PLAINTIFF v. J. MARK SMITH, DEFENDANT

No. COA00-187

(Filed 6 March 2001)

1. Unfair Trade Practices— trade secrets—confidential cost history records

Plaintiff lawn care business presented sufficient evidence to support the jury's verdict that plaintiff's confidential cost history records were a trade secret under N.C.G.S. § 66-152 and that defendant former employee who had served as vice-president and general manager misappropriated them, because the evidence taken in the light most favorable to plaintiff reveals that plaintiff's cost history records were "a compilation of information, method, technique, or process" which were treated by plaintiff as confidential, were neither known outside plaintiff's business nor shared with its employees, had value to plaintiff and potential value to plaintiff's competitors, and could not be easily acquired by others who had not performed similar services on the same properties from which plaintiff's cost history information was acquired. N.C.G.S. § 66-152(3).

2. Unfair Trade Practices— trade secrets—confidential cost history records—misappropriation

Plaintiff lawn care business's evidence in an unfair and deceptive trade practices action was sufficient to be submitted to the jury on the question of whether defendant former employee who had served as vice-president and general manager misappropriated plaintiff's confidential cost history records, because: (1) plaintiff offered evidence tending to show that after defendant had been working for plaintiff for about ten years and had become general manager, the president taught him how to prepare bids using the confidential cost history information; (2)

defendant participated with the president in preparing bids for their largest account; and (3) upon starting his own business in competition with plaintiff, defendant submitted bids to that account and underbid plaintiff on eleven of fourteen properties. N.C.G.S. §§ 66-152(1) and 66-155.

3. Damages and Remedies— lost profits—appropriation and use of confidential cost history information

Plaintiff lawn care business offered sufficient evidence to sustain the jury's damage award for lost profits against defendant former employee who began a competing business through the appropriation and use of plaintiff's confidential cost history information, because: (1) plaintiff offered evidence with respect to the previous business relationship between plaintiff and their largest account; and (2) plaintiff offered evidence to show the gross revenues which would have been realized upon the maintenance contracts for each of the eight properties for which defendant subsequently obtained maintenance contracts from this account and the profit margins which plaintiff would have realized on those revenues.

4. Evidence— percentage of profits on gross revenue—lost profits—lay opinion

The trial court did not err by permitting defendant lawn care business's president to testify as to the percentage of profits realized on plaintiff's gross revenue and as to plaintiff's lost profits due to defendant former employee's use of plaintiff's cost history records in securing eight of plaintiff's contracts, because: (1) N.C.G.S. § 8C-1, Rule 701 permits a lay witness to testify as to opinions based on the witness's own perception; and (2) the president testified that his opinion was based on his recollection of the revenues realized by plaintiff on the eight contracts and his knowledge, based on experience, of plaintiff's percentage of profits on gross sales.

5. Unfair Trade Practices— orally requested jury instruction—lost profits—special instructions required to be in writing

The trial court did not abuse its discretion in an unfair and deceptive trade practices case by refusing to give jury instructions on the proof required for a finding of lost profits even though defense counsel verbally requested such instructions, because N.C.G.S. § 1A-1, Rule 51(b) requires that a request for

special instructions be in writing, signed by counsel, and submitted to the trial court before the court instructs the jury.

Appeal by defendant from judgment entered 6 July 1999 and order entered 11 August 1999 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 January 2001.

Dozier Miller Pollard & Murphy, by Richard S. Gordon, for plaintiff-appellee.

Rayburn Smith Cooper & Durham, P.A., by James B. Gatehouse, for defendant-appellant.

MARTIN, Judge.

Plaintiff, Byrd's Lawn & Landscaping, Inc., a North Carolina corporation with its principal office in Mecklenburg County, brought this action alleging claims for relief for breach of fiduciary duty; misappropriation of confidential business information and a violation of G.S. § 66-152 *et seq.*, the Trade Secrets Protection Act; wrongful interference with contract; and unfair and deceptive practices in violation of G.S. § 75-1.1. Plaintiff alleged that it was engaged in providing landscape and lawn maintenance services for commercial properties, that defendant had been employed by plaintiff as its vice-president and general manager, and that his duties had included marketing plaintiff's services and developing business relationships with its customers. Plaintiff alleged that defendant, in the course of his employment, had access to plaintiff's confidential financial information and customer information and that while he was so employed, defendant solicited various of plaintiff's customers to transfer their business to him. Defendant then terminated his employment with plaintiff and opened a competing business, using the financial information which he had acquired from plaintiff to underbid plaintiff for its customers' business. Plaintiff alleged that it had sustained lost profits and sought treble damages and injunctive relief.

Defendant filed an answer in which he denied the material allegations of the complaint. When the case was called for trial, plaintiff submitted to a voluntary dismissal of its claims for breach of fiduciary duty and wrongful interference with contract; the trial proceeded upon the claims for violation of the Trade Secrets Protection Act and unfair and deceptive practices. At the close of all the evidence, the parties stipulated that if the jury found defendant had mis-

appropriated plaintiff's trade secrets, such conduct would constitute an unfair and deceptive practice; if the jury found there had been no misappropriation of plaintiff's trade secrets, defendant would be entitled to judgment on the G.S. § 75-1.1 claim as well.

The jury answered the issues finding that plaintiff's cost history records were a trade secret, that defendant misappropriated the trade secret, and that his conduct in so doing proximately caused injury to plaintiff's business in the amount of $41,000.00. The trial court trebled the damages pursuant to G.S. § 75-16 and entered judgment in favor of plaintiff in the amount of $123,000.00 plus interest and costs. Defendant's motion for judgment notwithstanding the verdict, and alternatively, a new trial, was denied. Defendant appeals.

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[1] The primary issue raised by defendant's assignments of error is whether plaintiff presented sufficient evidence to support the jury's verdict that plaintiff's cost history records were a trade secret and, if so, that defendant misappropriated them. Defendant contends he was entitled to judgment as a matter of law regarding plaintiff's misappropriation of trade secrets claim and his dispositive motions for directed verdict and judgment notwithstanding the verdict should have been granted.

The question presented by a defendant's motion for directed verdict is whether the plaintiff's evidence is sufficient "to take the case to the jury and support a verdict for the plaintiff." *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977). The plaintiff's evidence "must be taken as true and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom." *Id.* The motion should be denied unless it appears, as a matter of law, that the plaintiff is not entitled to recover under any view of the evidence. *Id.* A motion for judgment notwithstanding the verdict is essentially a renewal of an earlier motion for directed verdict and presents the same question. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985).

A trade secret is defined as:

> business or technical information, including but not limited to a formula, pattern, program, device, *compilation of information, method, technique, or process* that:

a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and

b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(3) (emphasis added). In determining whether information should be classified as a trade secret, the following factors are properly considered:

(1) the extent to which information is known outside the business;

(2) the extent to which it is known to employees and others involved in the business;

(3) the extent of measures taken to guard secrecy of the information;

(4) the value of information to business and its competitors;

(5) the amount of effort or money expended in developing the information; and

(6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Wilmington Star-News, Inc. v. New Hanover Regional Medical Center, Inc., 125 N.C. App. 174, 180-81, 480 S.E.2d 53, 56 (1997). Although North Carolina courts have not answered the precise question of whether confidential cost history records qualify as a trade secret, we find guidance in, and agree with, the language of the Tenth U.S. Circuit Court of Appeals in *Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc.*, 584 F.2d 946, 952 (10th Cir. 1978) where the Court said:

Confidential data regarding operating and pricing policies can also qualify as trade secrets. It is apparent that the ability to predict a competitor's bid with reasonable accuracy would give a distinct advantage to the possessor of that information (citation omitted).

In the present case, plaintiff presented sufficient evidence to support a finding that its historical cost information was a trade secret as defined by G.S. § 66-152. Plaintiff offered evidence through the testi-

mony of its president, Bobby Byrd, Sr., that it had maintained detailed cost records as to the materials, labor and equipment required for each of its contracts over a period of seventeen years. The information was kept by Mr. Byrd, first in a notebook and then on computer. The information was treated as confidential by Mr. Byrd, who used the information to prepare bids for the various properties upon which plaintiff performed services. Many of the accounts had to be rebid each year. Mr. Byrd testified that someone with access to these records could use the information to underbid plaintiff on any of its contracts. Therefore, Mr. Byrd did not even share the information with plaintiff's employees. Notwithstanding evidence offered by defendant that similar information may have been ascertainable by anyone in the lawn maintenance and landscape business, plaintiff's evidence, when considered in the light most favorable to it, is sufficient to sustain a finding by the jury that plaintiff's cost history records were "a compilation of information, method, technique, or process" which was treated by plaintiff as confidential, was neither known outside plaintiff's business nor shared with its employees, which had value to plaintiff and potential value to plaintiff's competitors, and which could not be easily acquired by others who had not performed similar services on the same properties from which plaintiff's cost history information was acquired.

[2] Misappropriation is defined as:

> acquisition, disclosure, or *use of a trade secret of another* without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.

N.C. Gen. Stat. § 66-152(1) (emphasis added). Misappropriation of a trade secret is established by introducing substantial evidence that the person against whom relief is sought: "(1) Knows or should have known of the trade secret; and (2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner." N.C. Gen. Stat. § 66-155. Such evidence may be rebutted, however, if the person against whom relief is sought presents substantial evidence that he acquired the information through "independent development." *Id.*

In the present case, plaintiff offered evidence tending to show that after defendant had been working for plaintiff for about ten years

and had become general manager, Mr. Byrd taught him how to prepare bids using the confidential cost history information. One of plaintiff's larger customers was Summit Properties, Inc., which owned fourteen properties upon which plaintiff performed services. Defendant had participated with Mr. Byrd in preparing bids for the Summit account and had reviewed the historical cost information relating to those properties shortly before leaving his employment with plaintiff. Upon starting his own business in competition with plaintiff, defendant submitted bids to Summit and underbid plaintiff on eleven of the fourteen properties. Defendant was awarded contracts for eight of the properties. Such evidence is sufficient circumstantial evidence to sustain a finding that defendant knew of the confidential information, had the opportunity to acquire it for his own use, and did so. Although defendant testified in rebuttal that he was able to compile his bids using his own experience and without resort to the information contained in plaintiff's records, plaintiff's evidence was sufficient to be submitted to the jury on the question of whether defendant misappropriated the confidential cost records.

[3] Defendant also contends plaintiff offered insufficient evidence to sustain the jury's damage award. The party seeking damages has the burden of proving them. *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 547, 356 S.E.2d 578, 586, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987). "As part of its burden, the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Id.* at 547-48, 356 S.E.2d at 586 (citation omitted).

With respect to damages for lost profits, our courts have refused to permit recovery based upon speculative forecasts, requiring proof that absent the wrong, profits would have been realized in an amount provable with "reasonable certainty." For example, in *Keith v. Day*, 81 N.C. App. 185, 343 S.E.2d 562 (1986), this Court addressed the difficulty in calculating damages for lost profits in the context of the breach of a non-compete agreement: "The indefiniteness consequent upon this difficulty does not, however, by itself preclude relief . . . . 'What the law does require in cases of this character is that the evidence shall with a fair degree of probability establish a basis for the assessment of damages.' " *Id.* at 196, 343 S.E.2d at 569 (citation omitted). Moreover, there is no bright-line rule in determining what amount of evidence is sufficient to establish lost profits:

> [W]e have chosen to evaluate the quality of evidence of lost profits on an individual case-by-case basis in light of certain criteria to determine whether damages have been proven with 'reasonable certainty.'

Iron Steamer, Ltd. v. Trinity Restaurant, Inc., 110 N.C. App. 843, 847-48, 431 S.E.2d 767, 770 (1993). We think those principles are applicable here as well.

In the present case, in addition to the evidence with respect to the previous business relationship between plaintiff and Summit, plaintiff offered evidence to show the gross revenues which would have been realized upon the maintenance contracts for each of the eight Summit properties for which defendant subsequently obtained maintenance contracts, and the profit margins which plaintiff would have realized on those revenues. We hold this evidence established a sufficient basis to support a jury finding that, absent defendant's appropriation and use of plaintiff's confidential cost information, plaintiff would have realized profits, and for the jury to calculate the amount of those profits with reasonable certainty.

[4] In a related argument, however, defendant contends the trial court erred in permitting Mr. Byrd to testify as to the percentage of profits realized on plaintiff's gross revenues, and as to plaintiff's lost profits due to defendant's use of the cost history records in securing the eight Summit contracts, because Mr. Byrd had not been qualified as an expert and his testimony was not based on sufficient factual support. We reject his argument. G.S. § 8C-1, Rule 701 permits a lay witness to testify as to opinions based on the witness's own perception. Mr. Byrd testified that his opinion was based on his recollection of the revenues realized by plaintiff on the eight Summit contracts and his knowledge, based on experience, of plaintiff's percentage of profit on gross sales. This assignment of error is overruled.

[5] Finally, defendant assigns error to the trial court's refusal to give jury instructions, verbally requested by defendant's counsel, with respect to the proof required for a finding of lost profits. Our review of the transcript reveals that counsel orally inquired of the trial court as to whether there would be "a special instruction on the lost profit [sic] specifically talking about proving it to a reasonable degree of certainty." Counsel acknowledged that she had no written request, nor did she provide the court with any language for the requested instruction. G.S. § 1A-1, Rule 51(b) requires that a request for special

instructions be in writing, signed by counsel, and submitted to the court before the court instructs the jury. Because defendant did not comply with the requirements of Rule 51(b), the trial court acted properly within its discretion in denying the request. *Hord v. Atkinson*, 68 N.C. App. 346, 315 S.E.2d 339 (1984). Even so, the trial court's instructions included the following:

> The plaintiff's damages are to be reasonably determined from the evidence presented in the case. The plaintiff is not required to prove with mathematical certainty the extent of the injury to his business in order to recover damages. Thus, the plaintiff should not be denied damages simply because they cannot be calculate [sic] with exactness or a high degree of mathematical certainty. *An award of damages must be based on evidence which shows the amount of the plaintiff's damages with reasonable certainty.* However, you may not award any damages based upon mere speculation or conjecture (emphasis added).

This assignment of error is overruled.

No error.

Judges TIMMONS-GOODSON and THOMAS concur.

GREENSBORO MASONIC TEMPLE, PLAINTIFF v. PATRICK S. McMILLAN, DEFENDANT

No. COA00-311

(Filed 6 March 2001)

1. Contracts— breach—failure to prove damages—failure to prove contract breached—involuntary dismissal proper

The trial court did not err in a breach of contract action by converting defendant's N.C.G.S. § 1A-1, Rule 50(a) motion for a directed verdict into a N.C.G.S. § 1A-1, Rule 41(b) motion for involuntary dismissal and by granting this motion, because: (1) plaintiff failed to prove the damages suffered in the breach of contract claim; and (2) plaintiff failed to prove the contract was breached.

2. Contracts— breach—deposition and exhibits—involuntary dismissal proper

The trial court did not err in a breach of contract action when it granted an involuntary dismissal even though plaintiff contends the trial court failed to consider all of plaintiff's deposition and exhibits, because: (1) the trial court considered this evidence but did not peruse the material further after plaintiff could not point to places in the deposition or exhibits which would prove damages attributable to defendant; and (2) the trial court based its dismissal on plaintiff's failure to make out a prima facie case as well as the fact that the trial court believed that plaintiff breached the contract.

Appeal by plaintiff from judgment entered 26 October 1999 and amended judgment entered 16 December 1999 by Judge William L. Daisy in Guilford County District Court. Heard in the Court of Appeals 24 January 2001.

Johnson Tanner Cooke Younce & Moseley, by J. Sam Johnson, Jr., for plaintiff-appellant.

Forman Rossabi Black Marth Iddings & Albright, P.A., by T. Keith Black, for defendant-appellee.

WYNN, Judge.

A Rule 41(b) motion "not only tests the sufficiency of plaintiff's proof to show a right to relief, but also provides a procedure whereby the judge may weigh the evidence, determine the facts, and render judgment on the merits against the plaintiff." *McKnight v. Cagle*, 76 N.C. App. 59, 65, 331 S.E.2d 707, 711, *cert. denied*, 314 N.C. 541, 335 S.E.2d 20 (1985). The plaintiff in this case argues that the dismissal of its case under Rule 41(b) was improper because it presented sufficient proof to support its breach of contract claim. Because the transcript in this matter supports the trial court's conclusions that the plaintiff offered insufficient proof of breach and damages, we uphold the trial court's order of dismissal.

This appeal arises out of a construction contract in which the defendant Patrick McMillan agreed to undertake a $26,879 project for the Greensboro Masonic Temple Company, Inc. The parties disagree as to why McMillan failed to finish the project—the Greensboro Masonic Temple contends that McMillan abandoned the job; but

McMillan says that the Greensboro Masonic Temple breached the contract by failing to pay him.

Greensboro Masonic Temple ultimately hired other contractors to complete the construction project, paying a total of $45,953.40. By this action, Greensboro Masonic Temple seeks to recover $19,074.40 from McMillan—the difference between the amount it spent to complete the job and the amount contracted with McMillan.

At a bench trial, McMillan moved for a directed verdict under N.C.R. Civ. P. 50(a) at the close of the Greensboro Masonic Temple's evidence on the grounds that Greensboro Masonic Temple failed to offer evidence supporting its claim for damages. The trial court granted this motion after allowing the Greensboro Masonic Temple an opportunity to point out any evidence which might show damages attributable to McMillan.

[1] Greensboro Masonic Temple then moved for a new trial. The trial court denied this motion, but amended its judgment to designate that it treated McMillan's motion under Rule 50(a) as a motion for involuntary dismissal under Rule 41(b). We acknowledge that the trial court undertook that amending action because the proper motion to dismiss a case during a bench trial is a motion for involuntary dismissal under Rule 41(b), not a motion for directed verdict under Rule 50(a). And, when "a motion to dismiss under Rule 41(b) is incorrectly designated as one for a directed verdict, it may be treated as a motion for involuntary dismissal." *Neasham v. Day*, 34 N.C. App. 53, 54-55, 237 S.E.2d 287, 288 (1977). We, therefore, consider Greensboro Masonic Temple's appeal to be from the trial court's order of involuntary dismissal under Rule 41(b).

When considering a Rule 41(b) motion, the trial court does not need to evaluate the evidence in the light most favorable to the plaintiff, as would be required by a ruling on a motion for directed verdict. *See Dealers Specialities, Inc. v. Neighborhood Housing Services, Inc.*, 305 N.C. 633, 638, 291 S.E.2d 137, 140 (1982). *See also McKnight v. Cagle*, 76 N.C. App. 59, 65, 331 S.E.2d 707, 711 (1985).[1] A dismissal under Rule 41(b) should be granted when the plaintiff has shown no

1. In this case, the record shows that the trial court accorded more deference to Greensboro Masonic Temple's evidence than the law requires. In its judgment, the trial court noted that "the evidence, taken in the light most favorable to the Greensboro Masonic Temple and giving the Greensboro Masonic Temple the benefit of every reasonable inference which can be drawn from the evidence, is insufficient as a matter of law to establish a claim for relief against the Defendant."

right to relief or if the trial court determines that the defendant should otherwise prevail as a matter of law. *See Ayden Tractors v. Gaskins*, 61 N.C. App. 654, 660, 301 S.E.2d 523, 527, *disc. review denied*, 309 N.C. 319, 307 S.E.2d 162 (1983).

Rule 41(b) provides that if the trial court grants an involuntary dismissal it shall make findings of fact and separate conclusions of law. Failure to make findings of fact is reversible error and requires a new trial. *See Hill v. Lassiter*, 135 N.C. App. 515, 520 S.E.2d 797 (1999); *Mashburn v. First Investors Corp.*, 102 N.C. App. 560, 402 S.E.2d 860 (1991); *Young v. Kuehne Chemical Co., Inc.*, 53 N.C. App. 806, 281 S.E.2d 742, *rev. denied*, 304 N.C. 590, 289 S.E.2d 566 (1981). Such findings are intended to aid this Court by providing us with a clear understanding of the basis of the trial court's decision, and to make clear what was decided for purposes of *res judicata* and estoppel. *See Helms v. Rea*, 282 N.C. 610, 619, 194 S.E.2d 1, 7 (1973).

While this Court has not explicitly held that there are any exceptions to this requirement, we held in *Hill v. Lassiter*, 135 N.C. App. 515, 520 S.E.2d 797 (1999) and *Dept. of Transportation v. Overton*, 111 N.C. App. 857, 433 S.E.2d 471 *disc. review allowed*, 335 N.C. 237, 439 S.E.2d 144 (1993), *and disc. review improvidently granted*, 336 N.C. 598, 444 S.E.2d 448 (1994), that the trial court's basis for its decision could be found in the transcript. In those cases, the transcripts did not reveal an adequate basis for the trial court's grant of involuntary dismissal. But in the case at bar, the transcript affords us with a clear understanding of the trial court's basis for granting an involuntary dismissal—the Greensboro Masonic Temple failed to prove the damages suffered in the breach of contract claim. The transcript further shows that the Greensboro Masonic Temple failed to prove that the contract was breached. *See, e.g., Iron Steamer, Ltd. v. Trinity Restaurant, Inc.*, 110 N.C. App. 843, 431 S.E.2d 767 (1993).

The transcript, in this case, shows that during the bench trial there had been no testimony as to the costs associated with things that had to be redone, corrected and finished under the contract. Moreover, Greensboro Masonic Temple submitted only the costs associated with finishing the job. Significantly, Greensboro Masonic Temple presented no evidence of its cost to repair the damages that they contend were caused by McMillan. Indeed, during the bench trial, the trial court agreed with McMillan that Greensboro Masonic Temple could not specify which of its costs were attributable to the damages caused by McMillan. After providing what they had to pay to

finish the project, Greensboro Masonic Temple, when addressing the issue of damages stated: "Judge, you can sort of figure it out on your own."

Further, McMillan testified to being locked out of the facility before completion of the project. At the hearing regarding Greensboro Masonic Temple's motion for a new trial, the trial judge stated:

> I think [Greensboro Masonic Temple] would be well-advised to let this one go Mr. Johnson. Those two men that testified obviously were more interested in running this project than the person they hired to run it. As far as I'm concerned, they breached the contract when they started interfering with him.

The trial judge also commented,"had this case gone to decision, I would have ruled against [Greensboro Masonic Temple] anyway, because I thought they had breached the contract based upon the evidence I heard here and now."

Either of these two grounds—failure to properly attribute damages to the defendant or the breach of contract on the part of the Greensboro Masonic Temple—is a finding of fact that would support the trial court's order of involuntary dismissal under Rule 41(b). While the better practice would have been for the trial court to make its findings of fact and conclusions of law in the judgment, we find that the trial court's motivation was clear enough for appellate review. Further, we hold that based on the trial court's findings and conclusions, involuntary dismissal was proper.

[2] Greensboro Masonic Temple also argues that the trial court erred when it granted involuntary dismissal because it had not considered all of Greensboro Masonic Temple's evidence, namely, a deposition and its exhibits. We find fault with Greensboro Masonic Temple's argument on two grounds.

First, the trial court did not completely ignore the proffered deposition and exhibits, as is evidenced both by the appellant's brief and the transcript. While it appears that he did not read the documents in their entirety, the trial court specifically asked Greensboro Masonic Temple to point to places in the deposition or exhibits which would prove damages attributable to McMillan. Greensboro Masonic Temple failed to do so, leaving the trial court with no reason to peruse the material further. During the hearing regarding Greensboro Masonic Temple's motion for a new trial, the trial court stated the fol-

lowing as its reasoning for granting the motion to dismiss and denying the motion for a new trial:

> [T]he question of what's in the deposition is not as important to me as what's not in the deposition . . . [T]here wasn't evidence of what it cost [Greensboro Masonic Temple] to repair the damages that they contend were caused by the defendant. You had lots of information about what they had to pay to finish the project, but not any specific information about what it costs to do the work, and that's why I granted the motion, and I'm satisfied . . .

Second, the trial court did not base its dismissal solely on Greensboro Masonic Temple's failure to make out a *prima facie* case; rather, it explicitly stated during the hearing for a new trial that it believed the Greensboro Masonic Temple breached the contract. This independent ground for dismissing the case made the trial court's failure to read the transcript in its entirety at most harmless error. Since the trial court made the finding that Greensboro Masonic Temple breached the agreement, no amount of proof of damages by Greensboro Masonic Temple would have allowed it to recover from McMillan. *See Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 512, 358 S.E.2d 566, 570 (1987) (holding that if either party commits a material breach of contract, the other party should be excused from the obligation to further perform).

The judgment of the trial court is,

Affirmed.

Judges McGEE and JOHN concur.

TERESA B. WILLIAMS, PLAINTIFF/APPELLEE v. LISA A. MANUS AND TONY MANUS, DEFENDANTS/APPELLANTS

No. COA00-261

(Filed 6 March 2001)

Costs— attorney fees—award not supported by findings and reason

An award of attorney fees to plaintiff pursuant to N.C.G.S. § 6-21.1 was remanded where defendants in a personal injury

action arising from an automobile accident offered $501; plaintiff received a non-binding arbitration award of $3,500; defendant appealed the award and the jury returned a verdict of $62; plaintiff's counsel made a motion for attorney fees and costs and submitted an affidavit chronicling 73.5 hours devoted to the case; and the trial court held a hearing and entered an order awarding $5,000 in attorney fees and $848.72 in costs. The discretion to award attorney fees is not unbridled; the award here appears to be unsupported by reason in light of the court's failure to make any findings of fact and the jury verdict, the amount plaintiff sought to recover, plaintiff's contract for legal services, and the hourly rate counsel received.

Appeal by defendant Lisa A. Manus from order entered 1 December 1999 by Judge Christopher W. Bragg in Union County District Court. Heard in the Court of Appeals on 22 January 2001.

Dean & Gibson, L.L.P., by Michael G. Gibson and Thomas G. Nance, for defendant appellant.

Culler & Culler, P.A., by Richard A. Culler, for plaintiff appellee.

SMITH, Judge.

On 19 August 1997, Teresa B. Williams (plaintiff) was pulling away from a stop sign when a vehicle driven by Lisa A. Manus and owned by Tony Manus (defendants) struck the rear of her vehicle. Plaintiff made a claim for her alleged injuries to defendants' liability insurance carrier, but the claim was denied because the carrier determined that the impact was at too low a speed, and there was "no evidence to suggest that there would have been a sufficient amount of force from this contact to have caused injuries to anyone."

On 25 June 1998, plaintiff filed this action for personal injuries seeking damages "in excess of five thousand dollars ($5,000.00)." Defendants answered and served an offer of judgment in the amount of $501.00. On 30 October 1998, the parties appeared for non-binding arbitration and plaintiff was awarded $3,500.00. Defendant Lisa A. Manus appealed the award, and the case proceeded to trial. On 21 September 1999, the jury returned a verdict for plaintiff in the amount of $62.00.

Following the trial, counsel for plaintiff made a motion for attorney's fees and costs pursuant to N.C. Gen. Stat. § 6-21.1 (1999).

Counsel also submitted an affidavit chronicling 73.5 hours of time dedicated to plaintiff's case. A hearing was held on the motion, and the trial court entered an order awarding plaintiff's counsel $5,000.00 in attorney's fees and $848.72 in costs. Defendant appeals from the award of attorney's fees.

Defendant's sole argument on appeal is that the trial court erred in awarding $5,000.00 in fees to plaintiff's counsel. Defendant asserts that to allow an award of attorney's fees in this case where the jury verdict is so small and so far below the defendant's settlement offer, would be the equivalent of holding that the award of attorney's fees is guaranteed. Under these circumstances, defendant contends that plaintiffs and their counsel would be motivated to reject all reasonable settlement offers. Defendant additionally argues that the trial court failed to make findings of fact showing that it considered the several factors relating to the appropriateness of the award. *Culler v. Hardy*, 137 N.C. App. 155, 526 S.E.2d 698 (2000); *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999).

After careful review of the record, briefs and contentions of the parties, we vacate and remand. Pursuant to N.C. Gen. Stat. § 6-21.1, attorney's fees may be allowed as part of court costs in certain cases. N.C. Gen. Stat. § 6-21.1 states:

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

Although the statute expressly states that attorney's fees are allowed in the discretion of the trial court, this discretion is not unbridled. When awarding attorney's fees, the trial court is required to consider and make findings of fact regarding the following factors:

> (1) settlement offers made prior to the institution of the action . . . ; (2) offers of judgment pursuant to Rule 68, and whether

> the "judgment finally obtained" was more favorable than such offers; (3) whether defendant unjustly exercised "superior bargaining power"; (4) in the case of an unwarranted refusal by an insurance company, the "context in which the dispute arose."; (5) the timing of settlement offers; (6) the amounts of the settlement offers as compared to the jury verdict; and the whole record.

Horton, 132 N.C. App. at 351, 513 S.E.2d at 334-35 (citations omitted). Here, however, the trial court made absolutely no findings in support of its award of attorney's fees.

We also note that the attorney's fees award might be considered unreasonable in light of the jury verdict, the amount plaintiff sought to recover from defendants, and plaintiff's contract for legal services with counsel. If one considers the hourly rate counsel received, however, the award might be unreasonably low.

This Court has stated:

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

Id. at 352, 513 S.E.2d at 335 (quoting *Harrison v. Herbin*, 35 N.C. App. 259, 261, 241 S.E.2d 108, 109, *cert. denied*, 295 N.C. 90, 244 S.E.2d 258 (1978)). In light of the foregoing, and the trial court's failure to make any findings of fact to support its award of attorney's fees, the award appears to be unsupported by reason.

Accordingly, we hold the trial court erred in awarding attorney's fees to counsel for plaintiff without considering the guidelines established by *Horton*. Thus, the award of attorney's fees in the present case is reversed, and the case remanded to the trial court for further proceedings consistent herewith.

Reversed and remanded.

Chief Judge EAGLES and Judge HUDSON concur.

STATE OF NORTH CAROLINA v. TIMOTHY EARL BLACKWELL

No. COA98-1284-2

(Filed 6 March 2001)

Homicide— felony murder—assault with a deadly weapon inflicting serious injury—felonious impaired driving

A defendant's conviction for first-degree murder must be vacated based on the State's reliance on four different charges of assault with a deadly weapon inflicting serious injury and felonious impaired driving to support its felony murder charge because such crimes are not felonies delineated or described in the murder statute, and thus they cannot support a conviction of first-degree murder under the felony murder rule. However, the record contains ample evidence to support a charge of the lesser-included offense of second-degree murder under N.C.G.S. § 15A-1447(c), and defendant may be tried on remand for second-degree murder.

On remand from the Supreme Court of North Carolina in accordance with their opinion 353 N.C. 259, 538 S.E.2d 929 (2000). Previously heard by this Court on 25 August 1999, 135 N.C. App. 729, 522 S.E.2d 313 (1999), on appeal by defendant from judgment entered 17 April 1998 by Judge Orlando F. Hudson in Durham County Superior Court. The issues on remand are those as directed by our Supreme Court in its opinion filed 21 December 2000, 353 N.C. 259, 538 S.E.2d 929 (2000), to amend our previously filed opinion in light of *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000).

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Jonathan P. Babb, for the State.

Public Defender Robert Brown, Jr. and Assistant Public Defender Shannon A. Tucker, for defendant-appellant.

GREENE, Judge.

In the previously filed opinion of this Court on 7 December 1999, we held Defendant was entitled to a new trial on his first-degree murder conviction because "the violated plea agreement" in the felonious impaired driving charge was "introduced as substantive evidence" at Defendant's murder trial and this evidence "became the backbone of the State's theory of prosecution." *State v. Blackwell*, 135 N.C. App.

729, 733, 522 S.E.2d 313, 316 (1999). *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000), now provides an additional reason to vacate Defendant's murder conviction. A defendant "may not be subject to a potential death sentence absent a showing of actual intent to commit one or more of the underlying felonies delineated or described in our state's murder statute." *Jones*, 353 N.C. at 163, 538 S.E.2d at 922. Neither assault with a deadly weapon inflicting serious injury (AWDWISI) nor felonious impaired driving are felonies delineated or described in the murder statute and, thus, these crimes cannot support a first-degree murder conviction. *See id.* at 167-68, 538 S.E.2d at 924-25. In this case, the State relied on four different charges of AWDWISI and felonious impaired driving to support its felony murder charge and for this additional reason that conviction must be vacated.

On remand, Defendant cannot be retried for first-degree murder; however, because the record contains ample evidence to support a charge of the lesser-included offense of second-degree murder, Defendant may be tried on remand for second-degree murder. *See* N.C.G.S. § 15A-1447(c) (1999). Additionally, if the trial court orders specific performance of the plea arrangement on the felonious impaired driving, Defendant may be tried on the AWDWISI charges. If the trial court rescinds the plea arrangement, the Defendant may be tried on the felonious impaired driving and AWDWISI charges. Whether the trial court orders specific performance or rescinds the plea arrangement, evidence of felonious impaired driving could be used to demonstrate Defendant had the requisite state of malice (under Rule 404(b) of the North Carolina Rules of Evidence) as required for second-degree murder. *Id.* at 173, 538 S.E.2d at 928.

Vacated and remanded.

Judges WALKER and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 FEBRUARY 2001

CARPENTER v. CARPENTER No. 00-266	Buncombe (99CVD1877)	Vacated and remanded
IN RE PERRY No. 00-734	Durham (99J111)	No error
REYNOLDS v. ALLEGHANY COUNTY SHERIFF'S DEP'T No. 00-477	Wilkes (99CVS712)	Affirmed
STATE v. BARRETT No. 00-505	Union (98CRS8319)	No error
STATE v. COLEY No. 00-189	Durham (98CRS12345) (98CRS12346) (98CRS12347) (98CRS12354) (98CRS12355) (98CRS12360) (98CRS12361)	Reversed and remanded
STATE v. DOWNER No. 00-270	Mecklenburg (98CRS28778) (98CRS28779)	No error
STATE v. JORDAN No. 00-430	Mecklenburg (98CRS137062) (98CRS137063) (98CRS137064)	No error
STATE v. MASSEY No. 00-557	Mecklenburg (98CRS33738) (98CRS33739) (98CRS33740) (98CRS33741) (98CRS141972)	No error
STATE v. McKNIGHT No. 00-378	Mecklenburg (98CRS29535) (99CRS102293)	No error
STATE v. MOORE No. 00-894	Alamance (99CRS56578)	No error
STATE v. PEARSON No. 00-723	Wayne (99CRS3572)	No error
STATE v. ROGERS No. 00-690	Gaston (98CRS27838) (98CRS27839) (98CRS27841)	No error

STATE v. SHEFFIELD No. 99-625	New Hanover (98CRS987)	No error
STATE v. SILVER No. 00-519	Halifax (99CRS43)	No error
STATE v. SMITH No. 00-574	Forsyth (98CRS32354) (98CRS32357)	No error
STATE v. WALTERS No. 00-559	Mecklenburg (97CRS41455)	No error
STATE v. YOUNG No. 00-57	Guilford (96CRS39238) (96CRS39239) (96CRS39240)	No error
SYKES v. MOSS TRUCKING CO. No. 00-344	Ind. Comm. (106105)	Affirmed
THOMPSON v. M. DURWOOD STEPHENSON & ASSOCS., INC. No. 00-86	Johnston (99CVS00454)	Affirmed
TORIAN v. TORIAN No. 00-417	Durham (97SP605)	Affirmed
TURNAMICS, INC. v. ADVANCED ENVIROTECH SYS., INC. No. 00-167	Buncombe (98CVS4903)	Affirmed
WESLOWSKI v. CUMBERLAND COUNTY HEALTH DEP'T No. 99-1485	Cumberland (98CVS1273)	Affirmed in part; reversed in part and remanded
WHITLEY v. SHORT No. 00-448	Mecklenburg (98CVD8741)	Dismissed

FILED 6 MARCH 2001

GOOD NEIGHBORS OF S. DAVIDSON v. TOWN OF DENTON No. 99-1546	Davidson (98CVS2047)	Reversed and remanded
IN RE SANDERS No. 00-100	Wilson (99J22B)	Affirmed
PHILLIPS v. NOLAND No. 00-338	Haywood (99CVS878)	Affirmed
STATE v. CLOYD No. 99-1178	Cumberland (98CRS11515)	Defendant received a fair trial free from prejudicial error.

STATE v. McKENZIE No. 99-1580	Moore (98CRS10863)	Affirmed
STATE v. ROBINSON No. 00-104	Wake (97CRS78723) (97CRS78724)	No error
STATE v. THORNTON No. 00-188	Yadkin (99CRS1166)	Affirmed
STATE v. WILSON No. 00-107	Forsyth (98CRS21630) (98CRS21631)	No error
TAHA v. THOMPSON No. 00-301	Wake (92CVS3603)	Dismissed
YOUNG v. NATIONWIDE MUT. INS. CO. No. 99-1245	Catawba (99CVS376)	Affirmed in part; reversed in part and remanded

BURGESS v. BUSBY

[142 N.C. App. 393 (2001)]

LINDA BURGESS, JOY CLEMENT, BONNIE EDDLEMAN, META FISHER, TERRY KESLER, TOMMY KNOX, GENE MOORE AND MARK SIDES, PLAINTIFF-APPELLANTS v. MERLE RUDY BUSBY, DEFENDANT-APPELLEE

No. COA99-1439

(Filed 20 March 2001)

1. Emotional Distress— intentional infliction—doctor's publication of jurors' names to medical providers—motion to dismiss improperly granted

The trial court erred by granting defendant doctor's motion to dismiss plaintiffs' claim for intentional infliction of emotional distress based on defendant's publication of plaintiffs' names in a written letter to every physician's mail distribution box at Rowan Regional Medical Center after plaintiffs served as jurors in a medical malpractice case that found a doctor guilty of negligence, because: (1) plaintiffs' names were not revealed to the medical community pursuant to a statutory requirement as a part of the state's public policy; (2) plaintiffs' names were not reported to a public agency, but to the practitioners who were providing medical care to plaintiffs and their families; (3) the method by which defendant used this public information with an alleged malicious intent of interfering with plaintiffs' primary care could be considered extreme conduct; and (4) the complaint sufficiently alleges defendant's conduct as extreme and outrageous by the specific allegation that defendant interfered with plaintiffs' relationships with their primary medical practitioners.

2. Torts, Other— outrage—not recognized in North Carolina

The trial court properly dismissed plaintiffs' claim for the tort of outrage based on defendant's publication of plaintiffs' names in a written letter to every physician's mail distribution box at Rowan Regional Medical Center after plaintiffs served as jurors in a medical malpractice case that found a doctor guilty of negligence, because North Carolina courts have not recognized this tort and the Court of Appeals declines to do so under the facts of this case.

3. Wrongful Interference-tortious interference with contractual relationship— no showing of monetary damages or actual pecuniary harm

The trial court did not err by dismissing plaintiffs' tortious interference with a contractual relationship claim based on de-

fendant's publication of plaintiffs' names in a written letter to every physician's mail distribution box at Rowan Regional Medical Center after plaintiffs served as jurors in a medical malpractice case that found a doctor guilty of negligence, because plaintiffs have not sufficiently alleged how defendant's interference with plaintiffs' physician-patient relationships resulted in monetary damages or actual pecuniary harm to plaintiffs.

4. Wrongful Interference— interference with prospective contractual relationships—not recognized in North Carolina

The trial court did not err by dismissing plaintiffs' interference with prospective contractual relationships claim based on defendant's publication of plaintiffs' names in a written letter to every physician's mail distribution box at Rowan Regional Medical Center after plaintiffs served as jurors in a medical malpractice case that found a doctor guilty of negligence, because: (1) this action does not exist in North Carolina; and (2) plaintiffs have not alleged any particular prospective relationships with which defendant tortiously interfered.

5. Wrongful Interference— interference with a fiduciary relationship—no showing of cause of action for physician-patient relationship

The trial court did not err by dismissing plaintiffs' interference with a fiduciary relationship claim based on defendant's publication of plaintiffs' names in a written letter to every physician's mail distribution box at Rowan Regional Medical Center after plaintiffs served as jurors in a medical malpractice case that found a doctor guilty of negligence, because plaintiffs have not cited any case law that establishes a cause of action for interference with a physician-patient relationship.

6. Torts, Other— intrusive invasion of privacy—publication of jurors' names—dismissal proper

The trial court did not err by dismissing plaintiffs' intrusive invasion of privacy claim based on defendant's publication of plaintiffs' names in a written letter to every physician's mail distribution box at Rowan Regional Medical Center after plaintiffs served as jurors in a medical malpractice case that found a doctor guilty of negligence, because: (1) plaintiffs have not alleged that the information published was wrongfully obtained or that

defendant committed the kind of intrusion intrinsic to this tort; and (2) defendant did not have to intentionally intrude upon the private records of plaintiffs to obtain the published information since plaintiffs' names as jurors were part of the public record with no expectation of privacy.

7. Unfair Trade Practices— medical professional providing letter to other medical professionals to discourage health care to plaintiffs—exception for professional services rendered by members of a learned profession

The trial court did not err by dismissing plaintiffs' unfair and deceptive trade practices claim under N.C.G.S. § 75-1 based on defendant's publication of plaintiffs' names in a written letter to every physician's mail distribution box at Rowan Regional Medical Center after plaintiffs served as jurors in a medical malpractice case that found a doctor guilty of negligence, because this case falls within the exception to N.C.G.S. § 75-1.1(b) since it is a matter affecting the professional services rendered by members of a learned profession.

8. Torts, Other— common law obstruction of justice—error to dismiss claim

The trial court erred by dismissing plaintiffs' claim for common law obstruction of justice even though the criminal statute of N.C.G.S. § 14-225.2 defining obstruction of justice through harassment and communication with jurors has been enacted, because: (1) the North Carolina Supreme Court has stated that the statute did not abrogate the common law offense of obstruction of justice; (2) plaintiffs' complaint sufficiently alleges a cause of action for common law obstruction of justice when it asserts that defendant alerted health care providers to the names of the jurors in retaliation for their verdict, this retaliation was designed to harass plaintiffs, and defendant's conduct was meant to obstruct the administration of justice in the county; and (3) the complaint also alleges all the necessary elements of obstructing justice through harassment of and communication with jurors under N.C.G.S. § 14-225.2.

9. Damages and Remedies— punitives—aggravating factor sufficiently alleged

The trial court erred by concluding that plaintiffs did not sufficiently allege a claim for punitive damages under N.C.G.S. § 1D-15, because the aggravating factor required under N.C.G.S.

§ 1D-15 is sufficiently alleged in the complaint by plaintiffs' claim for intentional infliction of emotional distress.

10. Constitutional Law— freedom of speech—doctor's letter publicizing jurors' names—not protected speech

Defendant doctor's written letter publicizing plaintiffs' names to every physician's mail distribution box at Rowan Regional Medical Center after plaintiffs served as jurors in a medical malpractice case that found a doctor guilty of negligence is not protected speech under the United States or the North Carolina Constitutions, and is therefore, not a defense to the imposition of liability under the facts alleged by plaintiffs.

Appeal by plaintiffs from order entered 23 August 1999 by Judge Peter McHugh in Rowan County Superior Court. Heard in the Court of Appeals 12 October 2000.

Donaldson & Black, P.A., by Arthur J. Donaldson and Rachel S. Decker, for plaintiff-appellants.

Morris York Williams Surles & Barringer, by John H. Capitano and John P. Barringer, for defendant-appellee.

McGEE, Judge.

Plaintiffs filed a complaint against defendant on 13 May 1999 alleging claims for intentional infliction of emotional distress, outrage, interference with contractual and fiduciary relationships, vexatious intrusive invasion of privacy, unfair and deceptive trade practices, common law obstruction of justice, and punitive damages. Defendant filed an answer on 21 July 1999, including a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Following a hearing on defendant's motion to dismiss, the trial court entered an order on 23 August 1999 dismissing plaintiffs' complaint. Plaintiffs appeal.

Plaintiffs allege in their complaint that they are eight of the former jurors in a medical malpractice case filed in Rowan County Superior Court against defendant and other medical providers. The complaint alleges the jury in the medical malpractice case rendered a verdict in 1998 finding that defendant was not negligent but that his fellow physician in the medical malpractice case was negligent and awarded $150,000 to the plaintiffs in that case.

Plaintiffs allege that on or about 14 May 1998, defendant placed, or caused to be placed, a written communication in every physician's mail distribution box at Rowan Regional Medical Center. Plaintiffs allege that this letter was received by every practitioner at the hospital with staff privileges. Plaintiffs allege this letter stated:

> Rudy Busby, M.D. FACS
> 901 West Henderson Street
> Salisbury, N.C.
> May 14, 1998
>
> Dear Colle[a]gues:
>
> Please be appraised [sic] of the following:
>
> People who have sued doctors[:]
> Daniel W. Wright, Jr., Charlotte, N.C.
> Ashley D. Wright, Stanley, N.C.
>
> Jurors who have found a doctor guilty[:]
> Adams, Billy [] [address]
> Bowman, Charles [] [address]
> Burgess, Linda [] [address]
> Clement, Joy [] [address]
> Eddleman, Bonnie [] [address]
> Fisher, Meta [] [address]
> Kesler, Terry [] [address]
> Knox, Tommy [] [address]
> Moore, Gene [] [address]
> Pressley, Anita [] [address]
> Sides, Mark [] [address]
> Wade, Helen [] [address]
>
> Others of whom I am leery[:]
> Mr. & Mrs. John Bennet Parker [address]
> Elizabeth Parker Wright [address]
> Betty Dan Spencer [address]
> Judy Davis [address]
>
> I am now back and offering a full line of General, Vascular, and Thoracic Surgery!
>
> /Signed/ Rudy

Following each juror's name, the letter included the address of each juror. Plaintiffs allege that the names listed under defendant's category of "People who have sued doctors" were the plaintiffs in defendant's malpractice case; that the names listed under "Jurors who have found a doctor guilty" were the jurors in the medical malpractice case, including plaintiffs in the present case; and the names listed under "Others of whom I am leery" were the plaintiffs' witnesses in the medical malpractice case.

Plaintiffs' complaint alleges that defendant maliciously distributed the letter identifying plaintiffs, other jurors, and the witnesses in the medical malpractice case to all of the admitting medical staff at the only hospital that serves Rowan County, for the purpose of influencing the present and future medical care of the people identified in the letter. Plaintiffs allege that "the practitioners who [received the letter] provide medical care to residents of Rowan County including plaintiffs." As a result of the letter, plaintiffs allege that: they "fear that in emergency and non-emergency situations . . . they will be refused medical treatment," or that their medical practitioners will "sever the doctor-patient relationship," and that the letter will become a part of their medical files causing difficulty in "obtaining health insurance coverage in the future[.]" Plaintiffs also allege that they "fear further severe emotional distress" if called to serve on a jury again, because they will be exposed "to further harassment by litigants[.]"

The essential question in reviewing a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) is

> whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory. The complaint must be construed liberally, and the court should not dismiss the complaint unless it appears that the plaintiffs could not prove any set of facts in support of their claim which would entitle them to relief.

Lynn v. Overlook Development, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991) (citations omitted); *see Benton v. Construction Co.*, 28 N.C. App. 91, 220 S.E.2d 417 (1975). We therefore apply these principles to each of the claims alleged by plaintiffs in their complaint.

I.

[1] Plaintiffs first argue that the trial court erred in dismissing their claim for intentional infliction of emotional distress (IIED). The essential elements of intentional infliction of emotional distress are "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress[.]" *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). A complaint is adequate, under notice pleading, if it gives a defendant sufficient notice of the nature and basis of the plaintiff's claim and allows the defendant to answer and prepare for trial. *Redevelopment Comm. v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

It is initially a question of law whether the alleged conduct on the part of the defendant "may reasonably be regarded as extreme and outrageous[.]" *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311, *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985). The alleged conduct in an IIED claim must "exceed[] all bounds of decency tolerated by society[.]" *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 704, 365 S.E.2d 621, 625 (1988).

Plaintiffs contend that defendant's publication of their names is similar to the circumstances in *Woodruff v. Miller*, 64 N.C. App. 364, 307 S.E.2d 176 (1983). In *Woodruff*, the defendant was hostile to the plaintiff because of the loss of two bitterly contested lawsuits. In the present case, as in *Woodruff*, defendant was involved in a prior lawsuit. The *Woodruff* Court found that the defendant's act of obtaining the criminal juvenile records of the plaintiff, and then circulating a copy of these records throughout the community, was extreme and outrageous conduct. *Id.* at 366-67, 307 S.E.2d. at 178. The Court held that the defendant's attempt to "ruin plaintiff for no purpose but defendant's own spiteful satisfaction" was "disruptive conduct . . . regarded as extreme and outrageous-rather than normal and acceptable[.]" *Id.*

Defendant cites *Dobson v. Harris*, 134 N.C. App. 573, 521 S.E.2d 710 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000) to assert that "the complaint fails to allege conduct that is extreme and outrageous[.]" Our Court in *Dobson* found that although the defendant may have "exaggerated or fabricated the events [of child abuse that] she reported to DSS, the report served only to initiate an investigatory process" by DSS, and therefore the alleged conduct was not outrageous. *Id.* at 578-79, 521 S.E.2d at 715. In addition, our Supreme Court noted in its review of *Dobson* that "N.C.G.S. § 7A-543

(now N.C.G.S. § 7B-301) imposes an affirmative duty for anyone with 'cause to suspect' child abuse or neglect to report that conduct to the department of social services." *Dobson*, 352 N.C. at 80-81, 530 S.E.2d at 834.

The complaint in the case before us alleges that defendant sent a letter to each private medical practitioner with privileges at the only hospital in Rowan County, naming plaintiffs as those "who have found a doctor guilty[.]" Unlike *Dobson*, plaintiffs' names were not revealed to the medical community pursuant to a statutory requirement and as a part of the state's public policy. In fact, the complaint alleges that plaintiffs' names were not reported to a public agency, but to the practitioners who were providing medical care to plaintiffs and their families.

Plaintiffs allege defendant's letter labels plaintiffs as "Jurors who have found a doctor guilty" and lists the full name and address of each of the jurors, including those of plaintiffs. Defendant contends that the names of the jurors were part of the public record and not privileged information. However, plaintiffs assert that it is the method by which defendant used this information, with an alleged malicious intent of interfering with plaintiffs' primary health care, that is the basis of their claim. These facts are comparable to the actions of the defendant in *Woodruff*, who published the plaintiff's juvenile court record, which was part of the public record. The Court found in *Woodruff* that the malicious use of the information was extreme conduct. *Woodruff*, 64 N.C. App. at 366, 307 S.E.2d at 178.

Although defendant's letter may not subject plaintiffs to public ridicule as in *Woodruff*, the complaint alleges the letter does subject plaintiffs to prejudice by the physicians in their local health care system. Plaintiffs' allegations that defendant's action in writing a letter specifying names and addresses of Rowan County residents who performed their civic duty as jurors and in distributing the letter to every medical practitioner with hospital admitting privileges in Rowan County sufficiently alleges extreme and outrageous conduct. In addition, plaintiffs contend the language of defendant's letter reveals his malicious intent as he groups plaintiffs with those "who have sued doctors" and "Others of whom I am leery." Further, defendant is alleged to have specifically submitted this letter to a group of health care professionals who were part of the primary care physicians for plaintiffs. Plaintiffs have sufficiently alleged that defendant's conduct was intentional.

Defendant asserts that plaintiffs' complaint is based on conclusory allegations and not on factual allegations as required by *Venable v. GKN Automotive*, 107 N.C. App. 579, 421 S.E.2d 378 (1992). In *Venable*, the plaintiff's complaint asserted that his termination from employment "caused him great mental anguish and distress and . . . damaged him greatly in his relationships with his acquaintances and peers in the community, and . . . cost him the wages and benefits of his position." *Id.* at 584, 421 S.E.2d at 381. Our Court determined that a cause of action for intentional infliction of emotional distress had not been established for failure "to allege sufficient facts" and that "plaintiff's allegations are conclusory in nature and fail to allege facts sufficient to constitute a claim[.]" *Id.* However, the complaint before us specifically alleges that

> [p]laintiffs fear that in emergency and non-emergency situations, they and members of their families will be refused medical treatment by the medical practitioners to whom defendant Busby sent the communication, the practitioners who provide medical care to residents of Rowan County including plaintiffs. Plaintiffs also feared and continue to fear that the practitioners above described will sever the doctor-patient relationship with the plaintiffs because of the above-described communication. Furthermore, plaintiffs fear that retaining present health insurance coverage or obtaining health insurance coverage in the future will be impaired by reason of [defendant's letter] appearing in their medical files . . . . Knowing that they may be recalled for jury duty plaintiffs also fear further severe emotional distress by serving on a jury again[.]

An allegation by plaintiffs of emotional distress caused by defendant's interference with plaintiffs' relationship with their primary medical practitioners is specifically set forth in the complaint. The complaint sufficiently alleges defendant's conduct as extreme and outrageous. The trial court erred in granting defendant's motion to dismiss plaintiffs' claim for intentional infliction of emotional distress.

II.

[2] Plaintiffs argue that although the tort of outrage has not been established in North Carolina, under the facts of the present case, they urge our Court to follow the precedent established by the Arkansas Supreme Court. We agree that the tort of outrage has not been recognized in North Carolina. *See Beasley v. National Savings Life Ins. Co.*, 75 N.C. App. 104, 330 S.E.2d 207 (1985), *disc. review*

improv. allowed, 316 N.C. 372, 341 S.E.2d 338 (1986). Plaintiffs ask our Court to rely on the Arkansas Supreme Court decisions in *McQuay v. Guntharp*, 963 S.W.2d 583 (Ark. 1998) and *Travelers Ins. Co. v. Smith*, 991 S.W.2d 591 (Ark. 1999) to determine that they have stated a claim for outrage.

In *McQuay*, the Arkansas Supreme Court determined that

> [t]o establish an outrage claim, a plaintiff must demonstrate the following elements: (1) the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was "extreme and outrageous," was "beyond all possible bounds of decency," and was "utterly intolerable in a civilized community"; (3) the actions of the defendant were the cause of the plaintiff's distress; and (4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it.

McQuay, 963 S.W.2d at 585.

The Arkansas Supreme Court, in recognizing the separate tort of outrage, relied "in part on the teachings of Professor [William L.] Prosser[.] . . . 'According to [Prosser], the new tort consisted of intentional, outrageous infliction of mental suffering in the extreme form and that it resembled assault.' " *Id.* at 585 (citing *M.B.M. Co., Inc. v. Counce*, 596 S.W.2d 681, 686 (Ark. 1980)). The defendant medical doctor's tortious act in *McQuay* was improper physical touching of his female patients and violation by the defendant of trusted doctor-patient relationships. Defendant's actions in the case before us do not rise to the level of a personal assault.

In *Travelers Insurance*, the defendant delayed the autopsy of the plaintiff's husband's body and because of this delay the body was not embalmed and began to deteriorate. *Travelers*, 991 S.W.2d at 594. The court held that the defendant interfered with the sanctity of a family's right to bury its deceased but also stated it had "take[n] a strict approach and give[n] a narrow view to the tort of outrage." *Id.* at 596.

Our appellate Courts have not recognized the tort of outrage and we decline to do so under the facts before us. The trial court correctly dismissed this claim for relief. *Von Hagel v. Blue Cross and Blue Shield*, 91 N.C. App. 58, 64, 370 S.E.2d 695, 700 (1988).

III.

[3] Plaintiffs assert that the trial court erred in dismissing their claim for tortious interference with a contractual relationship. The elements of the tort of interference with contract are: (1) a valid contract between plaintiff and a third person that confers upon plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) the defendant acts without justification; and (5) the defendant's conduct causes actual pecuniary harm to plaintiff. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988).

The complaint alleged that "[p]laintiffs each had relationships with medical practitioners to whom the [defendant's letter] was sent." Although a contract is not specifically pled, plaintiffs appear to be asserting that their patient-physician relationship with their own physicians is the contractual relationship with which defendant interfered. Plaintiffs rely on *Fowler v. Insurance Co.*, 256 N.C. 555, 124 S.E.2d 520 (1962), to assert that our Courts have recognized the tort of interference with a contract for personal services. In *Fowler*, the Supreme Court held that "[t]he right to recover damages resulting from a wrongful interference with a contract for personal services has long been recognized." *Id.* at 556, 124 S.E.2d at 521 (citations omitted).

The elements of tortious interference with a contract were first established in our state in *Childress v. Abeles*, 240 N.C. 667, 84 S.E.2d 176 (1954). *Childress* does not define the element of "actual damages." However, in our review of *Childress* and subsequent case law, damages in those tortious interference with contract cases were actual monetary damages. *Id.* at 676, 84 S.E.2d at 183 (the plaintiff had fully performed and was entitled to full commissions, and the defendants intentionally and without justification induced the defendant not to perform its contract with the plaintiff to the plaintiff's actual damage); *Lexington Homes Inc. v. W.E. Tyson Builders, Inc.*, 75 N.C. App. 404, 412, 331 S.E.2d 318, 323 (1985) (the defendant had to stop payment on $42,000 worth of checks and several checkholders filed liens against defendant's property when their checks were canceled, which tended to show that defendant was actually damaged in some pecuniary amount by the tort complained of); *Lenzer v. Flaherty*, 106 N.C. App. 496, 512, 418 S.E.2d 276, 286 , *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992) ("withdrawal of

supervision in fact caused the intended effect of plaintiff losing her employment, resulting in damage to plaintiff"); and *Barker v. Kimberly-Clark Corp.*, 136 N.C. App. 455, 462, 524 S.E.2d 821, 826 (2000) (summary judgment for defendants was error when the actions of the defendants caused the plaintiff to lose her employment with defendant corporation, resulting in damage to her).

In the present case, plaintiffs allege damage to their physician-patient relationships and seek damages in excess of $10,000. However, in the cases cited in plaintiffs' argument, actual damages were a monetary amount connected to a contract right. Plaintiffs have not sufficiently alleged how defendant's interference with plaintiffs' physician-patient relationships resulted in monetary damages or "actual pecuniary harm" to plaintiffs, which is a required element of tortious interference with contract. *See Polygenex Int'l, Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 252, 515 S.E.2d 457, 462 (1999) (actual damage required to state claim for tortious interference with contract).

[4] Plaintiffs also allege interference with prospective contractual relationships. In *EEE-ZZZ Lay Drain Co. v. N.C. Dept. of Human Resources*, 108 N.C. App. 24, 31, 422 S.E.2d 338, 343 (1992), *overruled on other grounds*, 347 N.C. 97, 489 S.E.2d 880 (1997), our Court held that "[w]e find no basis for believing that such a cause of action [interference with prospective contractual relations] even exists in North Carolina." Plaintiffs have not alleged any particular prospective relationships with which defendant tortiously interfered and the trial court did not err in dismissing plaintiffs' claim for interference with prospective contracts. *See Teleflex Info. Sys., Inc. v. Arnold*, 132 N.C. App. 689, 513 S.E.2d 85 (1999). We affirm the trial court's dismissal of the plaintiffs' tortious interference with contract claim.

IV.

[5] Plaintiffs next argue their complaint states a claim for interference with a fiduciary relationship.

Plaintiffs contend that our Courts have recognized a cause of action for assisting the breach of a fiduciary duty and that to state such a cause of action, the plaintiff must show that the defendant knew of the fiduciary relationship and aided and abetted the breach of the fiduciary duty. Plaintiffs allege that defendant knowingly interfered with the established fiduciary relationship between plaintiffs

and their physicians. Defendant argues it is doubtful that this tort exists in the form urged by plaintiffs.

Plaintiffs cite only *Tuttle v. Tuttle*, 146 N.C. 352, 59 S.E. 1008 (1907) in asserting a claim against defendant for tortious interference with a fiduciary relationship. In *Tuttle*, the plaintiffs filed an action to set aside a conveyance of real property, alleging the transfer was fraudulent. Plaintiffs' reliance on *Tuttle* is misplaced as the issue before the *Tuttle* Court was alleged fraud involving a fiduciary relationship and co-defendants who assisted the fiduciary in perpetrating a fraud upon the fiduciary's co-tenants.

Plaintiffs have not cited any case law that establishes a cause of action for interference with a physician-patient relationship. We affirm the trial court's dismissal of plaintiffs' claim for interference with a fiduciary relationship.

V.

[6] Plaintiffs further argue that their complaint states a claim for intrusive invasion of privacy. Our Court has recognized the intrusive invasion into the private affairs of another as a valid cause of action.

> "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

Miller v. Brooks, 123 N.C. App. 20, 25-26, 472 S.E.2d 350, 354 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172 (1997) (quoting *Smith v. Jack Eckerd Corp.*, 101 N.C. App. 566, 568, 400 S.E.2d 99, 100 (1991)). However, North Carolina does not recognize a cause of action for the invasion of privacy by disclosure of private facts, *see Hall v. Post*, 323 N.C. 259, 372 S.E.2d 711 (1988), *rev'd on other grounds*, 323 N.C. 259, 372 S.E.2d 711 (1988), or invasion of privacy by placing a plaintiff in a false light before the public. *See Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 312 S.E.2d 405, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984).

We have held that " 'intrusion' as an invasion of privacy is [a tort that] . . . does not depend upon any publicity given a plaintiff or his affairs but generally consists of an intentional physical or sensory interference with, or prying into, a person's solitude or seclusion or his private affairs." *Hall*, 85 N.C. App. at 615, 355 S.E.2d at 823.

Specific examples of intrusion include "physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another." *Id.*

Plaintiffs in this case allege that defendant provided their names to their primary medical providers characterizing them as the jurors who "found a doctor guilty" of negligence. Plaintiffs have not alleged that the information published was wrongfully obtained nor that defendant committed the kind of intrusion intrinsic to this tort. Defendant did not have to intentionally intrude upon the private records of plaintiffs to obtain the published information. Plaintiffs' names as jurors were part of the public record and therefore there is no expectation of privacy. The allegations in plaintiffs' complaint fail to state a claim for intrusive invasion of privacy and we affirm the trial court's dismissal of this cause of action.

VI.

[7] We next address plaintiffs' unfair and deceptive trade practices claim under N.C. Gen. Stat. § 75-1. In order to establish a claim, plaintiffs must show (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused actual injury to them. *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 432 S.E.2d 428 (1993), *aff'd*, 339 N.C. 602, 453 S.E.2d 146 (1995). N.C. Gen. Stat. § 75-1.1(b) (1999) defines commerce as "all business activities however denominated, but does not include professional services rendered by a member of a learned profession."

Plaintiffs rely on *Abram v. Charter Medical Corp. of Raleigh*, 100 N.C. App. 718, 398 S.E.2d 331 (1990), *disc. review denied*, 328 N.C. 328, 402 S.E.2d 828 (1991), in asserting that the exception to the statute dealing with professional services rendered by a member of a learned profession applies "where the action taken was necessary for the assurance of good health care." Upon examination of *Abram*, this is a misreading of our Court's holding. In *Abram*, we found that the medical defendant's efforts to block the certification of the plaintiff's medical facility was exempt from N.C.G.S. § 75-1.1(b) because both the plaintiff and the defendant were part of the health care community. *Id.* at 722-23, 398 S.E.2d at 334. Plaintiffs state that our Court in *Abram* applied the N.C.G.S. § 75-1.1(b) exception "because the action affected health [care] that people would receive at the competitor's facility." Plaintiffs further argue that the N.C.G.S. § 75-1.1(b) excep-

tion does not apply to their claim because defendant "was not trying to ensure that the jurors receive adequate health services; rather, he was attempting to prevent jurors' access to health care."

Defendant in this case, a medical professional, provided a letter to other medical professionals in his county with the alleged intention of discouraging them from providing professional health care to plaintiffs. As in *Abram*, this is a matter affecting the professional services rendered by members of a learned profession and therefore falls within the exception in N.C.G.S. § 75-1.1(b). *See Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 293 S.E.2d 901, *disc. review denied*, 307 N.C. 127, 297 S.E.2d 399 (1982); *Reid v. Ayers*, 138 N.C. App. 261, 531 S.E.2d 231 (2000). We affirm the trial court's dismissal of plaintiffs' complaint for unfair and deceptive trade practices.

VII.

[8] Plaintiffs argue that their complaint states a cause of action against defendant for obstruction of justice. Plaintiffs argue that North Carolina recognizes the common law claim of obstruction of justice where the defendant acts in a manner that obstructs, impedes or hinders public or legal justice. In support of their argument, plaintiffs cite Article 30 of Chapter 14 of the N.C. General Statutes, a criminal statute defining obstruction of justice through harassment of and communication with jurors. N.C. Gen. Stat. § 14-225.2 (1999) states:

> (a) A person is guilty of harassment of a juror if he:
>
> . . .
>
> (2) As a result of the prior official action of another as a juror in a grand jury proceeding or trial, threatens in any manner or in any place, or intimidates the former juror or his spouse.
>
> (b) In this section "juror" means a grand juror or a petit juror and includes a person who has been drawn or summoned to attend as a prospective juror.
>
> (c) A person who commits the offense defined in . . . subdivision (a)(2) of this section is guilty of a Class I felony.

As cited by plaintiffs, our Supreme Court stated in *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983), that:

> *Obstruction of justice is a common law offense in North Carolina.* Article 30 of Chapter 14 of the General Statutes does

> not abrogate this offense. N.C. Gen. Stat. § 4-1 (1981). Article 30 sets forth specific crimes under the heading of *Obstructing Justice* , such as: . . . *N.C.G.S. 14-225.2, harassment of jurors*; [and] N.C.G.S. 14-226, intimidating witnesses. . . .
>
> "At common law it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice."

(first and third emphasis added).

In determining whether the common law offense of obstruction of justice remains a valid cause of action after the enactment of Article 30 of Chapter 14 of the General Statutes, we consider N.C. Gen. Stat. § 4-1 (1999) that provides:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

Our Supreme Court explicitly stated in *In re Kivett* that Article 30 of Chapter 14 did not abrogate the common law offense of obstruction of justice. *Kivett*, 309 N.C. at 670, 309 S.E.2d at 462.

Plaintiffs argue that our Supreme Court noted in *Henry v. Deen*, 310 N.C. 75, 310 S.E.2d 326 (1984), that the civil conspiracy claim the plaintiff alleged was a traditional obstruction of justice common law claim, except the conspiracy claim involved more than one wrongdoer. The Supreme Court stated "[t]he gravamen of the action is the resultant injury, and not the conspiracy itself." *Id.* at 87, 310 S.E.2d at 334, (citing *Shope v. Boyer*, 268 N.C. 401, 150 S.E.2d 771 (1966)). The complaint in *Henry* alleged the defendant doctors agreed to create and did create false and misleading entries in the plaintiff's medical chart and conspired to destroy or conceal the plaintiff's actual medical record and create a false one. The Court stated that if these acts were found to have occurred, they would be acts which "obstruct, impede or hinder public or legal justice and would amount to the common law offense of obstructing public justice." *Id.* (citing *In re Kivett*, 309 N.C. 635, 309 S.E.2d 442 (1983)). The Court stated that if an amendment to allege injury was allowed by the trial court to the complaints in *Henry*, the complaints would "set forth a claim in which the plaintiff alleged a conspiracy, wrongful acts and injuries

resulting from those acts. The claim, therefore, is legally sufficient to withstand a motion for dismissal pursuant to Rule 12(b)(6)." *In re Kivett*, 310 N.C. at 90, 310 S.E.2d at 336.

Plaintiffs' complaint sufficiently alleges a cause of action for common law obstruction of justice in that it alleges (1) defendant alerted health care providers to the names of the jurors in retaliation for their verdict; (2) this retaliation was designed to harass plaintiffs; and (3) defendant's conduct was meant to obstruct the administration of justice in Rowan County. The complaint also alleges all the necessary elements of obstructing justice through harassment of and communication with jurors. N.C.G.S. § 14-225.2 (1999). We reverse the trial court's dismissal of plaintiffs' claim for obstruction of justice against defendant.

VIII.

[9] Plaintiffs assert their complaint states a claim for punitive damages under N.C. Gen. Stat. § 1D-15. N.C. Gen. Stat. § 1D-15 (1999) provides in part:

> (a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.

"Punitive damages are recoverable in tort actions only where there are aggravating factors surrounding the commission of the tort such as actual malice, oppression, gross and wilful wrong, insult, indignity, or a reckless or wanton disregard of plaintiff's rights." *Burns v. Forsyth Co. Hospital Authority*, 81 N.C. App. 556, 561, 344 S.E.2d 839, 844 (1986). Our Court held in *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 438, 378 S.E.2d 232, 236-37 (1989), *disc. review improv. allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990) that one of the constituent elements in alleging a claim for intentional infliction of emotional distress is an "extreme and outrageous" act by defendant. "The existence of an outrageous act supports submission of an issue pertaining to punitive damages to the jury." *Id.*

In the case before us, plaintiffs' complaint sufficiently alleges a claim for intentional infliction of emotional distress. Therefore, the aggravating factor required under N.C.G.S. § 1D-15 is sufficiently alleged in the complaint to support a claim for punitive damages. We reverse the order of the trial court as to this cause of action.

IX.

[10] Plaintiffs' final argument is that defendant's letter is not protected speech under the United States or the North Carolina Constitutions and protected speech is therefore not a defense to the imposition of liability under the facts alleged by plaintiffs. Defendant counters that the communication to plaintiffs' physicians is protected speech under *Hall*. *Hall* specifically dealt with "invasion of privacy by public disclosure of true but 'private' facts." *Hall*, 323 N.C. at 270, 372 S.E.2d at 717. The claims in *Hall* were based upon two stories printed in *The Salisbury Post* which revealed private facts about an adoptive mother and child. The facts in the case before us are not based on the disclosure of private facts through publication and therefore *Hall* does not apply.

The United States Supreme Court in *Pennekamp v. Florida*, 328 U.S. 331, 90 L. Ed. 1295 (1946) stated that "[f]reedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." *Id.* at 347, 90 L. Ed. at 1303-04. "We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence[.]" *Bridges v. California*, 314 U.S. 252, 271, 86 L. Ed. 192, 207-08 (1941).

We have already noted that defendant's letter is alleged in plaintiffs' complaint to be an obstruction of justice through harassment of a jury after its deliberation and verdict. Defendant's alleged attempt to interfere with plaintiffs' health care because the jury found a doctor had committed malpractice is not protected speech. "[W]e must weigh the impact of the words against the protection given by the principles of the First Amendment, as adopted by the Fourteenth[.]" *Pennekamp*, 328 U.S. at 349, 90 L. Ed. at 1305. Jury service is a public duty and is a "solemn obligation of all qualified citizens, and . . . excuses from the discharge of this responsibility should be granted only for reasons of compelling personal hardship[.]" N.C. Gen. Stat. § 9-6(a) (1999). Plaintiffs allege in their complaint that a citizen who

undertakes this public duty should be free from a personalized published harassment. We agree with plaintiffs' contention that defendant's communication is not protected speech.

In review, we affirm the trial court's dismissal of plaintiffs' claims for outrage, tortious interference with contract, interference with a fiduciary relationship, intrusive invasion of privacy, and unfair and deceptive trade practices. We reverse and remand the trial court's dismissal under Rule 12 (b)(6) of plaintiffs' claims for intentional infliction of emotional distress, common law obstruction of justice, and punitive damages.

Affirmed in part; reversed and remanded in part.

Judges WALKER and HORTON concur.

Judge HORTON concurred in this opinion prior to 8 February 2001.

STATE OF NORTH CAROLINA v. STEVEN MURRAY GROVER, SR.

No. COA99-1447

(Filed 20 March 2001)

Evidence— expert testimony—child sexual abuse

The trial court erred in a prosecution for statutory rape and related offenses by admitting testimony from a clinical social worker and a pediatric nurse practitioner concluding that the victims had been sexually abused based solely on the children's statements to them or to someone else. It is permissible for an expert to testify that a child exhibits characteristics consistent with abused children, but impermissible for an expert to testify that a child has been sexually abused in the absence of physical evidence.

Judge WALKER dissenting.

Appeal by defendant from judgments entered 8 March 1999 by Judge James C. Spencer, Jr. in Granville County Superior Court. Heard in the Court of Appeals 6 November 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Celia Grasty Lata, for the State.

Thomas L. Currin for defendant-appellant.

HUNTER, Judge.

Steven Murray Grover, Sr. ("defendant") appeals the jury's verdict convicting him of one count of statutory rape of a person thirteen, fourteen, or fifteen years old, nine counts of taking indecent liberties with a child, one count of incest between near relatives, and one count of felony child abuse by a sexual act. Due to the prejudicial error of the trial court's admittance of expert testimony that was neither based on a specialized knowledge or expertise nor assisted the jury in understanding or determining a fact in issue, we hold that defendant is entitled to a new trial.

Evidence presented at trial tended to show that defendant was married to his third wife, and had a child from each of his prior two marriages. Defendant's daughter (herein "M") was born on 26 March 1983; his son (herein "S") was born 29 August 1984. Apparently, defendant spent little time with the children during their formative years. However, when M was twelve and S was eleven, the two began spending weekends with defendant, and thereafter in the summer of 1996 defendant gained custody of S. Significantly, S "had a history of behavioral and psychological difficulties. He be[came] . . . a patient at the Children's Psychiatric Institute in Butner . . . in 1991. . . . [S] continued regular monthly psychiatric counseling with Dr. Paul Grant while in [defendant's] custody."

> During March 1997, [S] was disciplined by [defendant] with a belt for misbehavior at school. . . . [S] showed the bruises to his mother . . . who filed an action for a domestic violence protective order. . . . Pursuant to that order, effective for one year, [S's mother] was granted custody of [S] in May, 1997. . . .

In August 1997, M began living with defendant, his third wife, and S. In November 1997, M told S's mother that she and S had been sexually abused by defendant. After which, S's mother took both M and S to Granville County Social Services where both children were interviewed and given medical examinations "for signs of physical trauma to their genital and anal areas." Neither child's exams revealed any physical abuse or trauma, and M's hymen was found to be intact. Defendant denied all allegations against him but did not testify at trial.

At trial, S testified that he took showers with defendant; that defendant masturbated in front of him and M; that after defendant ejaculated, defendant told him and M to touch and taste the semen; that defendant would have him and M play hide and go seek while the three were naked, and; that once, defendant put Vaseline between S's legs and then closed the legs onto defendant's own penis, moving it back and forth until defendant ejaculated, and all this, while M watched. S further testified that defendant and he watched XXX rated movies depicting both heterosexual and homosexual intercourse and the use of rubber penises ("dildos"). Likewise, M testified that at night defendant would come into her bedroom (which she shared with S) and touch her on her breasts and vagina. She stated that defendant touched her with his hands and penis and that defendant masturbated in front of her. M further testified that defendant once attempted vaginal penetration with his penis but she yelled because it hurt and he got up. She stated that she was afraid of defendant because he had threatened to hurt her mother if M told anyone about his actions.

Defendant preserved twelve assignments of error but makes only seven arguments to this Court. Therefore, we deem any assignment not argued, abandoned. N.C.R. App. P. 28(a). Defendant's first assignment of error is that the trial court committed reversible error by admitting the expert witness testimony of Jeanne Arnts and Susie Rowe, both of whom opined that the children had been sexually abused, when there was no physical evidence of such abuse. We agree with defendant that the trial court did so err and thus, defendant is entitled to a new trial.

It has long been the law in North Carolina that:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C, Rule 702(a) (1999). Additionally, this Court has held that where "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," and were inadmissible. *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). Therefore, in order for the trial court to have properly admitted the expert testimony at issue,

> [t]he State was required to lay a sufficient foundation to show that the opinion expressed by [the experts] was really based upon [their] special expertise, or stated differently, that [the experts] w[ere] in a better position than the jury to have an opinion on the subject. . . .

State v. Trent, 320 N.C. 610, 614, 359 S.E.2d 463, 465 (1987).

In the case at bar, on *voir dire* Ms. Arnts (the clinical social worker who twice interviewed S) stated, "[t]he conclusion was that I *confirmed* that [S] is a sexually abused child." (Emphasis added.) When asked what she based her conclusion on, Ms. Arnts stated, "[i]t was based upon [S]'s statements in the interviews, along with information—similar information that was corroborated by his sister." Following *voir dire* and over defendant's objection, the trial court then allowed Ms. Arnts to testify

> [t]hat [my] conclusion was based upon [S]'s description of a number of sexualized activities and acts, which—in which he was engaged, and I believed that the fact that he had a sister who was des—also describing sexual abuse in the same home environment by the same person that [S] described, and corroborated some of what [S] said, which also corroborated [S]'s statements and provided further validation.

Finally, Ms. Arnts admitted that she filed her report even before S's physical examination results had returned for

> two reason [sic], actually. One was that [S] did not describe anything to me which would cause medical findings—cause medical trauma to him, causing physical trauma to him. He did not describe penetrating trauma that we would expect them to see something on the medical exam to support what he said.
>
> And then the other reason is just the fact that Social Services, you know, needs to get things done in a timely manner, and it was—[S] wasn't physically examined until January[,] [a month after the interviews were completed].

The record before us further reflects that later during the trial, Ms. Rowe (the pediatric nurse practitioner who conducted M's physical examination) also testified "[i]t was [her] conclusion that [M] was a sexually abused child." However, when confronted with questions of whether she found any physical evidence of abuse of M, Ms. Rowe was reluctant to admit that she found none. Regarding the anal exam, she testified:

Q. So, you saw no evidence of any abuse when you examined the anal area?

A. I saw no evidence of any trauma.

Q. Well, you saw no evidence of any abuse when you examined her, no trauma, no abuse. You saw no evidence of it.

. . .

Q. . . . —what evidence, if any, did you find—

A. (Interposing) The anal exam was normal.

Q. All right, so you didn't find any evidence of abuse—

. . .

A. Of trauma. I saw no evidence of trauma.

Q. Or any other kind of abuse.

[A]. The determination of whether the trauma is abuse is not necessarily what we determine . . . .

Q. . . . what I am asking you is this. It was a perfectly normal exam.

A. That is correct.

Q. With no findings and no evidence whatsoever, so why is it that you are unwilling to say that you didn't find any evidence of abuse when you examined the anus?

A. The exam was normal. The fact that there is no history of abuse is not relevant.

. . .

A. There is no trauma to the anus. You can have—you can have sexual abuse to the anus without trauma. So *there is no physical evidence of sexual abuse*, but that doesn't mean it didn't occur.

Q. Thank you, what you just told me is what I wanted you to say, that there is, in fact, no physical evidence of sexual abuse in the anal area, and that is correct, wasn't it?

A. Yes.

(Emphasis added.) As to M's vaginal exam, defense counsel again had to inquire of Ms. Rowe several times before she would straightforwardly answer as to whether she did, in fact, find any physical evidence of sexual abuse:

> Q. And you did not—you looked using this [colpo]scope and everything else and you simply found no evidence of sexual abuse?
>
> A. I found no evidence of trauma to the hymenal membrane.
>
> Q. Did you find any other evidence of sex abuse in that area when you examined it?
>
> A. The examination is normal.
>
> Q. . . . so you found no evidence of trauma or of sex abuse in that examination, isn't that true, ma'am?
>
> A. The examination is normal, has no evidence of trauma and a normal exam can be seen, whether there is sexual abuse or no[] sexual abuse.
>
> . . .
>
> Q. Now, your exam was also consistent with absolutely no sexual abuse having occurred at all, wasn't it?
>
> A. The exam, physical exam is consistent with absolutely no sexual abuse, but we have a history that plays into this as well. The history is the primary focus of the findings.
>
> Q. So, [M's] disclosures to you were the basis of any conclusions that you or the Center reached, and nothing that occurred in these physical examinations, isn't that a fact, ma'am?
>
> A. My—excuse me, but the disclosures to me and the interviewer, not just to me.
>
> Q. There is nothing in any of these physical exams that contributes one iota to any conclusion that you have stated that there was any sexual abuse of this child, isn't that true?
>
> A. It is true only to the point that normal exams can be seen in children who have experienced child sexual abuse.
>
> . . .

> Q. . . . Isn't it true that any conclusions you reached are based on things other than these physical examinations, because the physical examinations are negative as to trauma and sexual abuse?
>
> A. . . . *the diagnosis is made on the interview information.*

(Emphasis added.)

Defendant argues that without any physical evidence of abuse, and with no other basis for their testimonies, the expert witnesses' testimonies were inadmissible under Rule 702, being that "their opinions that sexual abuse had occurred merely attested to the truthfulness of the child . . . ." *State v. Dick*, 126 N.C. App. at 315, 485 S.E.2d at 90. Contrarily, the State argues that neither expert witness "gave an opinion as to the credibility of the children's in-court testimony or as to Defendant's guilt or innocence." To support its position, the State cites cases in which our Supreme Court held that it was not improper for an expert to testify to a victim's symptoms or physical examination being consistent with the victim's statements of abuse or credibility. *See State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988) (pediatrician's testimony that results of physical examination were consistent with victim's pre-examination statement was admissible as "vastly different" from improper comment on victim's truthfulness or credibility); and, *State v. Kennedy*, 320 N.C. 20, 31-32, 357 S.E.2d 359, 366 (1987) (no error to admit physician's opinion that victim's symptoms were consistent with sexual abuse). However, we are unconvinced by the State's argument.

Regarding Ms. Arnts' testimony, although the State contends that her opinion testimony concluding that S was sexually abused was not solely based upon S's disclosures to her, the evidence of record before this Court does not support the State's argument. It is true that Ms. Arnts not only interviewed S twice, but also reviewed S's responses to a fifty-four question "trauma symptom checklist" test administered to children who may exhibit anger, depression, disassociative symptoms, post-traumatic stress symptoms, or symptoms with sexual distress. Consequently, Ms. Arnts testified that S

> had endorsed several of what we call, critical items. Items that . . . we may require some immediate intervention.

> And—but in terms of the clinical scales for anxiety, or depression, or anger, or PTS, fear or dissociation, he was not in the clinical range for any of those.
>
> . . .
>
> Clinical range would be that we'd want to look much more closely at those particular symptoms that he's endorsing, get more information.
>
> . . .
>
> [However, Ms. Arnts further testified that S] had none in that range.

Nonetheless, Ms. Arnts still concluded that S had been sexually abused. We find Ms. Arnts' own testimony dispositive as to what she based her conclusion on: "[S]'s description of a number of sexualized activities and acts . . . corroborated" by his sister, M.

Further, we find the subject expert testimony analogous to that in *State v. Bates*, 140 N.C. App. 743, 538 S.E.2d 597 (2000). In *Bates*, this Court acknowledged that where an expert witness

> conducted an interview and a physical examination of a child who claimed she had been abused[,] [and where] the physical examination revealed no evidence that the child had been sexually abused[,] [b]ut . . . the [experts] "diagnosed" the children as victims of sexual abuse based solely on the children's statements that they had been abused[, . . .] this opinion testimony lack[s] a proper foundation and should not . . . be[] admitted.

Id. at 748, 538 S.E.2d at 601. Furthermore, " '[o]ur appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence.' " *State v. Dick*, 126 N.C. App. at 315, 485 S.E.2d at 89 (quoting *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988)). Therefore, we hold that with no physical evidence of sexual abuse and with Ms. Arnts admitting that her conclusion was "based solely on the children's statements that they had been abused[,] [we agree with defendant that her] opinion testimony lacked a proper foundation and should not have been admitted." *Bates*, 140 N.C. App. at 748, 538 S.E.2d at 601. *See also 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).

Likewise, the record clearly reflects that Ms. Rowe's expert opinion was solely based on the disclosures made to her by M—or disclosures made by M to someone else at the Center. Therefore, we hold that the State failed to demonstrate that "the opinion expressed by [Ms. Rowe] was really based upon h[er] special expertise, or . . . that [s]he was in a[ny] better position than the jury to have an opinion on the subject" as required for admittance pursuant to N.C. Gen. Stat. § 8C-1, Rule 702. *Trent*, 320 N.C. at 614, 359 S.E.2d at 465. Thus, the trial court erred in admitting her testimony as well. *Bates*, 140 N.C. App. at 748, 538 S.E.2d at 600-01.

Testimony that a child has been "sexually abused" based solely on interviews with the child are improper. *Dick*, 126 N.C. App. at 315, 485 S.E.2d at 89. However, we do not hold that an expert cannot testify as to characteristics of abused children. *State v. Aguallo*, 322 N.C. at 822, 370 S.E.2d at 678. "[E]xpert[s] in the field may testify on the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent with this profile." *State v. Hall*, 330 N.C. 808, 818, 412 S.E.2d 883, 888 (1992) (footnote omitted); *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359. The nature of the experts' jobs and the experience which they possess make them better qualified than the jury to form an opinion as to the characteristics of abused children. *Aguallo*, 322 N.C. at 821, 370 S.E.2d at 677. Thus, while it is impermissible for an expert, in the absence of physical evidence, to testify that a child has been sexually abused, it is permissible for an expert to testify that a child exhibits "characteristics [consistent with] abused children." *Id.*

The dissent opines that the cases cited by the majority are distinguishable from the case at bar and that instead, *State v. Reeder*, 105 N.C. App. 343, 413 S.E.2d 580 (1992) applies. We note at the outset that *Reeder* seems to be an anomaly within the case law. The overwhelming majority of cases have not supported the propositions set forth by the dissent. *See State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000); *State v. Bates*, 140 N.C. App. 743, 538 S.E.2d 597; *State v. Dick*, 126 N.C. App. 312, 485 S.E.2d 88; *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993); *but see State v. Youngs*, 141 N.C. App. 220, 540 S.E.2d 794 (2000). However, assuming *Reeder* is precedent in this case, its holding is inapposite.

The dissent, applying *Reeder* and arguing that "[e]ach of the cases cited [by the majority] involves a medical doctor who conducted a physical examination of the victim but did not find physical evidence

of the victim having been sexually abused," takes the position that both Ms. Arnts' and Ms. Rowe's testimonies were proper. We find Ms. Rowe's testimony identical to that of the cases cited—specifically in that as a pediatric nurse practitioner, Ms. Rowe conducted only a physical examination of M—nothing more, and found no physical evidence of abuse. Thus, even pursuant to the dissent's argument, Ms. Rowe has provided nothing upon which her testimony could properly be based.

However, the dissent argues that just as the two clinical psychologists in *Reeder* were allowed to testify, Ms. Arnts should likewise be allowed to testify. Applying the *Reeder* facts to the case at bar, we note that in *Reeder*, "Dr. Jackson[,] [a counseling psychologist,] testified that he had *observed behavorial characteristics in the child consistent with those of sexually abused children.*" *Id.* at 350, 413 S.E.2d at 584 (emphasis added). We agree, and have noted above, that had Ms. Arnts testified that S's behavioral characteristics were consistent with those of sexually abused children, that testimony would have been proper. *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987). However, that was not her testimony.

The second expert in *Reeder* was Dr. Mills, also a clinical psychologist in the private practice of evaluating and treating sexually abused children in the normal course of her practice. After conducting five interviews over a two-month period, Dr. Mills testified that, based on *"her observations of the child's behavior, as well as her recollections of statements the child had made to her during the course of th[ose] interviews*[,] . . . it was her opinion that the four-year old child had been sexually abused." *Reeder*, 105 N.C. App. at 350, 413 S.E.2d at 584. This Court also held that testimony to be proper. Again, we agree that had Ms. Arnts testified likewise, her statement would have been admissible. However, Ms. Arnts clearly testified that although she administered the "trauma symptom checklist" to S, his responses did not fall in the range which would cause her Center "to look much more closely at those particular symptoms." Thus, Ms. Arnts' testimony, in fact, suggests that S's psychological testing was contrary to that of sexually abused children, yet the trial court allowed her to testify that S had been sexually abused. This was error.

Finally, it has long been the law in North Carolina that a defendant is entitled to a new trial if "there is a reasonable possibility that, had the error [at trial] not been committed, a different result would

have been reached . . . . N.C. Gen. Stat. § 15A-1443(a) (1999). Based on the record before this Court, and having found that both Ms. Arnts' and Ms. Rowe's testimonies were admitted in error, we also find that the opinion testimonies were prejudicial to defendant, bolstering the veracity of the children's testimonies of sexual abuse with nothing more to support the opinions. *See State v. Marine*, 135 N.C. App. 279, 281, 520 S.E.2d 65, 66 (1999). Thus, we hold that had Ms. Arnts' and Ms. Rowe's testimonies been excluded, "there is a reasonable possibility that the jury would have reached a different verdict." *Bates*, 140 N.C. App. at 747, 538 S.E.2d at 600. Therefore, defendant is entitled to a new trial.

Having so held, we need not address defendant's remaining assignments of error. However, we note that because all of the State's charges against defendant rest upon the alleged sexual abuse of defendant's two children, and because the inadmissible expert opinion lent credibility to the children's testimonies with no other supporting evidence, defendant is entitled to a new trial as to all charges.

New trial.

Chief Judge EAGLES concurs.

Judge WALKER dissents.

WALKER, Judge, dissenting.

I respectfully dissent from the majority's decision to award defendant a new trial on the basis of opinion testimony by the State's expert witnesses.

The testimony at issue is that of Jeanne Arnts, a clinical social worker, and Susie Rowe, a pediatric nurse practitioner. Ms. Arnts was qualified as an expert in the field of child sexual abuse. She was employed by Duke University Medical Center in the Center for Child and Family Health (the Center). She testified that she had worked with sexually abused children for sixteen years and had given dozens of lectures during that time span concerning recognizing and responding to child sexual abuse. She further testified that after interviewing S twice and performing psychological tests on him, she came to the conclusion that he had been sexually abused. Notably, she testified that she reached this conclusion with-

out waiting to learn the results of the physical tests because "there wasn't anything that [S] said—or that [S] described, which would leave physical findings."

Ms. Rowe, a pediatric nurse practitioner also with the Center, was qualified as an expert in the area of medical evaluation and diagnosis of child sexual abuse. She testified she had worked in the area of child abuse for more than ten years and had testified as an expert twenty-five to thirty times. She examined M and stated that there was an absence of physical evidence indicating abuse. When asked on direct examination what conclusions she had made as a result of her examination, Ms. Rowe testified that it was the conclusion of the Center that M was an abused child. Defendant did not object to this testimony but later objected when the Center's report outlining its conclusion was introduced. Ms. Ruth Lee, a child therapist at the Center, was involved in the evaluation of M and contributed to the report.

I agree with the majority that experts may testify as to their opinion if they possess "scientific, technical or other specialized knowledge" which will assist the jury to "understand the evidence or to determine a fact in issue." N.C.R. Evid. 702(a) (1999). However, this Court has held that, in the course of that testimony, experts may not testify as to the veracity of another witness. *State v. Dick*, 126 N.C. App. 312, 485 S.E.2d 88, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). Thus, in order for experts to properly assert their belief as to a fact in issue, they must be "in a better position to have an opinion than the jury." *State v. Oliver*, 85 N.C. App. 1, 11, 354 S.E.2d 527, 533 (1987).

The majority interprets these rules to prohibit an expert from testifying that a victim has been sexually abused unless there is physical evidence to support such a conclusion. In support of this holding, the majority relies on a series of cases which hold that in the absence of physical evidence, a medical doctor's testimony that abuse has occurred is merely an affirmation of the victim's version of events and thus an impermissible opinion as to the victim's credibility. *State v. Bates*, 140 N.C. App. 743, 538 S.E.2d 597 (2000); *State v. Dick*, 126 N.C. App. 312, 485 S.E.2d 88 (1997); *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993); *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987). However, these are distinguishable from the case at bar. Each of the cases cited involves a medical doctor who conducted a physical examination of the victim but did not find physical evidence of the victim having been sexually abused. Thus, in the absence of physical

evidence of abuse, the medical doctor's ability to evaluate psychological or emotional symptoms is no greater than that of the jury. On that basis, our courts have excluded such testimony.

The case of *State v. Reeder*, 105 N.C. App. 343, 413 S.E.2d 580 (1992) supports the admissibility of Ms. Arnts' testimony. The defendant appealed his conviction of first-degree sexual offense and taking indecent liberties with a three-year-old child and a four-year-old child. The defendant contended that opinion testimony by two clinical psychologists that these children were sexually abused was merely an improper assertion as to the credibility of the children since no physical evidence of sexual abuse was admitted. Both children had been evaluated and treated by psychologists. This Court held a sufficient foundation was established to allow their expert opinions to be admitted into evidence. *Id.* at 350, 413 S.E.2d at 584.

Similarly in this case, the conclusion reached by Ms. Arnts and the Center was the result of psychological evaluations undertaken for the purposes of detecting characteristics of sexual abuse in the victim's demeanor, emotions and actions. The absence or existence of physical evidence of sexual abuse was not the basis for her conclusion. Thus, the fact that Ms. Arnts' conclusion may have corroborated the testimony of S does not make it inadmissible. Like the experts in *Reeder*, Ms. Arnts was in a better position than the jury to evaluate the facts and testimony as a result of her training and experience. The record reveals the trial court properly determined a sufficient foundation had been established to allow the evidence from Ms. Arnts, Ms. Rowe and the report of the Center.

Furthermore, assuming *arguendo* that the trial court erred in admitting the testimony of Ms. Arnts and Ms. Rowe, I do not believe such error was prejudicial. Defendant must show that a reasonable probability exists that, had such evidence been excluded, the jury would have reached a different conclusion. N.C. Gen. Stat. § 15A-1443(a) (1999). Even without the disputed testimony, the jury had sufficient evidence from which to conclude defendant committed the act of sexual abuse. Here, we have the testimony of M who was fourteen years old and S who was thirteen years old when they were seen by the experts at the Center. Their testimonies are consistent with their previous descriptions of the sexual abuse by defendant. Therefore, I find the trial court did not commit reversible error.

STATE OF NORTH CAROLINA v. JAMES DAVID ROBERTS

No. COA00-229

(Filed 20 March 2001)

1. **Search and Seizure— investigatory stop—minimal intrusion for safety of officer**

An officer's initial contact with defendant amounted to an investigatory stop rather than an arrest when the officer grabbed defendant's hands and placed them on the wall in order to conduct a pat-down search of defendant's outer clothing after defendant had just exited from a high drug area and defendant refused to stop at the officer's request, because the seizure involved a minimal intrusion for the safety of the officer, and without more, did not convert the seizure into an arrest.

2. **Search and Seizure— motion to suppress—no reasonable suspicion of criminal conduct**

The trial court erred in a felony possession of cocaine case by denying defendant's motion to suppress evidence obtained in a search of defendant's person after an investigatory stop, since the evidence did not support the trial court's conclusion that an officer had reasonable suspicion to believe that defendant was involved in criminal conduct, because: (1) evidence that officers observed the black truck in which defendant was a passenger being operating upon public streets at 9:30 p.m. and that at times it traveled slowly, stopped at a convenience store for about four minutes, and later traveled through a neighborhood with a reputation for illegal drug transactions leads to nothing more than an inchoate and unparticularized suspicion or hunch of criminal activity; and (2) evidence that defendant walked away from the officer after he asked defendant to stop is not evidence that defendant was attempting to flee and only indicates defendant's refusal to cooperate.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from judgment dated 12 May 1999 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 30 January 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas D. Zweigart, for the State.

David G. Belser for defendant-appellant.

GREENE, Judge.

James David Roberts (Defendant) appeals a 12 May 1999 judgment entered after Defendant pleaded guilty to felony possession of cocaine and being an habitual felon.

On 5 April 1999, Defendant was indicted for felonious possession of a controlled substance and being an habitual felon. On 12 May 1999, Defendant filed a motion to suppress evidence seized from Defendant on the date of his arrest. At the hearing on Defendant's motion to suppress, Defendant called Officer Quinton Miller (Miller) of the Asheville Police Department to testify. Miller testified that on 28 November 1998 at approximately 9:30 p.m., he and Officer Frederick Anthony Waters (Waters) were "sitting just to the left of the entrance of Lee Walker Heights Apartments (Lee Walker Heights)" in a marked police vehicle. Miller and Waters observed a black truck driving toward them and "[i]t appeared the [black truck] wanted to make a right and go into the entrance [of] Lee Walker Heights," however, Miller believed the driver of the black truck saw Miller and Waters in the police vehicle, and continued driving straight. At that point, Miller could not identify the occupants of the black truck. Miller stated the driver did not do anything illegal, but "[h]e just looked suspicious."

Miller and Waters continued to "sit there at that location" and then noticed the black truck drive up to the "Hot Spot," a convenience store. At the time, the Hot Spot was closed and it appeared the driver of the black truck was looking up the street at Miller and Waters. Miller stated the occupants of the black truck looked "suspicious" sitting at a closed convenience store. Miller and Waters then moved their vehicle behind a business located on Biltmore Avenue and observed the black truck at the Hot Spot for approximately three or four minutes. The black truck was out of the officers' vision for about five to ten minutes. The next time Miller saw the black truck, "it was entering into Lee Walker Heights." Miller observed Defendant as a passenger in the black truck. Miller did not observe the black truck after it entered Lee Walker Heights, but he was aware the black truck stayed in Lee Walker Heights for "anywhere from one minute to one minute and fifteen or twenty seconds." Miller stated he was "familiar"

with the time the black truck remained in Lee Walker Heights because, based on his experience, "anyone going [to Lee Walker Heights] to visit or see someone, normally . . . take[s] . . . more than a minute, but . . . it takes about that long to make some type of transaction." Miller, however, did not observe the occupants of the black truck make any transaction, or engage in illegal activity, or observe the black truck stop during the time it was in Lee Walker Heights.

Once the black truck exited Lee Walker Heights, the driver made a left turn onto Short Coxe Avenue. The black truck "started going straight" and then stopped "right there in the middle of the road." Defendant got out of the black truck and the driver continued driving. Miller then stepped out of the police vehicle and Waters continued to follow the black truck. Miller "asked . . . [D]efendant to stop, initially[,] . . . [but] [D]efendant continued to walk toward the Hot Spot." Miller stated there was nothing in particular to indicate Defendant had a weapon in his possession, but Miller smelled alcohol and Defendant's walking away from Miller, after being asked to stop, exhibited aggression. Miller testified it was fair to say he stopped Defendant because he had "a general suspicion because [Defendant] was leaving a high drug area," along with "a combination of different suspicions." In addition to Defendant, "[t]here was another person standing out by the Hot Spot location." Miller stated Defendant had not engaged in any criminal activity that he was aware of and, other than Defendant leaving a high drug area, the facts that caused Defendant to be a suspicious looking person included:

> [t]he fact that the vehicle in which . . . [D]efendant was riding approached Lee Walker Heights . . . , started to turn into Lee Walker Heights, and then turned and continued straight; [and] the fact that the vehicle that . . . [D]efendant was riding in was sitting at the Hot Spot while the Hot Spot [was] closed with his lights off.

After Miller "caught up with" Defendant, he asked Defendant to place his hands on the wall. Defendant, however, continued walking and Miller stated he "had to grab [Defendant's] hand and place it" on the wall to protect his safety. Miller started talking to Defendant and explained to Defendant that "[Defendant] had just exited from a high drug area, open air drug market," and Miller was going to pat down Defendant for Miller's safety. Miller's pat down of Defendant revealed no weapons, but upon placing both his hands against Defendant's chest, Miller "felt an object. The contour of it and the mass led

[Miller] to believe that it was some type of contraband." The object "felt like a little pebble . . . . It's not like a round rock. It's a contour of it." After patting down Defendant for weapons, Miller then reached into Defendant's pocket and removed .02 grams of crack cocaine.

On cross-examination, Miller testified he had been employed with the Asheville Police Department for approximately five years and was very familiar with Lee Walker Heights and the drug trade that occurs in that area. Based on Miller's experience, it takes about a minute to drive through Lee Walker Heights and "if someone is standing out on the street . . . it doesn't take anywhere from ten or fifteen or twenty seconds to make a [drug] transaction." According to Miller's experience, the Hot Spot had been used for drug transactions as well. Miller stated that in addition to Defendant not listening to his request to stop and talk and not placing his hands on the wall, Defendant's walking away from Miller and Defendant's smell of alcohol caused "a great concern" with Miller. Upon feeling the object in Defendant's pocket, Miller "instantly formed the opinion that it was crack cocaine." When Defendant was in the process of being arrested, Defendant stated the crack cocaine "was for some woman" standing near the Hot Spot.

Waters testified for the State that he was patrolling with Miller on 28 November 1999. Waters stated the black truck appeared as if it were going to turn into Lee Walker Heights, however, it proceeded to drive straight. The next time Waters observed the black truck it was parked at the Biltmore Grocery, also known as the Hot Spot. Based on Waters' experience, "all of the people that have c[o]me out [of Lee Walker Heights] within a two [minute] time limit ha[ve] purchased narcotics."

On cross-examination, Waters testified that before the black truck exited Lee Walker Heights he had already made the determination he was going to stop it based on the activity of the black truck before entering Lee Walker Heights. This determination was based on the black truck appearing as if it were going to turn into Lee Walker Heights, the black truck proceeding straight after possibly seeing the officers, the black truck being parked at the Biltmore Grocery with its headlights off, and then once the officers left, the black truck going into Lee Walker Heights. Although there was nothing illegal about Defendant exiting the black truck at the time he did, it raised Waters' suspicion.

The trial court entered findings of fact consistent with the evidence and concluded none of Defendant's constitutional rights had

been violated and Miller's actions were "based upon far more than some suspicion, but [were] based upon a reasonable suspicion based upon an objective view by [Miller] of all of the facts and circumstances which [Miller] had seen and observed." The trial court denied Defendant's motion to suppress the evidence seized.

The issues are whether: (I) Miller's seizure of Defendant constituted an arrest or an investigatory stop; and (II) Miller's seizure of Defendant was in violation of the Fourth Amendment.

I

[1] Defendant argues Miller's grabbing of Defendant's hands and shoving them against the wall amounted to an arrest. We disagree.

"[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980) (opinion of Stewart, J.). Whether a seizure constitutes an arrest or an investigatory stop depends on the "nature and extent of the detention." *United States v. Place*, 462 U.S. 696, 703, 77 L. Ed. 2d 110, 118 (1983). The "critical threshold issue" in making this determination depends on the "intrusiveness of the seizure." *Id.* at 722, 77 L. Ed. 2d at 131 (Blackmun, J., concurring). A police officer is permitted to physically take hold of an individual and pat down the outer surface of his clothing for the safety of the officer. *Terry v. Ohio*, 392 U.S. 1, 26, 20 L. Ed. 2d 889, 908-09 (1968). This brief stop and pat-down search of an individual's outer clothing, without more, amounts to a minimum intrusion on the individual and does not convert the seizure into an arrest. *See id.* at 26, 29-30, 20 L. Ed. 2d at 908-09, 911.

In this case, at the time Miller grabbed Defendant's hands and placed them on the wall, a seizure occurred for purposes of the Fourth Amendment. After placing Defendant's hands on the wall, Miller conducted a pat-down search of Defendant's outer clothing. Miller's grabbing of Defendant's hands and placing them against the wall involved a minimal intrusion for the safety of Miller, and without more, did not convert the seizure into an arrest. Accordingly, Miller's initial contact with Defendant amounted to an investigatory stop and not an arrest.

II

[2] Defendant next argues that even if his seizure did not amount to an arrest, Miller did not have reasonable suspicion to believe Defendant was involved in criminal conduct. We agree.

An officer who "observes conduct which leads him reasonably to believe that criminal conduct may be afoot" may stop the individual to make reasonable inquiries, *State v. Pearson*, 348 N.C. 272, 275, 498 S.E.2d 599, 600 (1998), employing "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time," *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983). The officer, however, must have more than an "inchoate and unparticularized suspicion or 'hunch' " of criminal activity, *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909, but also must have "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity," *United States v. Cortez et al.*, 449 U.S. 411, 417, 66 L. Ed. 2d 619, 628 (1981). In other words, a stop is justified if, based on the totality of the circumstances, "the detaining officers . . . have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.* at 417-18, 66 L. Ed. 2d at 629. Factors which are properly considered in determining if an officer had reasonable suspicion include: activity at an unusual hour, *see State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994); nervousness of an individual, *State v. McClendon*, 350 N.C. 630, 639, 517 S.E.2d 128, 133 (1999); high crime area, *Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576 (2000); and unprovoked flight,[1] *id.* at 125, 145 L. Ed. 2d at 577. None of these factors, standing alone, are sufficient to justify a finding of reasonable suspicion, but must be considered in context. *Cortez*, 449 U.S. at 417, 66 L. Ed. 2d at 629; *Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 576.

In this case, Defendant's seizure was not supported by reasonable suspicion. The officers observed the black truck being operated upon public streets at 9:30 p.m., which at times traveled slowly, stopped at

1. Although an officer, even without a basis for seizing another, is allowed to put questions to a person, *Royer*, 460 U.S. at 498, 75 L. Ed. 2d at 236, that person is not required to answer and indeed "has a right to ignore the police and go about his business," *Wardlow*, 528 U.S. at 125, 145 L. Ed. 2d at 577. A refusal to cooperate, " 'without more, does not furnish the minimal level of objective justification needed for a detention or seizure.' " *Id.* (quoting *Florida v. Bostick*, 501 U.S. 429, 437, 115 L. Ed. 2d 389, 400 (1991)). "[U]nprovoked flight[, however,] is simply not a mere refusal to cooperate." *Id.* Flight is defined as an "act or an instance of fleeing, esp. to evade arrest or prosecution." *Black's Law Dictionary* 653 (7th ed. 1999).

a closed convenience store for about four minutes, and later traveled through a neighborhood with a reputation for illegal drug transactions. The black truck later stopped in the middle of the road and Defendant exited the vehicle, walking toward the Hot Spot. Miller approached Defendant and asked him to stop and Defendant continued to walk away. This evidence leads to nothing more than an "inchoate and unparticularized suspicion or 'hunch' " of criminal activity. *See Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909. Accordingly, Miller did not have a reasonable suspicion to stop Defendant[2] and, thus, any seizure of drugs from Defendant's person should have been suppressed. *See Place*, 462 U.S. at 710, 77 L. Ed. 2d at 123 (evidence obtained as the result of an unreasonable seizure is inadmissible).

The order of the trial court is therefore reversed, its judgment is vacated, and this matter is remanded to the trial court to allow Defendant to withdraw his guilty plea.

Reversed, judgment vacated, and case remanded.

Judge JOHN concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge, concurring in part and dissenting in part.

I agree with the majority's holding that Officer Miller's detention of defendant was an investigatory stop, and not an arrest. However, I respectfully dissent from Part II of the majority's opinion. I would hold that Officer Miller had reasonable suspicion to believe defendant was involved in criminal conduct based on the totality of the circumstances.

As the majority states, an "investigative stop and detention leading to a pat down search must be based on an officer's reasonable suspicion of criminal activity." *State v. Briggs*, 140 N.C. App. ——, ——, 536 S.E.2d 858, 860 (2000) (citing *State v. Sanders*, 112 N.C. App. 477, 481, 435 S.E.2d 842, 845 (1993)). "[T]he detaining officer must have a particularized and objective basis for suspecting the partic-

2. Evidence Defendant walked away from Miller after he asked Defendant to stop is not evidence Defendant was attempting to flee from Miller, and, thus, indicates nothing more than Defendant's refusal to cooperate. Therefore, this evidence is not considered in determining whether Miller had reasonable suspicion to stop Defendant.

ular person stopped of criminal activity" based upon the "totality of the circumstances." *United States v. Cortez*, 449 U.S. 411, 417-18, 66 L. Ed. 2d 621, 628 (1981).

In *Illinois v. Wardlow*, 528 U.S. 119, 145 L. Ed. 2d 570 (2000), defendant fled upon seeing police vehicles patrolling an area known for heavy narcotics trafficking. Two officers caught up with defendant, stopped him and conducted a protective pat down search. *Id.* The Illinois Supreme Court held that flight upon approach of a police vehicle in a high crime area is insufficient to justify a reasonable suspicion of criminal activity. *People v. Wardlow*, 183 Ill.2d 306, 701 N.E.2d 484 (1998), *rev'd*, 528 U.S. 119, 145 L. Ed. 2d 570 (2000). On appeal by the State of Illinois, the United States Supreme Court held that the officers had reasonable suspicion of criminal activity to support an investigative stop based on the "totality of the circumstances". *Illinois v. Wardlow*, 528 U.S. 119, 145 L. Ed. 2d 570 (2000). In overturning the decision of the Illinois Supreme Court, Chief Justice Rehnquist wrote:

> [I]t was not merely [defendant's] presence in an area of heavy narcotics trafficking that aroused the officer's suspicion but his unprovoked flight upon noticing the police. Our cases have recognized that *nervous, evasive behavior* is a pertinent factor in determining reasonable suspicion.

Id. at 124, 145 L. Ed. 2d at 576 (emphasis supplied) (citations omitted).

In the present case, the majority indicates that the facts do not support the conclusion that defendant fled from Miller and Waters. I disagree. In *Wardlow*, Chief Justice Rehnquist wrote: "we cannot reasonably demand scientific certainty from judges or law enforcement officers . . . Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Id.* at 125, 145 L. Ed. 2d at 577. In *United States v. Cortez*, the Supreme Court held that:

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. *Finally, the evidence thus collected must be seen and weighed not in terms*

> *of library analysis by scholars, but as understood by those versed in the field of law enforcement.*

Cortez, 449 U.S. at 418, 66 L. Ed. 2d at 629 (emphasis supplied).

Officers Miller and Waters testified to the following facts: they were following defendant, they called the dispatcher to report they were going to stop the truck, defendant saw that he was being followed, the truck abruptly stopped in the middle of the street, defendant and the driver split up, defendant walked towards a closed store, Officer Miller knew that defendant was aware the store was closed because he had seen defendant there earlier that evening, when Officer Miller asked defendant to stop, defendant refused, Officer Miller renewed his request for defendant to stop, and had to physically restrain defendant. Based on the totality of the circumstances and "commonsense judgments and inferences about human behavior", this was sufficient evidence that defendant was fleeing or exhibiting nervous, evasive behavior, and not merely going on about his business.

In *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722, our Supreme Court held that there was sufficient evidence to provide a reasonable suspicion to stop defendant to investigate drug activity and to frisk him for weapons. Justice Whichard wrote:

> 1) defendant was seen in the midst of a group of people congregated on a corner known as a "drug hole"; 2) [Officer] Hedges had had the corner under daily surveillance for several months; 3) [Officer] Hedges knew this corner to be a center of drug activity because he had made four to six drug-related arrests there in the past six months; 4) [Officer] Hedges was aware of other arrests there as well; 5) defendant was a stranger to the officers; 6) upon making eye contact with the uniformed officers, defendant immediately moved away, behavior that is evidence of flight; and 7) it was [Officer] Hedges' experience that people involved in drug traffic are often armed.
>
> While no one of these circumstances alone necessarily satisfies Fourth Amendment requirements, we hold that, when considered in their totality, Officer Hedges had sufficient suspicion to make a lawful stop.

The Court particularly noted that Officer Hedges saw the defendant "not simply in a general high crime area, but on a specific corner known for drug activity." *Id.* The Court recognized that the "mere

presence in a neighborhood frequented by drug users is not, standing alone, a basis for concluding that the defendant was himself engaged in criminal activity." *Id.* at 234, 415 S.E.2d at 722 *(citing Brown v. Texas*, 443 U.S. 47, 52, 61 L. Ed. 2d 357, 362-63 (1979)). The Court held that "defendant's immediately leaving the corner and *walking away from the officers*" after seeing them was an "additional circumstance" supporting a finding of reasonable suspicion. *Id.* at 234, 415 S.E.2d at 722-23. (emphasis supplied) (*citing United States v. Jones*, 619 F.2d 494, 498 (5th Cir. 1980) (individual's flight from uniformed law enforcement officer may be fact used to support reasonable suspicion "that criminal activity is afoot"); *United States v. Magda*, 547 F.2d 756, 758-59 (defendant's companion immediately moved away with a "rapid motion" after looking in direction of observing officer); *State v. Belton*, 441 So.2d 1195, 1198 (La. 1983) (flight, nervousness, or a startled look at the sight of an officer may be a factor leading to reasonable suspicion), *cert. denied*, 466 U.S. 953, 80 L. Ed. 2d 543 (1984)); *See Also*, *Briggs*, *supra* (upholding protective search where defendant was stopped in high crime area, the hour was late, and officer knew drug dealers frequently carry weapons).

In *Butler*, *supra*, defendant walked away after realizing a police officer had seen him. The Court in *Butler* held this was evidence of flight. In the present case, after noticing he was being followed by a marked police vehicle, the truck, in which defendant was a passenger, abruptly stopped in the middle of the street and defendant walked away. I would hold defendant displayed evidence of flight or "nervous, evasive behavior".

Wardlow and *Butler* mandate that Officer Miller's actions be considered in light of the "totality of the circumstances". Officer Miller testified to the following circumstances: 1) defendant was in a high crime area; 2) the apartment complex was known as an "open air drug market"; 3) Officer Miller had conducted surveillance and made arrests around this apartment complex for three to four years; 4) it was nighttime, around 9:50 p.m.; 5) defendant's truck slowed to turn into the apartment complex, and apparently seeing the police vehicle, the driver hesitated and did not turn into the complex; 6) when the police vehicle was not in view, defendant's truck returned and entered the complex; 7) upon seeing the police vehicle following him, the truck defendant was in abruptly stopped; 8) defendant stepped out of the truck while still in the middle of the street; 9) defendant walked towards a dark, closed store, also in a high drug crime area; 10) defendant smelled of alcohol; 11) when asked to stop for ques-

tioning, defendant walked away, behavior that is evidence of flight; 12) defendant refused to stop and place his hands in plain view despite requests from Officer Miller; and 13) criminals involved in drug traffic are often armed.

Defendant was present in an area of heavy narcotics trafficking. Defendant displayed nervous and evasive behavior. Defendant attempted to flee into the darkness. The majority holds that these circumstances lead "to nothing more than an 'inchoate and unparticularized suspicion or hunch' of criminal activity." I find such a holding contrary to the precedent discussed above. Therefore, I respectfully dissent from Part II of the majority's opinion.

I would also hold that the protective search and subsequent seizure of contraband was lawful. The Supreme Court has held that seizure of nonthreatening contraband detected during a pat down search is permissible as long as the officer's search was within the bounds authorized by *Terry. Minnesota v. Dickerson*, 508 U.S. 366, 124 L. Ed.2d 334 (1993).

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity **immediately apparent**, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.

Id. at 375-76, 124 L. Ed.2d at 346 (emphasis supplied). The "immediately apparent" requirement is satisfied if the police have probable cause to believe that they have come upon evidence of criminal conduct during the pat down search. *State v. White*, 322 N.C. 770, 370 S.E.2d 390, *cert. denied*, 488 U.S. 958, 102 L. Ed.2d 387 (1988). "Probable cause is a 'common sense, practical question' based on 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *State v. Wallace*, 111 N.C. App. 581, 584, 433 S.E.2d 238, 240 (1993) (citation omitted). "The standard to be met when considering whether probable cause exists is the totality of the circumstances." *Id.*

Officer Miller testified that drug dealers often carry weapons. Defendant was in an area known for its drug trafficking, it was nighttime, and defendant was acting suspicious and evasive. Officer Miller testified that he was familiar with the mass and contour of crack

cocaine. Using his expertise and tactile senses, Miller possessed probable cause under the circumstances to believe that the contraband in defendant's pocket was crack cocaine. Officer Miller was justified in seizing the contraband without a warrant. Therefore, I would affirm the decision of the learned trial court.

STATE OF NORTH CAROLINA v. DONALD AMBROSE MILLER

No. COA00-13

(Filed 20 March 2001)

1. Evidence— prior convictions—driving while impaired—reckless driving—malice

The trial court did not err in a prosecution for second-degree murder arising from defendant's impaired driving by admitting defendant's prior convictions for driving while impaired and careless and reckless driving to establish that defendant acted with malice.

2. Homicide— second-degree murder—driving while impaired—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of second-degree murder arising from driving while impaired for lack of sufficient evidence where defendant had prior convictions, was swerving prior to the accident, and had a blood alcohol level far beyond the legal limit four hours after the accident.

3. Homicide— second-degree murder—driving while impaired—instruction—malice

The trial court did not err when instructing the jury on malice in a second-degree murder prosecution arising from driving while impaired. Although defendant contended that the court erred by not stating that the act must be performed intentionally, the court gave an instruction expressly approved in *State v. Rich*, 351 N.C. 386.

4. Evidence— effect of towing on tires—testimony of Trooper

The trial court did not err in a prosecution for second-degree murder arising from driving while impaired by allowing a Trooper

to testify as to what happens to a vehicle tire when it is towed from an accident scene after the court refused to allow the Trooper to testify as an expert. The testimony was a statement of fact derived from the Trooper's observation as to the condition of vehicle tires following an accident and was rationally based on his perception gained through experience as a State Highway Patrolman. Moreover, the State introduced ample evidence of skid marks and gouges in the road to support its theory of how the collision occurred.

5. Witnesses— not allowed to testify—suspicion of perjury

The trial court did not err in a prosecution for second-degree murder by not allowing a witness, Dillahunt, to testify on defendant's behalf where defense counsel did not include Dillahunt on his pretrial list of witnesses because he believed that Dillahunt would perjure himself and expressed these reservations to the trial court. Defendant failed to show that the trial court's denial of his motion to amend the witness list could not have been the result of a reasoned decision.

6. Constitutional Law— effective assistance of counsel—witness not on pretrial list—suspicion of perjury

The decision of defense counsel not to include a witness on the pretrial witness list did not constitute ineffective assistance of counsel where defense counsel made a strategic decision and, more importantly, believed that the witness would perjure himself. The Rules of Professional Conduct prohibited counsel from offering evidence which he knew or reasonably believed to be false.

7. Sentencing— second-degree murder—aggravating factors

The trial court did not err in a sentencing hearing for second-degree murder arising from impaired driving by finding in aggravation that defendant had knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person and that he had refused to participate in the proceedings by fleeing the courthouse after his conviction.

8. Sentencing— flight by defendant—no good cause for continuance

The trial court did not err by conducting a sentencing hearing for second-degree murder after defendant fled the courthouse

where the court suspended proceedings for several minutes while a sheriff searched for defendant, the bailiff informed the court that defendant's car was missing from the parking lot, and defense counsel responded affirmatively when asked if he was ready for the jury to return with the verdict. The record does not reflect a request by defense counsel to continue defendant's sentencing and, in any event, defendant's flight and refusal to participate does not constitute good cause.

Appeal by defendant from judgment entered 12 August 1999 by Judge James R. Vosburgh in Duplin County Superior Court. Heard in the Court of Appeals 15 February 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Patricia A. Duffy, for the State.

Edward G. Bailey, for defendant-appellant.

TYSON, Judge.

Defendant, Donald Ambrose Miller ("defendant"), appeals the trial court's entry of judgment imposing an active prison term of 248 months minimum and 307 months maximum, following his conviction for second-degree murder. We find no prejudicial error in defendant's trial or sentencing.

Facts

Defendant was driving a single car-carrier truck on Highway 41 on 12 September 1998. Defendant was traveling toward Potter's Hill, North Carolina, hauling a single car on the back of his truck. Seventeen year-old Jonathan Holmes ("Holmes") was also driving on Highway 41 at the same time. Holmes was driving a 1989 Chevrolet Camaro near his family's home in Potter's Hill.

In the early afternoon, Holmes' brother, who was at the Holmes' house, heard a loud crash. Holmes' parents and three siblings rushed outside to discover Holmes pinned inside his Camaro. The Camaro had been crushed in a collision with defendant's truck. Holmes died that afternoon from injuries sustained in the crash.

The physical evidence presented at trial was consistent with a head-on collision between Holmes and defendant in the southbound lane of Highway 41. Defendant's truck landed upside down on the

same side of the road as the Camaro. The car which defendant had been transporting was sitting in the middle of the road on its wheels near the other vehicles.

Rebbeca Galloway, a registered nurse trained in trauma treatment, was one of the first individuals to arrive on the accident scene. She testified at trial that she noticed "excessive numbers of beer cans scattered along the side of the road all around [defendant's] . . . vehicle" upon her arrival. Ms. Galloway witnessed defendant crawling out of the window of his truck. She testified that defendant "smell[ed] of alcohol," and that it was difficult to assess his injuries because he was "belligerent" and "combative." Ms. Galloway testified that defendant was preoccupied with having lost his "bottle." Defendant insisted that he "wanted a cigarette," despite Ms. Galloway's warnings that the smell of gasoline permeated the air and a fire could result. Ms. Galloway asked defendant if he was drunk. He responded, "Yeah, I believe I am."

The State also presented the testimony of Connie Williams. Ms. Williams testified that she was traveling on Highway 41 around 1:00 p.m. on the day of the accident. She testified that she looked up and saw the front of a car-carrying truck, such as defendant's, coming directly at her in her lane of travel. Ms. Williams had to veer off of the road to avoid colliding with the truck. Within minutes, Ms. Williams stopped at a nearby store. She witnessed an individual frantically enter the store to call 911, stating that he had just happened upon the scene of a three-car collision.

Trooper Ricky Hooks of the North Carolina Highway Patrol questioned defendant at the hospital. Trooper Hooks testified that defendant was "combative," that his eyes were red and glassy, and that defendant smelled of alcohol. Defendant's blood tests, performed at 5:08 p.m. that afternoon, approximately four hours after the accident, revealed a blood alcohol concentration of 0.223. The State also introduced evidence that defendant had been convicted for careless and reckless driving in 1982, for driving under the influence in 1983, and for driving while impaired, and for careless and reckless driving in 1985.

Defendant moved to dismiss the charge of second-degree murder at the close of the State's evidence. The trial court denied the motion. Defendant presented no evidence. While the jury deliberated, defendant absconded from the courthouse. The trial court waited for his return to resume court, but defendant could not be located. The trial

court resumed proceedings, and the jury returned guilty verdicts on the charges of second-degree murder, driving while impaired, and careless and reckless driving.

The court found defendant to have a prior record Level III, and two factors in aggravation. The trial court sentenced defendant to a minimum active term of 248 months (20 years and 8 months) to a maximum of 307 months (25 years and 7 months). The trial court also ordered defendant to participate in a substance abuse treatment program. Defendant appeals.

Issues

Defendant makes the following assignments of error: (1) the trial court erred in admitting evidence of defendant's prior driving-related convictions; (2) the trial court erred in denying defendant's motion to dismiss the second-degree murder charge for lack of sufficient evidence; (3) the trial court improperly instructed the jury on the malice element of second-degree murder; (4) the trial court erred in admitting testimony of Trooper Randy Tew, North Carolina Highway Patrol, as to what happens to vehicles towed from an accident scene; (5) the trial court erred in refusing to allow defense witness Benjamin Dillahunt to testify; and (6) the trial court erred in finding aggravating factors in sentencing in defendant's absence.

We hold that the trial court did not commit error for the reasons stated below.

I. Introduction of prior convictions

[1] Defense counsel conceded in oral argument to this Court that defendant's assignment of error to the introduction of his prior convictions is without merit, in light of the Supreme Court's decision in *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000). The State introduced evidence of defendant's 1982 conviction for careless and reckless driving, 1983 conviction for driving under the influence, and 1985 convictions for driving while impaired, and careless and reckless driving. The State offered the convictions to establish that defendant acted with the degree of malice necessary to establish second-degree murder.

Our Supreme Court has explicitly approved of the introduction of such evidence in order to establish malice or knowledge of the dangerousness of one's behavior. *See Rich*, 351 N.C. at 399, 527 S.E.2d at 306. In *Rich*, the defendant argued that his prior driving-related con-

victions, dating back to nine years prior, were irrelevant to the issue of malice at the time of the collision. *Id.* The defendant argued that introduction of such evidence violated Rule 404(b) of the Rules of Evidence, prohibiting introduction of other crimes "to prove the character of a person in order to show that he acted in conformity therewith." *Id.* (quoting N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999)).

Writing for the Court, Justice Lake determined that the evidence of prior traffic convictions was offered for the permissible purpose of establishing the defendant's " 'totally depraved mind' " and " 'recklessness of the consequences' " on the night the defendant struck the victim's vehicle while traveling around a curve at a high rate of speed, and rejected defendant's argument. *Id.* at 400, 527 S.E.2d at 307. The Court held that, "[b]ecause the State offered the evidence to show that defendant knew and acted with a total disregard of the consequences, which is relevant to show malice, the provisions of Rule 404(b) were not violated." *Id.*

The Supreme Court recently upheld the principles enumerated in *Rich*. *See State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000). In *Jones*, evidence of the defendant's pending charge of driving while intoxicated was introduced to establish that the defendant acted with malice. *Id.* at 172, 538 S.E.2d at 928. The Supreme Court agreed with the State that such evidence demonstrated "that defendant was aware that his conduct leading up to the collision at issue here was reckless and inherently dangerous to human life. Thus, such evidence tended to show malice on the part of defendant and was properly admitted under Rule 404(b)." *Id.*

We reject the argument that defendant's convictions, dating back to 1982, were too remote in time to be relevant. *See Rich* (prior conviction dating back nine years admissible); *State v. McAllister*, 138 N.C. App. 252, 530 S.E.2d 859, *appeal dismissed*, 352 N.C. 681, —— S.E.2d —— (2000) (seven year-old conviction for driving while intoxicated admissible to establish malice); *State v. Grice*, 131 N.C. App. 48, 505 S.E.2d 166 (1998), *disc. review denied*, 350 N.C. 102, 533 S.E.2d 473 (1999) (prior convictions over ten years old admissible).

The above authority is controlling on this issue. Accordingly, we find no error in the trial court's introduction of defendant's prior crimes to establish that defendant acted with the malice necessary to convict him of second-degree murder. This assignment of error is overruled.

II. Sufficiency of the evidence

[2] Defendant assigns error to the trial court's denial of his motion to dismiss the charge of second-degree murder for lack of sufficient evidence. Specifically, defendant argues that the State presented insufficient evidence of defendant's malice to support a conviction.

A trial court must deny a motion to dismiss for insufficient evidence where substantial evidence exists of each essential element of the crime charged. *McAllister*, 138 N.C. App. at 259-60, 530 S.E.2d at 864 (citing *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991)). "[T]he trial court must view all of the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence." *Id.* at 259, 530 S.E.2d at 864 (citing *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997)).

The elements of second-degree murder are an unlawful killing of a human being with malice, but without premeditation and deliberation. *Rich*, 351 N.C. at 395, 527 S.E.2d at 304 (quoting *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991)). Our Supreme Court has determined that " '[i]ntent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice.' " *Id.* (quoting *Brewer* at 522, 402 S.E.2d at 385). The State need only show "that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind" to survive a motion to dismiss based on the absence of the element of malice. *Id.*; *see also*, *McAllister* at 260, 530 S.E.2d at 864.

In *Jones*, *supra*, our Supreme Court recently held that the State properly introduced evidence of defendant's prior driving convictions in order to establish malice. *Jones*, 353 N.C. at 173, 538 S.E.2d at 928. The Court held that such evidence demonstrates "that defendant was aware that his conduct leading up to the collision at issue here was reckless and inherently dangerous to human life." *Id.*

In this case, as in *Jones*, the State offered evidence of defendant's prior convictions to establish defendant's awareness that his behavior leading up to the accident was wrongful and inherently dangerous to human life. Our Supreme Court has expressly held that such evidence is sufficient to establish the malice element of second-degree murder. In addition, the State introduced evidence tending to show that defendant was swerving prior to the accident, and that his blood alco-

hol concentration was 0.223, far beyond the legal limit, four hours after the accident. This evidence, viewed in the light most favorable to the State, is sufficient to withstand a motion to dismiss. The trial court properly denied defendant's motion.

III. Jury instruction on malice

[3] Defendant argues that the trial court erred in instructing the jury on the malice element of second-degree murder. The trial court instructed the jury that second-degree murder "is the unlawful killing of a human being with malice." The trial court explained the six required elements which the jury must find beyond a reasonable doubt to convict defendant of second-degree murder. On the fifth element of malice, the trial court instructed the jury as follows:

> There are three kinds of malice in our law of homicide. One kind of malice connotes a concept of express hatred, ill will or spite. This is called actual, expressed, or particular malice. Another kind of malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief and there is in addition a third kind of malice which is defined as nothing more than that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.

Defendant argues that the trial court erred in instructing the jury as to the second type of malice because it failed to express that the act must be performed intentionally. We disagree.

In *Rich*, the Supreme Court held that evidence is sufficient to support a second-degree murder charge where " 'an act which imports danger to another . . . is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.' " *Rich* at 395-96, 527 S.E.2d at 304 (quotation omitted). The Supreme Court upheld the trial court's instruction on malice:

> The jury's instructions clearly required a finding of malice sufficient to support second-degree murder if the jury concluded that defendant's actions were such as to be "inherently dangerous to human life [and were] done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." Because the trial court's instructions to the jury on the element of malice required for second-degree murder were clear and correct, we

> cannot conclude that the jury could have confused malice with culpable negligence.

Id. at 396, 527 S.E.2d at 304 (emphasis supplied).

In this case, the learned trial court gave an identical instruction on malice as the trial court in *Rich*. Our Supreme Court expressly approved of this instruction. This assignment of error is overruled.

IV. Testimony of Officer Tew

[4] Defendant argues that the trial court erred in allowing Trooper Randy Tew to testify as to what happens to a vehicle tire when it is towed from an accident scene. The State attempted to offer Trooper Tew as an expert in accident reconstruction. The trial court refused to allow Trooper Tew to testify as an expert. The State pursued a line of questioning with Trooper Tew intended to elicit his knowledge of characteristics of tires following an accident and towing. The trial court sustained defendant's objections to several of the State's questions. However, Trooper Tew was permitted to testify as follows:

> When a vehicle is involved in a collision if there is no weight on the tire, often times the tire, although flat, will stay attached to the rim . . . . When the vehicle is overturned, that is, weight put on the tires, often times the tires and the wheel, although already flat, will appear to be coming off of the rim more of a fashion that it was prior to having weight put on it.

Defendant argues that Trooper Tew's testimony was opinion testimony improperly used "to show the lanes each vehicle was in prior to the accident: the ultimate fact in issue." We disagree.

Under Rule 701 of the Rules of Evidence, a lay witness may testify in the form of 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).

Rule 701 encompasses statements that can be characterized as " 'shorthand statement[s] of fact.' " *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428, 445 (2000), *cert. denied*, *Braxton v. North Carolina*, 121 S. Ct. 890, —— L. Ed. 2d —— (2001) (citation omitted). A shorthand statement of fact encompasses a witness' conclusion " 'as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts

presented to the senses at one and the same time.' " *Id.* (quoting *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975)).

Trooper Tew's testimony was rationally based on his perception gained through experience as a State Highway Patrolman. His testimony was a statement of fact derived from his observation as to the condition of vehicle tires following an accident. In addition, the State introduced ample evidence of skid marks and gouges in the road to support its theory about how the collision occurred. Defendant has failed to carry his burden of establishing that introduction of Trooper Tew's statements, if error, changed the outcome of his trial. *See State v. Workman*, 344 N.C. 482, 505, 476 S.E.2d 301, 314 (1996) (defendant carries burden of establishing prejudice by showing a reasonable possibility that if the testimony had not been received, a different result would have been reached); N.C. Gen. Stat. § 15A-1443(a). Defendant has failed to show any prejudice resulting from Trooper Tew's testimony.

V. Testimony of Dillahunt

[5] Defendant assigns error to the trial court's refusal to allow Benjamin Dillahunt to testify on defendant's behalf. Defendant did not include Mr. Dillahunt on his pre-trial order list of witnesses. Defense counsel "had reservations concerning the believability of [Mr. Dillahunt]," despite knowledge of Mr. Dillahunt's alleged eyewitness testimony at the time he submitted the witness list. Counsel discussed with the trial court at length his belief that Mr. Dillahunt would perjure himself. Defendant requested that he be allowed to amend the witness list to include Mr. Dillahunt. The trial court denied the motion.

"Whether to admit evidence not listed in a pretrial order is entrusted to the discretion of the trial court . . . . The trial court's decision will not be reviewed unless an abuse of discretion is shown." *Beam v. Kerlee*, 120 N.C. App. 203, 214, 461 S.E.2d 911, 920 (1995), *cert. denied*, 342 N.C. 651, 467 S.E.2d 703 (1996) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

The record reveals that defense counsel knew of Mr. Dillahunt prior to submitting the pre-trial witness list. Counsel initially decided not to call Mr. Dillahunt due to serious reservations about his verac-

ity. Counsel expressed these reservations to the trial court. In light of these facts, defendant has failed to show that the trial court's denial of his motion to amend the witness list was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 at 285, 372 S.E.2d at 527.

[6] We also reject defendant's argument that his attorney's failure to include Mr. Dillahunt on the pre-trial witness list constituted ineffective assistance of counsel in violation of defendant's constitutional rights.

> In order to prevail on an ineffective assistance of counsel claim, defendant must satisfy a two-pronged test: first, he must show that his counsel's performance fell below an objective standard of reasonableness, *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985), and must demonstrate, second, that any error by counsel was so serious that there is a reasonable probability that the result of the trial would have been different absent the error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, 693, reh'g denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984).

State v. Campbell, 142 N.C. App. —, — S.E.2d — (No. COA00-83) (6 February 2001).

In *Campbell*, the defendant argued that he received ineffective assistance of counsel where his attorney failed to recall three witnesses whom counsel did not believe would help the defendant's case. *Id.* at —, — S.E.2d at —. In rejecting the defendant's argument, we stated, "[i]t is obvious that defendant's counsel was making a reasoned strategy decision. Where the strategy of trial counsel is 'well within the range of professionally reasonable judgments,' the action of counsel is not constitutionally ineffective." *Id.* (quoting *Strickland*, 466 U.S. at 699, 80 L.Ed.2d at 701).

In the present case, defendant's attorney made a strategic decision by excluding Mr. Dillahunt from the witness list. More importantly, Rule 3.3 of the North Carolina Rules of Professional Conduct prohibited counsel from offering evidence which he knew to be false, or reasonably believed to be false. The transcript reveals that counsel excluded Mr. Dillahunt from the witness list because he believed Mr. Dillahunt would perjure himself. The decision to exclude Mr. Dillahunt from the witness list was thus " 'well within the range of professionally reasonable judgments.' " *See Campbell, supra.*

VI. Aggravating factors

[7] Defendant assigns error to the trial court's finding factors in aggravation. Defendant further contends that the trial court erred in conducting the sentencing hearing in defendant's absence. The trial court aggravated defendant's sentence based on the statutory factor that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. *See* N.C. Gen. Stat. § 15A-1340.16. The trial court also found the non-statutory aggravating factor that defendant refused to participate in the proceedings, and fled the courthouse while being a convicted felon subject to an active prison sentence.

"The weighing of factors in aggravation and mitigation is within the sound discretion of the sentencing court, and will not be disturbed upon appeal absent a showing of an abuse of discretion." *State v. Clifton*, 125 N.C. App. 471, 480, 481 S.E.2d 393, 399 (citation omitted). The trial court's findings in aggravation were supported by the evidence. Defendant has failed to show that either finding was an abuse of the sound discretion vested in the trial court. We reject this argument.

[8] We also reject defendant's argument that the trial court erred in conducting the sentencing hearing after defendant fled the courthouse. A trial court may continue a sentencing hearing upon a showing of good cause. *State v. McKenzie*, 122 N.C. App. 37, 48, 468 S.E.2d 817, 826 (1996) (citing N.C. Gen. Stat. § 15A-1334(a) (1988)). "Whether to allow a continuance of the sentencing hearing lies within the discretion of the trial judge." *Id.* (citation omitted).

In the present case, the trial court suspended proceedings for several minutes while a sheriff searched for defendant. The bailiff informed the trial court that defendant's car was missing from the parking lot. When the trial court asked defense counsel if he was ready for the jury to return with the verdict, counsel responded affirmatively. The record does not reflect that defense counsel ever requested that the trial court continue defendant's sentencing, or that he offered any evidence of good cause to support postponement. In any event, defendant's flight and refusal to participate in the proceedings despite being a convicted felon does not constitute "good cause." Defendant has failed to show an abuse of discretion.

Defendant received a trial free of prejudicial error.

No error.

Judges MARTIN and TIMMONS-GOODSON concur.

BRIAN BREEDLOVE, A MINOR, BY HIS GUARDIAN AD LITEM, SHEILA A. HOWARD, HIS MOTHER, AND SHEILA HOWARD, INDIVIDUALLY PLAINTIFFS v. AEROTRIM, U.S.A., INC., A CORPORATION, ESTATE OF MATTHEW GELLERT, DEFENDANTS

No. COA00-456

(Filed 20 March 2001)

1. Evidence— conversations between plaintiff and deceased defendant—Dead Man's Statute—nonhearsay—no improper reference to settlement negotiations

The trial court did not err in a negligence case by allowing into evidence testimony regarding conversations between plaintiff mother and the now deceased defendant, because: (1) defendant's deposition of plaintiff regarding her conversation with deceased defendant constituted a waiver of the Dead Man's Statute's protection under N.C.G.S. § 8C-1, Rule 601(c); (2) portions of the taped answering machine message from the deceased defendant to plaintiff mother was not inadmissible hearsay since the statement was tendered to explain the subsequent conduct of plaintiff mother when she called the deceased defendant; and (3) admission of the answering machine message and plaintiff's testimony regarding her conversation with the deceased defendant did not violate the prohibition against reference to settlement negotiations under N.C.G.S. § 8C-1, Rule 408 and N.C.G.S. § 7A-38.1(1) since the trial court excluded reference to the negotiations before playing the message for the jury, the message was offered to show the context of the later conversation with plaintiff, and the admitted portions were not part of settlement negotiations.

2. Evidence— doctor's first deposition and second deposition—plaintiff's diagnosis—not misleading or prejudicial

The trial court did not err in a negligence case by allowing portions of the first deposition of a doctor into evidence in addition to the doctor's second deposition concerning plaintiff minor's updated diagnosis taken just five days before trial began,

because: (1) although the testifying doctor testified in the first deposition as to "possible" consequences of plaintiff's injuries, defendant cites no authority where the doctor updated the diagnosis of the injured plaintiff in terms of "probable" consequences in a later deposition; (2) the subsequent deposition identifies the conditions plaintiff had developed between dates of the depositions, and the treatments that were no longer necessary; and (3) admission of both depositions was neither misleading nor prejudicial.

3. Negligence— judgment notwithstanding the verdict— motion for new trial—properly denied

The trial court did not abuse its discretion in a negligence case by denying defendant's motion for judgment notwithstanding the verdict and alternatively for a new trial, because the evidence was properly admitted in the case and there was sufficient evidence to support the jury's verdict.

Defendant appeals from judgment entered by the Honorable Charles Lamm in Buncombe County Superior Court upon return of a jury verdict for plaintiffs. Heard in the Court of Appeals 30 January 2001.

Dameron, Burgin & Parker, P.A., by Charles E. Burgin, for plaintiffs-appellees.

Roberts & Stevens, P.A., by Frank P. Graham, for defendant-appellant-Estate of Matthew Gellert.

TYSON, Judge.

Defendant, Aerotrim, U.S.A., Inc. ("Aerotrim"), manufactured, marketed, and sold a "human gyroscope" amusement ride to defendant, Matthew Gellert ("Mr. Gellert"). Mr. Gellert contracted with the City of Asheville, North Carolina to operate the human gyroscope at the City's 1995 Bele Chere Festival.

On 30 July 1995, plaintiff, ten-year-old Brian Breedlove ("Brian"), attended the Bele Chere Festival. Brian paid five dollars to Mr. Gilbert to ride the human gyroscope. Mr. Gilbert strapped Brian in the ride at his waist and ankles. During the ride, the waist assembly came loose. Brian's upper body and legs fell backwards out of the spinning ride. Brian's ankles remain strapped to the ride, resulting in two broken ankles. Brian was immediately taken to the hospital where surgery was performed on both ankles.

On 19 August 1996, Brian and his mother, Sheila Howard ("Ms. Howard"), commenced this negligence action against Aerotrim, Mr. Gellert, and the City of Asheville. On 19 February 1997, a default judgment was entered against Aerotrim. On 27 May 1997, the City of Asheville was granted summary judgment.

"Howard-Gellert Motion in Limine"

On 14 November 1997, a mediated settlement conference was held between the plaintiffs and Mr. Gellert. Mr. Gellert telephoned Ms. Howard the evening following the settlement conference, leaving an answering machine message. Mr. Gellert expressed frustration with the mediation process, the length of time that had passed, and the fact that his attorneys were trying to "devalue the pain" and "trauma" Brian had gone through. Mr. Gellert stated he could possibly help plaintiffs and asked Ms. Howard to call him.

On 13 December 1997, Ms. Howard returned Mr. Gellert's call. According to Ms. Howard, Mr. Gellert stated that he was not "adamantly positive" that he had fastened Brian securely into the ride. This statement is contrary to his testimony given at his earlier deposition.

On 9 April 1999, Mr. Gellert died of cancer after an extended illness.

On 23 June 1999, defense counsel filed a motion *in limine* to exclude all testimony regarding conversations between Mr. Gellert and Ms. Howard. The trial judge granted the motion with regard to the answering machine message, but denied the motion with regard to Ms. Howard's telephone conversation with Mr. Gellert, except as it related to settlement negotiations.

"Eglinton Motion in Limine"

On 29 August 1997, Brian was referred to Dr. Daniel Eglinton, a board certified orthopedic surgeon. Dr. Eglinton gave a videotaped deposition on 8 May 1998 ("first deposition"). In his first deposition, Dr. Eglinton described Brian's injuries and detailed the care and treatment given to Brian. Dr. Eglinton also commented on potential future outcomes and treatment for Brian.

On 1 July 1999, Dr. Eglinton gave a supplement videotaped deposition ("second deposition"). In the second deposition, Dr. Eglinton updated Brian's condition. Dr. Eglinton testified that Brian's potential

outcomes and treatments were more limited than he had identified in the first deposition.

On 2 July, Mr. Gellert filed a motion *in limine* to exclude certain portions of the first deposition. Defendant argued that portions of the first deposition were irrelevant in light of the testimony in the second deposition. This motion was denied. Both depositions were played at trial for the jury in their entirety, with a limiting instruction that portions of the first deposition were being admitted only to illustrate Dr. Eglinton's testimony and were not to be considered as substantive evidence.

The case was heard before the Honorable Charles Lamm and a duly empaneled jury at the 6 July 1999 Civil Session of the Superior Court of Buncombe County. Defendant, the Estate of Matthew Gellert, moved for a directed verdict at the close of plaintiffs' case and again at the close of all evidence. Both motions were denied. On 27 July 1999, a judgment was entered that Brian recover $275,000.00, and Ms. Howard recover $17,717.01, from defendants, jointly and severally.

Defendant filed a post-trial motion for Judgment Notwithstanding the Verdict and alternatively for a New Trial. The motion was denied. Defendant appeals.

Issues

Defendant brings three issues on appeal to this Court: (1) whether the trial court committed reversible error by allowing into evidence testimony regarding conversations between Ms. Howard and Mr. Gellert; (2) whether the trial court committed reversible error by allowing portions of the first deposition of Dr. Daniel Eglinton into evidence; and (3) whether the trial court committed reversible error by denying defendant's motion for Judgment Notwithstanding the Verdict and, alternatively, for a New Trial.

(1) Conversations between Ms. Howard and Mr. Gellert

[1] Defendant contends that the admission of Ms. Howard's testimony regarding conversations between her and Mr. Gellert (a) violated North Carolina's Dead Man Statute, N.C.G.S. § 8C-1, Rule 601(c), (b) was inadmissible hearsay under the North Carolina Rules of Evidence, N.C.G.S. § 8C-1, Rule 801, and (c) included improper references to settlement negotiations in violation of Rule 408, N.C.G.S. § 8C-1, Rule 408. We disagree.

(a) North Carolina's Dead Man Statute

North Carolina's Dead Man Statute, formerly N.C.G.S. § 8-51, now codified as Rule 601(c) of the Rules of Evidence, N.C.G.S. § 8C-1, Rule 601(c), serves to disqualify the testimony of certain witnesses:

> **(c) Disqualification of Interested Persons.** Upon the trial of an action . . . a party or a person interested in the event . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . concerning any oral communication between the witness and the deceased person.

Rule 601(c) excludes a witness' testimony "when it appears (1) that such a witness is a party, or interested in the event, (2) that his testimony relates to . . . a communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest." *In Re Will of Lamparter*, 348 N.C. 45, 51, 497 S.E.2d 692, 695 (1998) (quoting *Godwin v. Wachovia Bank & Trust Co.*, 259 N.C. 520, 528, 131 S.E.2d 456, 462 (1963)).

At trial Ms. Howard testified regarding her conversation with Mr. Gellert as follows:

> [Mr. Gellert] expressed remorse and regret regarding Brian's injury. He needed, or I felt he needed to have reassurance that Brian and I did not hate him (the Court sustained an objection and gave a cautionary instruction "as to what she felt or she sensed," limiting her testimony to "what he said.") He said to me he was sorry, and that he hoped Brian was doing fine, and that he had spoken to his dad. He had given a lot of thought to what had happened, and what had occurred, and he had spoken to his father with whom he was extremely close. And, so it wasn't something that he was talking about lightly. He had really given a lot of thought. And, that he felt that if he were put on the witness stand at that point in time and asked if he could be [sic] adamantly positive about securing the pin, that he could not say that he was adamantly positive in doing that . . . He was upset with the time line, and how long it was taking . . . to, to get some settlement, to have some closure.

On its face, it appears that Ms. Howard's testimony comes within the prohibition of the Dead Man Statute.

However, our courts have long recognized that under certain circumstances, the representative of the deceased can waive the protection afforded by the Dead Man statute. *Smith v. Dean*, 2 N.C. App. 553, 559, 163 S.E.2d 551, 554 (1968). The door is opened for otherwise incompetent testimony when the objecting party first elicits such testimony. *Stone v. Homes, Inc.*, 37 N.C. App. 97, 102, 245 S.E.2d 801, 805, *disc. review denied*, 295 N.C. 653, 248 S.E.2d 257 (1978). Plaintiffs contend that defendant's deposition of Ms. Howard regarding her conversation with Mr. Gellert constituted a waiver of the Dead Man Statute's protection. We agree.

In *Hayes v. Ricard*, 244 N.C. 313, 93 S.E.2d 540 (1956), the plaintiff adversely deposed the defendant to obtain evidence for use at trial. "[E]xamination is a waiver of the protection afforded by [the Dead Man Statute] to the extent that *either party may* use it upon the trial". *Id.* at 324, 93 S.E.2d at 549 (emphasis supplied). A waiver at one stage continues throughout the proceedings. *Id. See also* Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* §145 (5th ed. 1998) ("If the representative [of the deceased] called the interested person as a witness, or **took his examination before trial**, or cross examined him . . . this constitutes a waiver, throughout the proceedings.") (emphasis supplied).

Defendant argues that since they did not offer the testimony at trial, the Dead Man Statute was not waived. This Court rejected a similar argument in *Wilkie v. Wilkie*, 58 N.C. App. 624, 294 S.E.2d 230 (1982). *Wilkie* concerned a dispute between the children of decedent's first marriage and Mrs. Wilkie, decedent's second wife. The children filed and served interrogatories upon Mrs. Wilkie inquiring about communications between Mrs. Wilkie and decedent. The children never sought to offer such testimony at trial. Mrs. Wilkie was allowed to testify as to her communications with decedent. This Court held that "the filing and service of interrogatories upon Mrs. Wilkie and her answers thereto constituted a waiver" by the children of the Dead Man Statute "to the extent of the matters inquired about in the interrogatories." *Id.* at 626, 294 S.E.2d at 231.

When the legislature revised the Dead Man Statute all existing case law exceptions were expressly reserved. The Official Commentary to Rule 601(c) states:

> it was not the intent of the drafters . . . to change any existing cases where the Deadman's Statute has been held to be inap-

plicable, or where, because of actions of one party or the other the protection of the rule has been held to be waived.

In the present case, defendant elicited evidence of Ms. Howard's conversation with Mr. Gellert during their deposition of Ms. Howard. The defendant waived any protection afforded by the statute.

(b) Hearsay

Defendant also assigns as error the trial court's admission into evidence of portions of the taped answering machine message from Mr. Gellert to Ms. Howard as inadmissible hearsay. The trial court had excluded the taped message in its ruling on the "Howard-Gellert Motion in Limine". Mrs. Helen Gellert, Mr. Gellert's widow, testified during the defense's case that she was not aware of any conversation between her husband and Ms. Howard in December of 1997. In response to this testimony, plaintiffs were allowed to play a small portion of the November 1997 message.

> Hello Ms. Howard, uh this is Matthew Gellert . . . uh please give me a call. I'll be in all evening, and I should be in most of tomorrow if you don't reach me tonight. Thank you.

Statements by one person to another are not considered hearsay if the statement is tendered to explain the subsequent conduct of the person to whom the statement was made. *State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994). The answering machine message explained what prompted Ms. Howard to later call Mr. Gellert. It was not error for the trial court to allow the jury to hear this small portion of the taped message, particularly after Mrs. Gellert had testified that she was not aware of any such conversation between her husband and Ms. Howard.

(c) Reference to Settlement Negotiations

Defendant contends that the admission of the answering machine message and Ms. Howard's testimony regarding her conversation with Mr. Gellert violated the prohibition against reference to settlement negotiations found in Rule 408 of the North Carolina Rules of Evidence and N.C.G.S. § 7A-38.1(l). Rule 408 of the North Carolina Rules of Evidence prohibits "evidence of conduct or evidence of statements made in compromise negotiations." N.C.G.S. § 8C-1, Rule 408 (1999). N.C.G.S. § 7A-38.1(l) prohibits "evidence of statements made and conduct occurring in a mediated settlement conference." These rules, however, do not prohibit the presentation of evidence of

statements made in compromise negotiations, if offered for some other purpose. *Renner v. Hawk*, 125 N.C. App. 483, 492-93, 481 S.E.2d 370, 375-76, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997).

Mr. Gellert did talk about "mediation" and "settlement" during the answering machine message. However, the trial court excluded reference to the negotiations before playing the message for the jury. The message was admissible for the purpose of showing the context of the later conversation with Ms. Howard.

Defendant contends that Ms. Howard's testimony regarding her December 1997 conversation with Mr. Gellert also violates Rule 408. The trial court excluded portions of the conversation concerning the previous month's mediation conference. However, the trial court allowed Ms. Howard to testify as to the remainder of Mr. Gellert's remarks, including the fact that Mr. Gellert was not "adamantly certain" that he properly secured Brian in the ride.

Defendant claims that the entire conversation was a compromise negotiation. There is no mention of an intent to compromise or negotiate in the admitted portions of the conversation. As admitted, the testimony was not evidence of statements made in compromise negotiations, but an admission of fact during a telephone conversation initiated by a party to the dispute.

The trial judge properly determined that the admitted portions of the conversation were not part of settlement negotiations. This testimony was properly admitted into evidence.

(2) Deposition Testimony of Dr. Eglinton

[2] Defendant argues that portions of the first deposition of Dr. Eglinton should have been excluded because they were no longer accurate at the time of trial. The first deposition was taken on 8 May 1998. This deposition contained a complete history of Dr. Eglinton's care and treatment of Brian up to that date. The testimony included medical illustrations, comments upon potential outcomes and future treatment.

The second deposition was taken five days before trial began. The second deposition was shorter, updating Dr. Eglinton's previous testimony. Dr. Eglinton testified about Brian's current condition, including his opinion that Brian's "growth plates" were now closed. This closure limited the potential outcomes and eliminated potential treatments identified in the first deposition. Dr. Eglinton clearly testified

to his updated diagnosis, and defense counsel extensively cross-examined him on these facts.

Defendant objected to portions of the first deposition regarding future treatments, disturbance of Brian's leg growth, potential medical problems, future prognosis, possibility of angular deformities and Brian's impairment rating. The trial court admitted both depositions in their entirety. The trial court limited the consideration of some of the accompanying exhibits to illustrative purposes only.

As a general rule, "a physician testifying as an expert to the consequences of a personal injury should be confined to certain consequences or probable consequences, and should not be permitted to testify as to possible consequences." *Fisher v. Rogers*, 251 N.C. 610, 614, 112 S.E.2d 76, 79 (1960). Defendant cites several instances in the first deposition where Dr. Eglinton testified as to the "possible" consequences of Brian's injuries. Defendant argues the admission of this testimony was reversible error. Defendant cites no authority where the testifying physician updated the diagnosis of the injured plaintiff in terms of "probable" consequences in a later deposition.

Reversible error is only found when the irrelevant evidence is of such a nature that it would mislead the jury or prejudice the opponent. *Brandis and Broun, supra* §81. The subsequent deposition identifies the conditions Brian had developed between dates of the depositions, and the treatments that were no longer necessary. Admission of Dr. Eglinton's depositions into evidence was neither misleading, nor prejudicial. This assignment of error is overruled.

(3) Motion for New Trial and Motion for Judgment Notwithstanding the Verdict

[3] Defendant also argues that the trial court abused its discretion by denying its motion for Judgment Notwithstanding the Verdict, and in the alternative, for a New Trial. Defendant contends that the verdict was contrary to the greater weight of the competent evidence. In considering such a motion, the court considers "the evidence in a light most favorable to the non-movant, resolving all inconsistencies, contradictions and conflicts for non-movant, giving the non-movant the benefit of all reasonable inferences drawn from the evidence." *Pruitt v. Powers*, 128 N.C. App. 585, 590, 495 S.E.2d 743, 747, *disc. rev. denied*, 348 N.C. 284, 502 S.E.2d 848 (1998) (quoting *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 177 (1990)).

We have ruled that the conversation between Mr. Gellert and Ms. Howard and the depositions of Dr. Eglinton were properly admitted into evidence, and hold that sufficient evidence exists to support the jury's verdict. Defendant's motion for a Judgment Notwithstanding the Verdict was properly denied. Also, the trial court did not abuse its discretion in denying defendant's motion for a New Trial. *See Corwin v. Dickey*, 91 N.C. App. 725, 729, 373 S.E.2d 149, 151 (1988) (reviewing denial of motion for a new trial under an abuse of discretion standard) *disc. rev. denied*, 324 N.C. 112, 377 S.E.2d 231 (1989).

No error.

Judges GREENE and JOHN concur.

HERMAN STEWART AND WIFE, ELIZABETH A. STEWART, PLAINTIFFS v. SOUTHEASTERN REGIONAL MEDICAL CENTER, ROBERT A. BAREFOOT, JR., M.D., SUNIL SHARMA, M.D., EMERGENCY PHYSICIAN ASSOCIATES, INC., LIFELINK CRITICAL CARE TRANSPORT, A DIVISION OF CAPE FEAR VALLEY MEDICAL CENTER, CUMBERLAND COUNTY HOSPITAL SYSTEM, INC., A/K/A CAPE FEAR VALLEY MEDICAL CENTER, MICHEL C. PARE, M.D., CAROLINA NEUROSURGICAL SERVICES, P.C., MAX H. FAYKUS, JR., M.D., DAVID R. FISHER, M.D., THOMAS J. MEAKEM, M.D., LEROY ROBERTS, JR., M.D., AND CAROLINA REGIONAL RADIOLOGY, P.A., DEFENDANTS

No. COA00-46

(Filed 20 March 2001)

1. Medical Malpractice— joinder of defendants—venue

It was not improper for plaintiffs in a medical malpractice action to join all of the defendants and to file the action in Robeson County when plaintiff was injured in an automobile accident in Robeson County, taken to a hospital in Robeson County, and subsequently transferred to a hospital in Cumberland County. Plaintiff named seventeen defendants, seven of whom were in Robeson County, stated that the alleged negligence took place in Robeson and Cumberland Counties, alleged that defendants' combined and individual negligence directly and proximately resulted in temporary and permanent injuries to plaintiff, and did not attempt to apportion and attribute plaintiff's damages to individual defendants.

2. Medical Malpractice— Rule 9(j) extension—location of motion

An extension under N.C.G.S. § 1A-1, Rule 9(j) was properly obtained in Robeson County and was effective against all named defendants where plaintiff was injured in an automobile accident in Robeson County, received treatment at a hospital in Robeson County, was transferred to Cumberland County for further treatment and brought a medical malpractice action against defendants in both counties. The cause of action first arose in Robeson County; a single motion filed in the county where the cause of action first arose will be effective to extend the statute of limitations against all defendants ultimately named in the action. As the Robeson County Superior Court had jurisdiction, the extension order was valid and effective as to all of the joined defendants, including the Cumberland County defendants, and the Cumberland County Superior Court was obligated to give the extension full effect as to all parties after the transfer of the action to Cumberland County.

3. Medical Malpractice— Rule 9(j) extension—notice and service—location of motion

Plaintiffs seeking a Rule 9(j) extension are not required to seek an extension in every county where every potential defendant is located, regardless of whether those defendants are ultimately included in the eventual complaint and, because a complaint has not yet been filed, parties seeking a Rule 9(j) extension must neither name nor serve notice upon potential defendants.

Judge GREENE concurring.

Appeal by plaintiffs from orders entered 4 August 1999 and 25 August 1999 by Judge Narley L. Cashwell in Cumberland County Superior Court. Heard in the Court of Appeals 13 February 2001.

Poling & Casey, by Richard D. Poling and Deborah G. Casey, for plaintiff appellants.

Yates, McLamb & Weyher, L.L.P., by Renee B. Crawford, for Michel C. Pare, M.D., and Carolina Neurosurgical Services, P.C., defendant appellees; and Walker, Clark, Allen, Herrin & Morano, L.L.P., by Gay Parker Stanley, for Thomas J. Meakem, M.D., Leroy Roberts, Jr., M.D., and Carolina Regional Radiology, P.A., defendant appellees.

Twiggs, Abrams, Strickland & Trehy, P.A., by Karen M. Rabenau and Donald H. Beskind, amicus curiae for North Carolina Academy of Trial Lawyers.

McCULLOUGH, Judge.

Plaintiff Herman Stewart was injured in an automobile accident in Robeson County, North Carolina, on 14 January 1995. He was taken from the scene of the accident to Southeastern Regional Medical Center in Robeson County, where he was evaluated by defendant Robert A. Barefoot, Jr., M.D., an emergency room physician, for a closed head injury. Mr. Stewart was subsequently transferred to Cape Fear Valley Hospital in Cumberland County, where he received medical treatment from various physicians, including defendants Thomas J. Meakem, M.D., Leroy Roberts, Jr., M.D., and Michel C. Pare, M.D. Mr. Stewart remained hospitalized at Cape Fear Valley Hospital until 4 June 1995, when he was transferred to a hospital near his home in New York State.

In January 1998, plaintiffs filed a motion in Robeson County Superior Court pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j), seeking a 120-day extension of the applicable statute of limitations. The motion named numerous potential defendants located in both Robeson and Cumberland Counties, including defendants Dr. Pare, Carolina Neurosurgical Services, P.C., Dr. Meakem, Dr. Roberts, and Carolina Regional Radiology, P.A., all of whom were located in Cumberland County. The motion for extension of the applicable statute of limitations to 14 May 1998 was allowed by a resident superior court judge in Robeson County.

On 11 May 1998, plaintiffs filed their complaint in Robeson County Superior Court, alleging that defendants failed to properly assess and treat Mr. Stewart's spinal cord injuries, resulting in permanent physical disabilities and other injuries. The Cumberland County defendants (Dr. Pare, Dr. Meakem, Dr. Roberts, Carolina Neurosurgical Services, P.C., and Carolina Regional Radiology, P.A.) filed answers alleging, among other things, that plaintiffs' action was time-barred as to them and subject to dismissal. Upon a motion filed by defendant Cape Fear Valley Medical Center, the case was later transferred to Cumberland County Superior Court. Over thirteen months after the complaint was filed, the Cumberland County defendants filed motions to dismiss the action, contending that plaintiffs had failed to comply with N.C.R. Civ. P. 9(j) in obtaining an extension of

the statute of limitations. The motions to dismiss were allowed by the trial court, and plaintiffs appealed.

[1] Plaintiffs argue that the trial court erred in dismissing their complaint with prejudice for their alleged failure to comply with N.C.R. Civ. P. 9(j). We agree, and reverse the orders of dismissal.

The motions to dismiss filed by the Cumberland County defendants were based on the alleged failure of plaintiffs to comply with N.C.R. Civ. P. 9(j), which concerns, in part, extensions of the applicable statute of limitations in medical malpractice actions. N.C. Gen. Stat. § 1A-1, Rule 9(j) (1999). Rule 9(j) provides in relevant part:

> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court of the county in which the cause of action arose may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

Id. Defendants argue that the extension obtained by plaintiffs in Robeson County was ineffective to extend the statute of limitations as to them, because any cause of action as to them arose in Cumberland County. Therefore, they argue, plaintiffs should have obtained the extension from a superior court resident judge in Cumberland County. Defendants further contend that Rule 9(j) effectively changes venue rules, so that "the only proper venue in a medical malpractice case is the county in which the cause of action arose."

Plaintiffs respond that: (1) the cause of action arose in Robeson County and was thus properly filed there; (2) defendants failed to properly raise the Rule 9(j) defense in a timely manner; (3) defendants' reading of Rule 9(j) would substantially prejudice plaintiffs, while denying the motions to dismiss would cause no undue prejudice to defendants; (4) defendants' reading of Rule 9(j) would undermine the legislative intent behind the statute, which requires a liberal construction of pleadings in favor of the pleader, with a view toward effecting substantial justice; and (5) defendants' motions should be barred under principles of equitable estoppel and laches.

We note initially that it was not improper for plaintiffs to join defendants as named defendants in this action. *See, e.g., Godfrey v.*

Power Co., 223 N.C. 647, 649, 27 S.E.2d 736, 737 (1943) ("where the negligent acts of two or more persons concur in producing a single injury, with or without concert among them, the general rule is that they may be treated as joint tort-feasors and sued separately or together at the election of the injured party"); *Ipock v. Gilmore*, 73 N.C. App. 182, 186, 326 S.E.2d 271, 275, *disc. reviews denied*, 314 N.C. 116, 332 S.E.2d 481 (1985) (joint tortfeasors may act " 'independently and without concert of action or unity of purpose' " if their individual acts " 'concur as to time and place and unite in proximately causing the injury[,]' " *id.* (quoting *Simpson v. Plyler*, 258 N.C. 390, 393, 128 S.E.2d 843, 845 (1963)); the question is whether the injury is indivisible, rendering "apportionment of damages among the individual tortfeasors impossible[,]" *Ipock*, 73 N.C. App. at 186, 326 S.E.2d at 275; *Warren v. Colombo*, 93 N.C. App. 92, 100, 377 S.E.2d 249, 254 (1989) (when two or more proximate causes join to produce the result complained of, defendants are jointly liable as tortfeasors).

N.C. Gen. Stat. §§ 1-76 through 1-81 concern the proper venue for certain types of actions. In cases involving a county hospital, the action "must be tried in the county where the cause, or some part thereof, arose . . . ." N.C. Gen. Stat. § 1-77 (1999); *Coats v. Hospital*, 264 N.C. 332, 334, 141 S.E.2d 490, 492 (1965). Nonetheless, the trial court may, in its discretion, move the action to another county "for the convenience of witnesses and the promotion of the ends of justice." *King v. Buck, Adjutant General*, 21 N.C. App. 221, 222, 203 S.E.2d 643, 644 (1974); *see* N.C. Gen. Stat. § 1-77. Where a domestic private hospital corporation is sued, N.C. Gen. Stat. § 1-79 dictates the county of residence of the corporation for venue purposes. N.C. Gen. Stat. § 1-79 (1999). For all causes of action not specifically addressed in Article 7, N.C. Gen. Stat. § 1-82 provides that such actions must be tried

> in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute . . . .

N.C. Gen. Stat. § 1-82 (1999). Thus, in a civil action in this state where venue is not specifically designated by N.C. Gen. Stat. §§ 1-76 through 1-81, where the plaintiff is a nonresident and the defendants are

residents, the proper venue for the action pursuant to N.C. Gen. Stat. § 1-82 is any county in which defendants reside at the commencement of the action. *See, e.g., Chow v. Crowell*, 15 N.C. App. 733, 735, 190 S.E.2d 647, 649 (1972).

Plaintiffs named seventeen separate defendants in their complaint, of which seven (including, among others, Southeastern Regional Medical Center, Dr. Robert A. Barefoot, Jr., Dr. Sunil Sharma, and Emergency Physician Associates, Inc.) were alleged by plaintiff to either be practicing principally or otherwise be situated in Robeson County. The complaint stated that the alleged negligence took place in Robeson and Cumberland Counties. The complaint further alleged that defendants were negligent in their treatment and care of Mr. Stewart, and that their combined and individual negligence directly and proximately resulted in temporary and permanent injuries to Mr. Stewart. The complaint did not attempt to apportion and attribute Mr. Stewart's injuries and damages to individual defendants. While the action was later transferred to Cumberland County Superior Court, it was not improper for plaintiffs to file the original complaint in Robeson County.

[2] Having determined that the complaint properly joined all defendants and was properly filed in Robeson County, we now turn to the question of whether the Rule 9(j) extension was correctly obtained in Robeson County, or whether, as defendants contend, the extension must have been obtained in Cumberland County in order to be effective as against the Cumberland County defendants. As noted above, Rule 9(j) provides that the applicable statute of limitations may be extended by "a resident judge of the superior court of the county in which the cause of action arose." Our Supreme Court has held that, generally, a cause of action accrues "when the first injury [is] sustained." *Mast v. Sapp*, 140 N.C. 533, 537, 53 S.E. 350, 351 (1906). "When the right of [a] party is once violated, even in ever so small a degree, the injury . . . at once springs into existence and the cause of action is complete." *Id.* at 540, 53 S.E. at 352; *see also Matthieu v. Gas Co.*, 269 N.C. 212, 215, 152 S.E.2d 336, 339 (1967) (the cause of action accrues at the time damages are first sustained).

As previously noted, the complaint alleges that "[a]ll acts of the Defendants complained of herein occurred in Robeson County and Cumberland County, North Carolina." It is undisputed that Mr. Stewart was first subjected to medical treatment in Robeson County by defendants residing in Robeson County, and that Mr. Stewart was subsequently transferred to a hospital in Cumberland County

for further treatment. Therefore, plaintiffs' cause of action as against the Robeson County defendants, and therefore their cause of action as against *all* defendants named in this unified action, clearly *first* arose in Robeson County. *See Mast*, 140 N.C. at 537, 53 S.E. at 351; and *Matthieu*, 269 N.C. at 215, 152 S.E.2d at 339. It is just as clear, and defendants do not contest, that the Rule 9(j) extension obtained in Robeson County was effective as to the Robeson County defendants.

Defendants would nonetheless require that plaintiffs obtain a separate Rule 9(j) extension in each county in which any named defendant is alleged to have committed negligence giving rise to a cause of action and would require that plaintiffs file separate actions in each such county. We decline to adopt such a strict construction of Rule 9(j) and hold that where there are multiple defendants, a single motion filed in the county where the cause of action first arose will be effective to extend the statute of limitations against all defendants ultimately named in the action.

Rule 9(j) was "intended, in part, to protect defendants from having to defend frivolous medical malpractice actions" by requiring that a qualified medical expert review a potential plaintiff's complaint. *Webb v. Nash Hosp., Inc.*, 133 N.C. App. 636, 639, 516 S.E.2d 191, 194, *disc. reviews denied*, 351 N.C. 122, 541 S.E.2d 471 (1999). In order to comply with Rule 9(j), the collateral extension provision grants plaintiffs additional filing time to gather the medical expertise that they need to support legitimate claims. Thus the rule was intended both to protect defendants from frivolous suits as well as to protect plaintiffs with meritorious cases from losing their rights. *See id.* Keeping in mind the general policy of liberality in construing our rules of civil procedure, as well as the legislative intent behind Rule 9(j), we now review the 13 January 1998 extension motion and order issued in Robeson County to determine whether it was effective as to defendants in Cumberland County.

The Rule 9(j) extension in the instant case was properly obtained in Robeson County at least insofar as it applied to the Robeson County defendants. Furthermore, the appellees were properly joined in the action as additional defendants inasmuch as they were alleged to be joint tortfeasors with the Robeson County defendants causing a single, indivisible injury to plaintiff. The motion filed by plaintiffs requesting the Rule 9(j) extension, and the order entered by the resident superior court judge in Robeson County granting the same,

named both the Robeson County and the Cumberland County defendants. An order is binding upon all parties named therein and is valid if issued by a court with jurisdiction. *Manufacturing Co. v. Union*, 20 N.C. App. 544, 549, 202 S.E.2d 309, 313, *cert. denied*, 285 N.C. 234, 204 S.E.2d 24 (1974); *Graham v. Graham*, 77 N.C. App. 422, 424, 335 S.E.2d 210, 212 (1985).

As the Robeson County Superior Court had jurisdiction, the extension order was valid and therefore effective as to all of the joined defendants, including the Cumberland County defendants. Upon the transfer of the action (at defendants' request) to Cumberland County, the superior court therein was obligated to give the Rule 9(j) extension full effect as to all named parties, absent a showing by defendants of changed circumstances warranting a modification of the order to effect justice or equity. The Cumberland County Superior Court's refusal to recognize the validity of the Rule 9(j) extension granted by the Robeson County Superior Court violated the well-established principle of law in North Carolina that, because no appeal lies from one superior court judge to another, one superior court judge may not correct errors of law committed by another. *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987).

[3] We further note that in *Timour v. Pitt County Memorial Hospital*, 131 N.C. App. 548, 550, 508 S.E.2d 329, 330 (1998), we held that the order granting a Rule 9(j) time extension was not required to be served on the other party because a complaint had not yet been filed. *See also Webb*, 133 N.C. App. at 639, 516 S.E.2d at 193-94 (rejecting defendants' argument that their due process rights were violated by plaintiff's failure to name them in the Rule 9(j) extension). Accordingly, parties seeking a Rule 9(j) extension must neither name nor serve notice upon potential defendants. Defendants' interpretation of Rule 9(j) would nevertheless require the absurd result of forcing plaintiffs to seek an extension in every county where every potential defendant is located, regardless of whether or not those defendants are ultimately included in the eventual complaint. Public policy considerations require us to reject defendants' position and the undue burden upon state judicial resources that separate extensions in multiple counties would entail.

Finally, we note that defendants have failed to show how, if at all, they would be prejudiced by an interpretation of Rule 9(j) requiring a single, rather than multiple, extensions.

We hold that the Rule 9(j) extension entered in Robeson County was effective as against all defendants therein named. The orders of the trial court entered on 4 August 1999 granting defendants' motions to dismiss are vacated, and we remand to the trial court for further proceedings.

Vacated and remanded.

Judge HUDSON concurs.

Judge GREENE concurs with separate opinion.

GREENE, Judge, concurring.

I write separately to state in somewhat different language this Court's answer to the issue raised in this case: Does a resident superior court judge have the authority to grant a Rule 9(j) statute of limitations extension affecting all defendants in a case, even though some of the acts giving rise to the plaintiff's claim arose outside the superior court judge's county of residence.

Rule 9(j) of the North Carolina Rules of Civil Procedure provides that "a resident judge of the superior court of *the* county in which *the* [medical malpractice] cause of action arose may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint." N.C.G.S. § 1A-1, Rule 9(j) (1999) (emphases added). A cause of action arises in the county where the acts or omissions that constitute the basis of the cause of action occurred. *Pitts Fire Safety Service, Inc. v. City of Greensboro*, 42 N.C. App. 79, 81, 255 S.E.2d 615, 616 (1979). As there can be multiple acts or omissions constituting the basis of a single cause of action, *see* 1 Am. Jur. 2d *Actions* § 83 (1994), a cause of action may arise in multiple counties. It thus follows a Rule 9(j) statute of limitations extension can be issued in any county where the acts or omissions constituting the basis of a plaintiff's claim occurred and is valid in any such county as to all defendants named in the plaintiff's complaint. *See* N.C.G.S. § 1A-1, Rule 9(j) (extension granted as to cause of action rather than as to claims against individual parties); *Webb v. Nash Hosp., Inc.*, 133 N.C. App. 636, 639-40, 516 S.E.2d 191, 193-94 (extension applies to all the defendants named in the plaintiff's complaint regardless of whether those defendants were named in extension order), *disc. review denied*, 351 N.C. 122, — S.E.2d — (1999).

In this case, there is no dispute that the acts and omissions constituting the basis of plaintiff's malpractice claim arose in Robeson and Cumberland Counties. Thus, a resident superior court judge in either Robeson County or Cumberland County had authority, under Rule 9(j), to order an extension of the statute of limitations as to all defendants who are alleged to have contributed to plaintiff's injuries. Judge Floyd, a resident superior court judge in Robeson County, therefore, had authority to order an extension of the statute of limitation and this extension is valid and binding on all defendants. It thus follows Judge Cashwell's order dismissing plaintiff's claims against certain defendants (whose alleged negligent acts occurred in Cumberland County) must be reversed.

STATE OF NORTH CAROLINA v. BRIAN KEITH GILMORE

No. COA00-21

(Filed 20 March 2001)

1. Burglary and Unlawful Breaking or Entering; Larceny— motion to dismiss—sufficiency of evidence

Although defendant failed to make a motion to dismiss the charges of breaking or entering or larceny at the close of the State's evidence or at the close of all the evidence to preserve the issue of the sufficiency of the evidence of these charges for appellate review, the Court of Appeals exercised its discretionary authority under N.C. R. App. P. 2 to conclude that the charges against defendant as to the break-in at a golf store should have been dismissed because: (1) the State did not present any evidence, other than fingerprint evidence, that defendant was the perpetrator of the break-in; (2) defendant was a customer in the store near or on the day of the break-in; (3) defendant's print may have been impressed on the glass prior to the time the crime was committed; and (4) there are no additional circumstances tending to show defendant's fingerprint was impressed at the time of the break-in.

2. Sentencing— habitual felon—stipulation to habitual felon status—issue not submitted to jury—no guilty plea

The trial court erred by sentencing defendant as an habitual felon in case number 98 CRS 10830 when this issue was not sub-

mitted to the jury and the record does not show defendant pleaded guilty to being an habitual felon under N.C.G.S. § 14-7.5, because although defendant did stipulate to his habitual felon status, such stipulation, in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea.

Appeal by defendant from judgments dated 18 August 1999 by Judge W. Erwin Spainhour in Moore County Superior Court. Heard in the Court of Appeals 13 February 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General Lars F. Nance, for the State.

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

GREENE, Judge.

Brian Keith Gilmore (Defendant) appeals judgments dated 18 August 1999, entered after a jury rendered a verdict finding him guilty of two counts of felonious breaking or entering, two counts of felonious larceny, and one count of felonious possession of stolen property.[1] Additionally, Defendant appeals a judgment dated 18 August 1999, finding him guilty of being an habitual felon.

The State presented evidence at trial, in pertinent part, regarding the 23 October 1998 break-in at Carolina Custom Golf, a business located in Southern Pines. Terry Ward (Ward), the assistant manager of Carolina Custom Golf, testified that on 23 October 1998, he received a telephone call from an alarm company that an alarm had gone off at Carolina Custom Golf. He testified Carolina Custom Golf is a store containing clothing, golf clubs, and other items, as well as a driving range. The store contains a "three foot by three foot square" window overlooking the driving range and, from the inside of the

1. Defendant was convicted of one count of felonious breaking or entering, one count of felonious larceny, and being an habitual felon relating to a break-in at Carolina Custom Golf (99 CRS 2727). Additionally, Defendant was convicted of one count of breaking or entering, one count of felonious larceny, one count of felonious possession of stolen property, and being an habitual felon relating to a break-in at Match Play (98 CRS 10830). Although Defendant gave notice of appeal from all of these convictions, Defendant does not set forth in his brief to this Court any assignments of error relating to the convictions based on the break-in at Match Play other than the habitual felon conviction. Any assignments of error regarding these convictions, other than the habitual felon conviction, are, therefore, deemed abandoned. N.C.R. App. P. 28(b)(5).

store, the window is located behind the cash register. When Ward arrived at the store, he noticed this window was broken, debris was scattered around the window seal, and "a lot of broken glass" was inside the window. Ward and his staff conducted an examination of the premises to determine if any items were missing. They discovered that the missing items included a "Tiger Wood[s] collection of Nike shirts." The total value of the missing items was approximately $600.00 to $700.00.

Ward testified he saw Defendant in Carolina Custom Golf on or around the day of the break-in. Ward saw Defendant at the putting green located inside the store, and he noticed Defendant because Defendant "had a larger coat on and[,] for October[,] it was a warm day and [Ward] couldn't understand why anybody would have a large coat on." Ward asked Defendant if he could help him, and Defendant responded that he was looking for a golf putter. Defendant left the store a short time later without making any purchases at the store. Defendant entered and exited the store through the front door, and Ward did not see Defendant anywhere near the driving range portion of Carolina Custom Golf. Further, Ward did not see Defendant at either the inside or the outside of the window that was subsequently used to gain entry into the store. After Defendant's departure, Ward found papers in the parking lot that he later discovered had Defendant's name on them.

Michael Campbell (Campbell), a patrol officer with the Southern Pines Police Department, testified he responded to the break-in call at Carolina Custom Golf on 23 October 1998. Campbell testified he was the first officer to arrive at the scene and several other officers subsequently arrived, including Darren Ritter (Ritter). Ritter dusted the broken window for fingerprints and he "located some prints on the window and took them with some evidence and sealed them and handed them to [Campbell]." Campbell testified he did not know the exact place on the window that was dusted for prints.

Ritter testified regarding the process he used to lift the prints discovered while investigating the robbery of Carolina Custom Golf. He stated one print was lifted from a piece of broken glass located on the floor inside the store, one print was lifted from the store's outside windowsill, and one print was lifted from a piece of broken glass located outside the store. The source of the broken glass was from the window used to gain entry into the store. Ritter never determined from the glass located outside the store whether the print taken was made on either the inside or the outside portion of the window.

Leonard Parker (Parker), a special agent with the North Carolina State Bureau of Investigation (SBI), testified he was assigned to do a print comparison of three prints sent to the SBI by the Southern Pines Police Department in connection with the Carolina Custom Golf break-in. Parker was asked to compare the three unknown prints, which included two fingerprints and one palm print, with known prints of Defendant. He determined, based on his comparisons, that the unknown print taken from a piece of glass located outside the store matched a known print of Defendant; one unknown print "was not of sufficient quality to be identifiable"; and the unknown palm print did not match Defendant's known palm print.

At the close of the State's evidence, Defendant made a motion "to argue to the jury the maximum punishment [he] could receive in this matter under the parameters of habitual felon, the elevated status it's going to give this case, if [Defendant] is convicted." The trial court denied the motion. Defendant did not offer evidence at trial. Also, Defendant did not make a motion to dismiss the charges at the close of the State's evidence or at the close of all the evidence.

After its deliberations, the jury found Defendant guilty of felonious breaking or entering and felonious larceny as to the Carolina Custom Golf break-in.

Subsequent to the rendering of these verdicts, Defendant brought a motion to dismiss the charge of being an habitual felon on the ground the North Carolina Habitual Felon Act violates Article I, Section 6 of the North Carolina Constitution (separation of powers). The trial court denied the motion. Defense counsel then stated Defendant "would stipulate to the status of habitual felon." The trial court then proceeded to question Defense counsel regarding whether Defendant stipulated to felony convictions dated 30 September 1993, 18 August 1994, and 30 October 1995, and Defense counsel responded that Defendant did stipulate these convictions occurred. The trial court sentenced Defendant based on the verdicts returned by the jury and as an habitual felon.

The issues are whether: (I) the record contains substantial evidence Defendant was the perpetrator of the breaking or entering and larceny at Carolina Custom Golf; and (II) Defendant was properly sentenced as an habitual felon when Defendant had not pleaded guilty to being an habitual felon and that issue was not submitted to the jury.

I

[1] Defendant argues the record does not contain substantial evidence Defendant was the perpetrator of the breaking or entering and larceny at Carolina Custom Golf. Specifically, Defendant contends evidence Defendant's fingerprint was found at the scene of the crimes, standing alone, does not constitute substantial evidence Defendant was present at the time the crimes were committed. We agree.

Initially, we note Defendant did not make a motion to dismiss the charges of breaking or entering or larceny at the close of the State's evidence or at the close of all the evidence; thus, Defendant has not preserved for appellate review the issue of the sufficiency of the evidence of these charges. N.C.R. App. P. 10(b)(3). Nevertheless, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, we address Defendant's argument. *See* N.C.R. App. P. 2 (Rules of Appellate Procedure may be suspended to "prevent manifest injustice to a party"); *State v. Myers*, 123 N.C. App. 189, 195, 472 S.E.2d 598, 602 (1996) (Rule 10(b)(3) suspended pursuant to Rule 2 when the defendant failed to make motion to dismiss at close of evidence).

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

Generally, fingerprint evidence is admissible to prove the identity of the perpetrator of a crime. *State v. Irick*, 291 N.C. 480, 488-89, 231 S.E.2d 833, 839 (1977). "Fingerprint evidence, standing alone, [however,] is sufficient to withstand a motion [to dismiss] only if there is '*substantial* evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed.' " *Id.* at 491-92, 231 S.E.2d at 841 (quoting *State v. Miller*, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975)). Evidence of such circumstances include, but are not limited to, "statements by the defendant that he had never been on the premises," "statements by

prosecuting witnesses that they had never seen the defendant before or given him permission to enter the premises," and "the discovery of the fruits of the crime in [the defendant's] possession." *Id.* at 492, 231 S.E.2d at 841; *State v. Scott*, 296 N.C. 519, 523, 251 S.E.2d 414, 417 (1979). Whether there is substantial evidence the fingerprints "could only have been impressed at the time the crime was committed" is a question of law. *Scott*, 296 N.C. at 523, 251 S.E.2d at 417.

In this case, the State presented evidence Defendant's fingerprint was present on a piece of glass from the broken window, which was located on the ground outside the store. The State presented evidence the outside portion of the window was accessible to the public, and Ritter, who lifted the print, did not determine whether the print was made on the inside or outside portion of the window glass. Additionally, the State presented evidence Defendant was a customer in the store near or on the day of the break-in. This evidence shows Defendant was lawfully present in the store prior to the break-in; therefore, Defendant's print may have been impressed on the glass prior to the time the crime was committed. Moreover, there are no additional circumstances tending to show Defendant's fingerprint was impressed at the time of the break-in.[2] The fingerprint evidence, therefore, is not substantial evidence Defendant was the perpetrator of the break-in at Carolina Custom Golf. *See State v. Atkins*, 56 N.C. App. 728, 730-31, 289 S.E.2d 602, 603-04 (1982) (fingerprint evidence alone, in the absence of other evidence tending to "connect defendant to the offenses charged," is insufficient to withstand a motion to dismiss when evidence shows defendant was lawfully on the premises in and around the building that was broken into prior to the break-in); *State v. Bass*, 303 N.C. 267, 272-74, 278 S.E.2d 209, 213-14 (1981) (evidence defendant's prints were present on window screen frame that was subsequently broken into is insufficient to withstand motion to dismiss when evidence shows defendant was on premises three or four weeks prior to break-in). As the State did not present any evidence, other than the fingerprint evidence, that Defendant was the perpetrator of the break-in at Carolina Custom Golf, the charges against Defendant as to the break-in at Carolina Custom Golf should have been dismissed. Accordingly, Defendant's convictions for felo-

2. The State argues in its brief to this Court that circumstances tending to show Defendant's print was impressed at the time of the break-in include Defendant's possession of the fruits of the crime, the fact that customers do not have access to the inside portion of the window because it is located behind the counter, and the fact that documents with Defendant's name on them were found in the parking lot. We disagree. The record does not contain any evidence Defendant possessed goods stolen from

nious breaking or entering and felonious larceny as to the break-in at Carolina Custom Golf are reversed.[3]

II

[2] Defendant argues the trial court erred by sentencing Defendant as an habitual felon as to case number 98 CRS 10830 because this issue was not submitted to the jury and the record does not show Defendant pleaded guilty to being an habitual felon. We agree.

The proceedings for determining whether a defendant is an habitual felon "shall be as if the issue of habitual felon were a principal charge." N.C.G.S. § 14-7.5 (1999). Under section 14-7.5, the issue of whether a defendant is an habitual felon is submitted to the jury. *Id.* A defendant may, in the alternative, enter a guilty plea to the charge of being an habitual felon. *See State v. Williams*, 133 N.C. App. 326, 330, 515 S.E.2d 80, 83 (1999).

In this case, the record shows Defendant stipulated to the three prior convictions alleged by the State, pursuant to N.C. Gen. Stat. § 14-7.4. N.C.G.S. § 14-7.4 (1999) ("[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 issue of whether Defendant was an habitual felon, however, was not submitted to the jury, and Defendant did not plead guilty to being an habitual felon. Although Defendant did stipulate to his habitual felon status, such stipulation, in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea. *See Williams*, 133 N.C. App. at 330, 515 S.E.2d at 83 (stipulation to habitual felon status tantamount to guilty plea when, subsequent to defendant's stipulation, the trial court asked defendant "questions to establish a record of her plea of guilty" and defendant "informed the court that she understood that her stipulations would give up her

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Carolina Custom Golf; rather, the State presented evidence Defendant possessed goods stolen from Match Play. Also, the record does not contain any evidence the print impressed on the broken glass was impressed on the inside rather than the outside of the broken window, and the evidence shows customers have access to the outside portion of the window. Finally, evidence Defendant left documents at Carolina Custom Golf tends to show only that Defendant was at some time present at Carolina Custom Golf. As the record shows Defendant was present at the store as a customer prior to the break-in, his presence at the store is not substantial evidence his print was left at the scene at the time of the break-in.

3. Because we reverse Defendant's convictions as to the Carolina Custom Golf break-in, we need not address Defendant's argument in his brief to this Court that the trial court erred by instructing the jury on the doctrine of recent possession of stolen goods as to these charges.

right to have a jury determine her status as an habitual felon"); N.C.G.S. § 15A-1022(a) (trial court may not accept guilty plea without first addressing defendant personally and making inquiries of defendant as required by this statute). Accordingly, Defendant's habitual felon conviction is reversed and remanded.[4]

Case No. 99 CRS 2727: Reversed.

Case No. 98 CRS 10830 (status as habitual felon): Reversed and remanded.

Case No. 98 CRS 10830 (breaking or entering; felonious larceny; felonious possession of stolen property): No error.

Judges McCULLOUGH and HUDSON concur.

ROBERT DEEM, PLAINTIFF v. TREADAWAY & SONS PAINTING & WALLCOVERING, INC., MICHAEL TREADAWAY, INDIVIDUALLY AND D/B/A TREADAWAY & SONS PAINTING, MONTGOMERY MUTUAL INSURANCE COMPANY, R.E. PRATT & CO., JAMES C. GOAD, CONCENTRA MANAGED CARE SERVICES, INC., F/K/A COMPREHENSIVE REHABILITATION ASSOCIATES, INC., HELEN SMITH, BECKY WERTS, AND JEAN SELTZER, DEFENDANTS

No. COA00-233

(Filed 20 March 2001)

1. Workers' Compensation— jurisdiction of Industrial Commission—fraud in handling claim

The trial court did not err by granting dismissals under N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6) of actions alleging fraud, bad faith, unfair and deceptive practices, intentional inflic-

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4. Defendant argues in his brief to this Court that the North Carolina Habitual Felon Act, N.C.G.S. §§ 14-7.1 to -7.12 (1999), violates Article I, Section 6 of the North Carolina Constitution (separation of powers). Additionally, Defendant argues in his brief to this Court that "THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION TO ALLOW DEFENDANT TO INFORM THE JURY IN HIS CLOSING ARGUMENT IN THE TRIAL ON THE SUBSTANTIVE FELONIES OF DEFENDANT'S MAXIMUM SENTENCE IF CONVICTED AS AN HABITUAL FELON." Because this Court rejected both of these arguments in *State v. Wilson*, 139 N.C. App. 544, 548, 533 S.E.2d 865, 868-69 (2000), *appeal dismissed and disc. review denied*,— N.C. —, — S.E.2d —, 2000 WL 33115423 (Dec. 27, 2000) (No. 437P00), these assignments of error are overruled.

tion of emotional distress, and civil conspiracy arising from the handling of plaintiff's workers' compensation claim. The opinion (after a rehearing) in *Johnson v. First Union Corp.*, 131 N.C. App. 142, governs; the North Carolina Workers' Compensation Act gives the Industrial Commission exclusive jurisdiction over workers' compensation claims and all related matters, including issues such as those raised in the case at bar.

2. Workers' Compensation— *Woodson* claim—no evidence of substantially certain harm

Plaintiff's claims for fraud, bad faith, unfair and deceptive practices, intentional infliction of emotional distress, and civil conspiracy arising from the handling of his workers' compensation claim did not rise to the level of a *Woodson* claim because there was no evidence to support a finding that defendants' actions were substantially certain to cause serious injury or death to plaintiff. Plaintiff's sole remedy was to petition the Industrial Commission to set aside his agreement with the employer.

Appeal by plaintiff from orders entered 29 November 1999 and 30 November 1999 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 January 2001.

Donaldson & Black, P.A., by Rachel Scott Decker, for plaintiff-appellant.

Stiles Byrum & Horne, L.L.P., by Ned A. Stiles and Stacy C. Willard, for defendant-appellees Treadaway & Sons Painting & Wallcovering, Inc., Michael Treadaway, Individually and d/b/a Treadaway & Sons Painting, and Montgomery Mutual Insurance Company.

Lovejoy & Bolster, P.A., by Jeffrey S. Bolster, for defendant-appellees R.E. Pratt & Co. and James C. Goad.

Golding Holden Cosper Pope & Baker, L.L.P., by Tricia Morvan Derr and C. Byron Holden, for defendant-appellees Concentra Managed Care Services, Inc., f/k/a Comprehensive Rehabilitation Associates, Inc., Helen Smith, Becky Werts and Jean Seltzer.

HUNTER, Judge.

Robert Deem ("plaintiff") appeals the trial court's grant of defendant-appellees Treadaway & Sons Wallcovering, Inc., Michael

Treadaway, individually and d/b/a Treadaway & Sons Painting, Montgomery Mutual Insurance Company, R.E. Pratt & Co., James C. Goad, Concentra Managed Care f/k/a Comprehensive Rehabilitation Associates, Inc., Helen Smith, Becky Werts and Jean Seltzer's motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6). We agree with the trial court that the North Carolina Industrial Commission ("Industrial Commission") has exclusive jurisdiction over plaintiff's claims. Thus, we affirm.

The facts pertinent to this case are as follows: On 26 July 1993, plaintiff was an employee of defendant Treadaway & Sons Painting ("Treadaway Painting") when he fell off a ladder and suffered a compensable injury. With the assistance of an attorney, plaintiff filed a workers' compensation claim with the Industrial Commission against his employer, Treadaway Painting and its workers' compensation carrier, defendant Montgomery Mutual Insurance Company ("Montgomery Mutual"). Montgomery Mutual hired an independent adjusting company, defendant R.E. Pratt & Co. ("Pratt"), to handle plaintiff's workers' compensation claim. Defendant Goad was Pratt's adjuster assigned to plaintiff's claim.

Plaintiff returned to work in November 1994 as a paint foreman. Later, his condition worsened and he was taken out of work on 3 January 1996. About the same time, Montgomery Mutual and Pratt hired defendant Concentra Managed Care ("Concentra") "to provide vocational rehabilitation counseling for the Plaintiff." Defendants Smith, Wertz and Seltzer were employees of Concentra. On 20 February 1996, plaintiff was released to work by his attending physician, however the release was based upon a number of restrictions. When Concentra notified Treadaway Painting that plaintiff could return to work with restrictions, Concentra was informed that plaintiff's job was no longer vacant. However, Treadaway Painting offered the job of laborer to plaintiff, which plaintiff accepted.

On 11 July 1997 plaintiff, through counsel, entered into an "Agreement of Final Settlement and Release" with Treadaway Painting, Montgomery Mutual and Pratt.

> Pursuant to this agreement, the plaintiff and his attorney Seth N. Bernanke agreed to release and discharge all claims available under the North Carolina Worker's Compensation Act relating to this injury in exchange for payment of $100,000. On July 23, 1997 the Industrial Commission entered an order approving the compromise settlement agreement reached by the plaintiff and

> Treadaway, Montgomery Mutual and R.E. Pratt & Co. in the amount of $100,000. . . .

Notwithstanding the former release and settlement agreement, on 31 December 1998, plaintiff filed this suit against Treadaway Painting, Montgomery Mutual, Pratt, Goad, Concentra and Concentra's three employees, alleging that defendants committed fraud, bad faith, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy *arising out of the handling of his workers' compensation claim.*

In response to plaintiff's complaint, each defendant filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), specifically stating that North Carolina's general courts of justice are without subject matter jurisdiction due to the Industrial Commission having exclusive jurisdiction, and; pursuant to Rule 12(b)(6), specifically stating that the plaintiff had failed to state a claim for which relief may be granted. The trial court agreed with defendants and granted each of their motions to dismiss based upon both Rules 12(b)(1) and (6). On appeal, plaintiff brings forward three assignments of error, all dealing with the trial court's grant of each defendant's motion to dismiss. Finding the record before us clear and case law plain, we affirm the trial court's rulings.

[1] In his brief to this Court, plaintiff admits that the issues in his complaint are addressed by this Court's ruling in *Johnson v. First Union Corp.*, 128 N.C. App. 450, 496 S.E.2d 1, *reversed*, 131 N.C. App. 142, 504 S.E.2d 808 (1998). Yet, it is plaintiff's contention that "the original decision of the [C]ourt of [A]ppeals is the law of North Carolina," and not the last and standing decision. Thus, plaintiff attempts to apply the first decision of the Court, and ignore the standing precedent—with no attempt to distinguish his case from the law which governs. However the Court's latter opinion, which it rendered after granting a petition for rehearing, overturned the former *Johnson* opinion. We are bound by the precedent set by that latter opinion. Thus, we find no merit in plaintiff's argument and agree with defendants that *Johnson*, 131 N.C. App. 142, 504 S.E.2d 808, does control.

In that case, plaintiffs Johnson and Smith each "filed claims with the North Carolina Industrial Commission seeking workers' compensation benefits for repetitive motion disorders they allegedly suffered in the course of their employment . . . . [However,] . . . both subsequently had their claims rejected . . . ." *Johnson*, 131 N.C. App. at 143,

504 S.E.2d at 809. Like the plaintiff in the case *sub judice*, plaintiffs Johnson and Smith later filed suit in superior court against their employer, its workers' compensation carrier, the adjusting company and the rehabilitation provider along with one of its employees, alleging: fraud, bad faith, refusal to pay or settle a valid claim, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy. *Id.* Although the trial court dismissed plaintiffs' case stating that plaintiffs had failed to state a claim upon which relief may be granted pursuant to Rule 12(b)(6), on appeal defendants argued—and this Court agreed—that the claims should have been dismissed pursuant to Rule 12(b)(1) because the Industrial Commission had exclusive jurisdiction. *Id.*

In enacting the North Carolina Workers' Compensation Act ("the Act"), our General Assembly set clear boundaries for how an employee injured on the job must seek remedy. Additionally, although the Legislature has amended parts of the Act over time, the main thrust of the Act and its purpose have remained the same:

> ". . . to provide compensation for an employee in this State who has suffered an injury by accident which arose out of and in the course of his employment, the compensation to be paid by the employer, in accordance with the provisions of the act, without regard to whether the accident and resulting injury was caused by the negligence of the employer, as theretofore defined by the law of this State. . . ."

Johnson, 131 N.C. App. at 144, 504 S.E.2d at 810 (quoting *Lee v. American Enka Corp.*, 212 N.C. 455, 461-62, 193 S.E. 809, 812 (1937)). We note here that, North Carolina is a contributory negligence state. Thus, to gain any remedy before the Act was enacted, an employee injured on the job would be subject to proving not only that the employer was negligent but that she herself was not negligent at all. *See Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991); *Blue v. Canela*, 139 N.C. App. 191, 532 S.E.2d 830 (2000). Instead, under the Act:

> ". . . The right of the employee to compensation, and the liability of the employer therefor[e], are founded upon mutual concessions, as provided in the [A]ct, *by which each surrenders rights and waives remedies which he theretofore had under the law of this State. . . .*"

Johnson, 131 N.C. App. at 144, 504 S.E.2d at 810 (emphasis in original) (quoting *American Enka Corp.*, 212 N.C. at 462, 193 S.E. at 812).

Thus, although there is a trade-off of rights, our Supreme Court has held that "[t]he act establishes a sound public policy, and is just to both employer and employee." *American Enka Corp.*, 212 N.C. at 462, 193 S.E. at 812. *See also Woodson*, 329 N.C. App. at 338, 407 S.E.2d at 227.

Nevertheless, plaintiff at bar argues that it matters not that his claims originally arose out of his compensable injury. Instead, he argues that the "intentional conduct" of defendants fails to come under the exclusivity provisions of the Act because that conduct did not arise out of and in the course of plaintiff's employment relationship. Again, finding *Johnson* on point, we disagree.

From both his complaint and his brief to this Court, we can clearly glean that *plaintiff's cause of action arises out of* his belief that "defendants engaged in fraudulent, illegal, and improper conduct designed at forcing plaintiff back into the job market at a made up job so that the defendants could artificially cut off *plaintiff's right to benefits under the Workers' Compensation Act.*" (Emphasis added.) Therefore, plaintiff's complaint is nothing more than an allegation that defendants did not appropriately handle his workers' compensation claim, and thus he was injured because he did not receive his entitled benefit. This is the exact argument of the *Johnson* plaintiffs and, in that case, this Court held that "[t]he North Carolina Workers' Compensation Act (N.C. Gen. Stat. § 97-1 through 97-200) gives the North Carolina Industrial Commission exclusive jurisdiction over workers' compensation claims *and all related matters, including issues such as those raised in the case at bar.*" *Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 809 (emphasis added). Noting that the *Johnson* plaintiffs also alleged the defendant committed intentional torts against them (including unfair and deceptive trade practices), we hold in the case at bar that plaintiff's claims are ancillary to his original compensable injury and thus, are absolutely covered under the Act and this collateral attack is improper. *Id.* at 144-45, 504 S.E.2d at 809. *See also Spivey v. General Contractors*, 32 N.C. App. 488, 232 S.E.2d 454 (1977).

[2] However, plaintiff further argues that his current claims should be allowed in the general court of justice because they are claims of "intentional conduct." Thus, plaintiff contends that as such, the "actions fall within the North Carolina Supreme Court's exception of intentional conduct from the exclusivity rule" as set out in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222. Again, we disagree.

It is well established that the "substantially certain" standard set out in *Woodson* creates an exception to the exclusivity provision of the Act. *Id.* at 337, 407 S.E.2d at 228. However, it is also well established that the exception is extremely narrow in that plaintiff's "forecast of evidence" must show the "employer intentionally engage[d] in [the] misconduct [complained of] knowing it [wa]s substantially certain to cause serious injury or death to [the] employee[] and [the] employee [wa]s injured or killed by that misconduct . . . ." *Id.* at 340, 407 S.E.2d at 228. Since plaintiff does not contend, neither is there evidence of record to support a finding that defendants' actions *sub judice* were "*substantially certain to cause serious injury or death*" to plaintiff, plaintiff's claims do not rise to the level of a *Woodson* claim. *Id.* (emphasis added). Thus, the trial court's dismissal of plaintiff's claims for lack of subject matter jurisdiction, pursuant to N.C. Gen. Stat. § (12)(b)(1), is affirmed, as the Industrial Commission has sole jurisdiction over all the issues raised. We specifically note that pursuant to N.C. Gen. Stat. § 97-17 (1999), the Industrial Commission has the exclusive jurisdiction over workers' compensation agreements and employee claims of fraud, misrepresentation, undue influence, mutual mistake, intentional infliction of emotional distress, and unfair and deceptive trade practices with respect to those agreements. Our Supreme Court has long held that:

> "If [a] plaintiff desires to attack [a workers' compensation] agreement for fraud, misrepresentation, undue influence, or mutual mistake, and has evidence to support such [an] attack, he may make application in due time for a further hearing for that purpose. In such event, the Industrial Commission shall hear the evidence offered by the parties, find the facts with respect thereto, and upon such findings determine whether the agreement was erroneously executed due to fraud, misrepresentation, undue influence or mutual mistake. If such error is found, the Commission may set aside the agreement, G.S. 97-17, and determine whether a further award is justified and, if so, the amount thereof."

Johnson, 131 N.C. App. at 144-45, 504 S.E.2d at 810 (quoting *Pruitt v. Publishing Co.*, 289 N.C. 254, 260, 221 S.E.2d 355, 359 (1976)). Thus, plaintiff's sole remedy in this case was to petition the Industrial Commission to set aside his agreement with Treadaway Painting. We recognize plaintiff is contending that this remedy is insufficient. However, we believe our General Assembly is the correct body to consider changes to our current workers' compensation remedies.

Having held that the trial court properly dismissed plaintiff's claims for lack of subject matter jurisdiction, we need not address the issue of whether plaintiff's claims were properly dismissed pursuant to N.C. Gen. Stat. § 1-1A, Rule 12(b)(6). The trial court's orders granting defendants' motions to dismiss are,

Affirmed.

Judges WALKER and CAMPBELL concur.

KIMBERLY JOAN GEORGE, PLAINTIFF v. ADMINISTRATIVE OFFICE OF THE COURTS, AN AGENCY OF THE STATE OF NORTH CAROLINA; AND R. DEAN HARTGROVE, IN HIS OFFICIAL CAPACITY AS CLERK OF SUPERIOR COURT OF STOKES COUNTY, DEFENDANTS

No. COA00-365

(Filed 20 March 2001)

Clerks of Court— alleged negligence or misconduct in performance of official duties—notice of lis pendens not required to be cross-indexed on public record

The trial court did not err by granting defendants' N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss plaintiff's claim for the alleged negligence or misconduct of a clerk of superior court in the performance of his official duties based on a failure to cross-index in the public record a notice of lis pendens on defendant's property, because: (1) plaintiff's prayer for relief asks the court to order defendant to refinance the property or reconvey a one-half interest in the property to plaintiff since defendant former husband did not abide by the terms of the parties' separation agreement; (2) the courts of this state have consistently held that the lis pendens statute under N.C.G.S. § 1-116 does not apply to an action to secure a personal money judgment even though such a judgment, if obtained and properly documented, is a lien upon the land of defendant; and (3) plaintiff was not entitled to have the notice of lis pendens cross-indexed on the public record since an action to enforce a separation agreement, absent any allegation of fraudulent conduct, or the existence of an express or implied trust, or allegations that would support a cause of action for specific performance, does not bring the direct affect on title

to property required to bring it within the meaning of N.C.G.S. § 1-116.1(a)(1).

Appeal by plaintiff from order entered 17 December 1999 by Judge Charles M. Neaves, Jr. in Stokes County District Court. Heard in the Court of Appeals 26 January 2001.

James L. Dellinger, Jr., for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Charles J. Murray, for defendants-appellees.

CAMPBELL, Judge.

Plaintiff appeals from an order granting defendants' motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. We affirm.

The uncontested pertinent facts and procedural history include the following: On 9 August 1994, plaintiff and her former husband, Tony David Johnson, entered into a separation agreement, in which plaintiff agreed to release her interest in their marital home located in Stokes County, North Carolina. In return, Tony David Johnson agreed to assume all obligations with regard to the marital home, to refinance the outstanding mortgage loan on the marital home within six months, and to pay plaintiff $7,500 upon sale of the property. Pursuant to this separation agreement, plaintiff executed a quitclaim deed on 25 August 1994 releasing her interest in the marital home.

On 20 March 1996, plaintiff instituted an action (96 CVD 115) in Stokes County District Court against her former husband alleging refusal to perform obligations under the separation agreement and seeking damages for breach of the agreement. Plaintiff alleged that the parties had entered into the separation agreement, and plaintiff had abided by the agreement in releasing her interest in the marital home. Plaintiff further alleged that defendant had failed and refused to refinance the marital home, thus breaching the separation agreement and causing damage to plaintiff. In the prayer for relief, plaintiff sought damages in excess of $10,000. Plaintiff also sought to compel defendant to refinance the property pursuant to the agreement, or to reconvey a one-half interest in the marital home to plaintiff. On 20 March 1998, plaintiff filed a notice of *lis pendens* with the Clerk of Superior Court of Stokes County, seeking to give record notice of the pending action against her former husband, and claiming that one of

the objects of the pending action was a one-half interest in the marital home. On 13 May 1998, Tony David Johnson conveyed the property in question to Wilbur L. Goad and his wife, Tammy P. Goad.

On 8 July 1999, plaintiff instituted the instant action against defendants, alleging negligence on the part of R. Dean Hartgrove (Hartgrove), in his official capacity as Clerk of Superior Court of Stokes County, in failing to accurately and properly maintain the public records of Stokes County, and against the Administrative Office of the Courts, in its position as supervisor of the Judicial Department of the State of North Carolina. Specifically, plaintiff contended that the notice of *lis pendens* filed in connection with 96 CVD 115 had not been correctly indexed. Consequently, plaintiff's interest in the marital property had not been protected, in that the lien she had sought to perfect by filing the notice of *lis pendens* had not appeared on the public record during the title examination conducted in connection with the transfer of the subject property from Tony David Johnson to Wilbur and Tammy Goad.

On or about 23 August 1999, defendants filed a motion to dismiss for lack of jurisdiction over the subject matter pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). On 17 December 1999, the trial court entered an order granting defendants' motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiff appeals from this ruling.

We begin by noting that any cause of action based upon alleged negligence or misconduct of any clerk of superior court in the performance of his or her official duties must comply with N.C. Gen. Stat. § 58-76-5. The parties do not address this requirement in their arguments on appeal, but we emphasize that nothing in this opinion is intended to affect the application of G.S. § 58-76-5 to any such claim.

Plaintiff argues the trial court erred in granting defendants' Rule 12(b)(6) motion. Under Rule 12(b)(6), a claim should not be dismissed unless it appears beyond doubt that plaintiff is entitled to no relief under any set of facts which could be proven. *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 401 S.E.2d 133 (1991). "[T]his will occur when there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim." *Id.* at 123, 401 S.E.2d at 135. In analyzing the complaint under Rule 12(b)(6), the

complaint must be liberally construed. *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987). In reviewing the grant of a motion to dismiss for failure to state a claim, the question for an appellate 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), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994).

In the present case, plaintiff contends defendant Hartgrove failed to properly maintain the public records of Stokes County, which he was required by law to do as Clerk of Superior Court of Stokes County. Plaintiff alleges the notice of *lis pendens* filed in connection with 96 CVD 115 did not show up in the public records of Stokes County during the title examination conducted by the closing attorney, William F. Marshall, Jr. Specifically, plaintiff alleges the notice of *lis pendens* was not properly indexed in the judgment index, as required by N.C. Gen. Stat. §§ 1-117 and 7A-109(b)(6). Taking all of the allegations of plaintiff's complaint as true, the underlying basis of plaintiff's claim is that she was entitled to have the notice of *lis pendens* that was filed in connection with 96 CVD 115 cross-indexed to appear on the public record. If defendant Hartgrove was not required by law to cross-index the notice of *lis pendens* filed in connection with 96 CVD 115, then his failure to do so, whether negligent or intentional, cannot be the basis for any claim for relief. Therefore, the question for this Court is whether 96 CVD 115 is the type of action in which a notice of *lis pendens* is required to be cross-indexed to appear on the public record.

In this State the common law rule of *lis pendens* has been replaced by the provisions of N.C. Gen. Stat. § 1-116 to N.C. Gen. Stat. § 1-120.2. *Cutter v. Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965). Thus, valid notice of *lis pendens* is only proper in one of the three types of actions enumerated in G.S. § 1-116(a), which reads as follows:

> (a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117, in the following cases:
>
> (1) Actions affecting title to real property;

(2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property; and

(3) Actions in which any order of attachment is issued and real property is attached.

N.C. Gen. Stat. § 1-116(a) (1999); *Cutter*, 265 N.C. 664, 667, 144 S.E.2d 882, 884. "[N]otice of *lis pendens* may not properly be filed except in an action, a purpose of which is to affect *directly* the title to the land in question or to do one of the other things mentioned in the statute." *Id.* at 668, 144 S.E.2d at 885 (emphasis added). Since it is clear from the complaint in 96 CVD 115 that the nature of plaintiff's action does not fall within (a)(2) or (a)(3), then the notice of *lis pendens* filed by plaintiff in 96 CVD 115 can only be required to be cross-indexed by the clerk of superior court pursuant to N.C. Gen. Stat. § 1-117 if it *directly* affects title to real property.

In determining whether a cause of action affects title to real property within the meaning of G.S. § 1-116(a)(1), the nature of the action must be analyzed by reference to the facts alleged in the body of the complaint rather than by what is contained in the prayer for relief. *Pegram v. Tomrich Corp.*, 4 N.C. App. 413, 166 S.E.2d 849 (1969). Although plaintiff's prayer for relief asks the court to order defendant to refinance the property or reconvey a one-half interest in the property to the plaintiff, our analysis must focus solely on the allegations of the complaint, and whether they give rise to an action that sufficiently affects title to real property.

Actions which are considered to fall within the *lis pendens* statute include actions to set aside deeds or other instruments for fraud, to require specific performance, or to correct a deed for mutual mistake, and other like cases where the claim is brought for the purpose of changing the record, not for the purpose of preventing a change in the record. *Cutter*, 265 N.C. 664, 144 S.E.2d 882. "An action to establish a trust as to certain described real property is an action 'affecting title to real property' under G.S. 1-116(a)(1) . . . ." *Pegram*, 4 N.C. App. 413, 415, 166 S.E.2d 849, 851. Likewise, "a claim for relief by a creditor seeking to set aside a fraudulent conveyance pursuant to G.S. 39-15 *et seq.* constitutes an action 'affecting title to real property' within the meaning of G.S. 1-116(a)(1)." *Bank v. Evans*, 296 N.C. 374, 381, 250 S.E.2d 231, 236 (1979). However, the courts of this state have consistently held that the *lis pendens* statute does not apply to an action the purpose of which is to secure a personal money judgment even though such a judgment, if obtained and properly dock-

eted, is a lien upon the land of the defendant named in the complaint. *Cutter*, 265 N.C. 664, 144 S.E.2d 882; *Pegram*, 4 N.C. App. 413, 166 S.E.2d 849.

Focusing on the allegations of the complaint, plaintiff's cause of action in 96 CVD 115 does not fit into the category of cases which have been held to *directly* affect title to real property under the *lis pendens* statute. There is no allegation that the separation agreement included an agreement, express or implied, that defendant hold title to the marital home as trustee for the mutual benefit of the parties. Nor is there any allegation of fraudulent conduct on the part of defendant which could support imposition of a constructive trust declaring defendant trustee. The allegations of plaintiff's complaint do not support a claim for specific performance requiring reconveyance of one-half of the marital home to plaintiff, nor any other claim brought for the purpose of changing the record. Plaintiff's complaint merely alleges that her former husband did not abide by the terms of their separation agreement, thereby causing damage to plaintiff. Plaintiff's complaint is similar to the personal money judgment claims which have consistently been held not to affect title to real property within the meaning of G.S. § 1-116(a)(1). Therefore, we hold that an action to enforce a separation agreement, absent any allegation of fraudulent conduct, or the existence of an express or implied trust, or allegations that would support a cause of action for specific performance, does not have the *direct* affect on title to real property required to bring it within the meaning of G.S. § 1-116(a)(1). This is the case, notwithstanding the fact the plaintiff may have released marital property rights pursuant to the separation agreement. *Cf. McLeod v. McLeod*, 266 N.C. 144, 146 S.E.2d 65 (1966). Consequently, we find that plaintiff's cause of action in 96 CVD 115 does not have a sufficient *direct* affect on title to real property to bring it within the *lis pendens* statute.

Based on our conclusion that plaintiff's cause of action in 96 CVD 115 does not affect title to real property, plaintiff was not entitled to have the notice of *lis pendens* cross-indexed on the public record, and defendant Hartgrove's failure to do so cannot be a proper legal basis for the claim in the instant case. Therefore, we hold the trial court did not err in granting defendants' Rule 12(b)(6) motion to dismiss.

Affirmed.

Judges WALKER and HUNTER concur.

HARRELL OIL COMPANY OF MOUNT AIRY, PLAINTIFF v. ALBERT CASE AND WIFE, BRENDA CASE; ELIZABETH CASE STANLEY AND HUSBAND, JOHN STANLEY, DEFENDANTS

No. COA00-34

(Filed 20 March 2001)

1. Partnerships— existence—sufficiency of evidence

The trial court did not err by determining that defendants were partners in the Lowgap Grocery and Grill, which they had purchased for their daughter to run, where defendants owned the building, the land, the inventory, and the equipment; defendants opened the bank account for the business and had authority to draw on this account at all times; defendants invested additional money on various occasions; defendants purchased the business in their own names and invited their daughter to participate rather than making loans directly to her; defendant Brenda Case took out an insurance policy which identified her as doing business as the Lowgap Grocery and Grill; defendant Albert Case executed a power-of-attorney in connection with the sale of the business which gave his daughter the authority to transfer "my" business in Lowgap, North Carolina; each defendant signed the closing statement for the sale of the business; defendants received the profits from the sale of the business; and both defendants testified to their status as partners, Albert describing himself as a "silent partner" and Brenda describing herself as a "sleeper partner." Defendants' ownership did not terminate simply because their daughter took over management of the business.

2. Interest— purchase of fuel by store—open-ended account—notice

The trial court did not err by concluding that plaintiff was entitled to interest on an amount due for fuel purchased by a store where there was only an oral agreement for the delivery of gasoline, but defendants received statements on a regular basis and an invoice upon each delivery, each of which contained a detailed and specific provision regarding the imposition of finance charges.

Appeal by Defendants from judgment entered 23 September 1999 by Judge Charles M. Neaves, Jr. in Surry County District Court. Heard in the Court of Appeals 13 February 2001.

Faw, Folger, Johnson & Campbell, L.L.P., by Fredrick G. Johnson and Hugh B. Campbell, III, for plaintiff-appellee.

Harry B. Crow, Jr., for defendants-appellants.

HUDSON, Judge.

Plaintiff filed a complaint on 7 November 1995 alleging that the four named defendants were jointly and severally liable, as co-owners of Lowgap Grocery & Grill (the business), for a debt arising from outstanding payments on the purchase of fuels from plaintiff. The trial court held that John Stanley was entitled to a directed verdict because he was not a partner in the business, and that the remaining defendants, Albert Case, Brenda Case, and Elizabeth Case Stanley, were jointly and severally liable to plaintiff in the amount of $48,880.06. Albert Case and Brenda Case appeal from that judgment.

The evidence before the trial court tended to show the following. In November of 1991, Albert and Brenda Case (defendants), a married couple, purchased the business, including the building in which the store was located, the property on which it was situated, and all equipment and inventory. Defendants owned the business through November of 1994, at which time they sold the business to Jerry Hodges. During the time that defendants owned the business, Elizabeth Case Stanley (Ann), defendants' daughter, ran the business, and defendants worked at the business approximately one day a week. Brenda testified that she and Albert had purchased the business with the intention that Ann would run and operate the store, and with the hope that Ann would eventually own the store.

In approximately December of 1992, Joe Harrell, who owns and operates the Harrell Oil Company of Mount Airy (plaintiff), reached a business agreement with Brenda. Pursuant to this agreement, defendants purchased gas tanks, pumps, and related equipment from plaintiff, and plaintiff installed the equipment. Plaintiff then delivered gas each week on consignment, the business sold the gas, and the business paid plaintiff the cost of the gas plus one half of the profit. Brenda acted as the spokesperson and contact person on behalf of the business. There was no written contract setting forth the terms of the agreement, only an oral agreement between Harrell and Brenda. The first delivery of gas by plaintiff occurred in February of 1993, and the final delivery occurred in October of 1994.

In approximately June of 1993, Harrell was notified by Ann that she would be in charge of the store and that plaintiff should deal with Ann regarding the business relationship rather than Brenda. From that point until the fall of 1994, Harrell testified that his business dealings occurred through Ann. Also beginning in June of 1993, the business fell behind on its payments to plaintiff. By the fall of 1994, the business had a significant unpaid balance. In approximately September of 1994, Brenda contacted Harrell and stated that she wanted to sell the business. After the business was sold, Brenda contacted Harrell again and told him that the business had been sold, and that she had $8,000 remaining after paying the outstanding bills. Brenda offered to give Harrell this sum in exchange for releasing defendants from their debt. Harrell declined, and offered to accept $20,000 for the debt that was due, which offer was not accepted by Brenda.

On 7 November 1995, plaintiff filed a complaint alleging that the four named defendants were jointly and severally liable to plaintiff for the sum of $29,743.67, plus interest from 1 August 1995 at the rate of 18% per year. The four named defendants filed answers denying liability to plaintiff. The trial court found that the business was operated as a partnership from February of 1993 until November of 1994 by defendants and Ann, and that the partnership is indebted to plaintiff in the principal amount of $26,054.16 for purchases of motor fuels and kerosene. The trial court further found that plaintiff is entitled to interest on the principal amount, due at the rate of 1.5% per month from November of 1994 until the date of judgment, and thereafter at the legal rate. Thus, the trial court found defendants and Ann jointly and severally liable for a total of $48,880.06, plus interest thereon at the legal rate from the day of judgment.

[1] On appeal, defendants raise seven assignments of error condensed into two arguments for our review. Defendants first argue that the trial court erred in determining that defendants were partners in the business and are liable to plaintiff on this basis. We note in addressing this issue that Ann has not appealed from the judgment of the trial court and, for this reason, her status as a partner in the business is unchallenged.

The Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." N.C.G.S. § 59-36(a) (1999). This Court has defined a "partnership" as "a combination of two or more persons, their property, labor, or skill in a common business or venture under an agreement to share

profits or losses and where each party to the agreement stands as an agent to the other and the business." *G. R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 110, 362 S.E.2d 807, 810 (1987). Determination of whether a partnership exists involves examining all the circumstances. *See Peed v. Peed*, 72 N.C. App. 549, 553, 325 S.E.2d 275, 279, *cert. denied*, 313 N.C. 604, 330 S.E.2d 612 (1985). Where a partnership is found to exist, "all partners are jointly and severally liable for the acts and obligations of the partnership." N.C.G.S. § 59-45(a) (1999).

It is well-established that "co-ownership and sharing of any actual profits are indispensable requisites for a partnership," and that "[f]iling a partnership tax return is significant evidence of a partnership." *Wilder v. Hobson*, 101 N.C. App. 199, 202, 398 S.E.2d 625, 627 (1990). Defendants argue that they were not partners in the business for three reasons. First, defendants contend that during the time the debt in question accrued, they were not co-owners of the business because Ann had taken full control of the business. Second, defendants contend that there was no agreement to share profits. Third, defendants contend that the existence of tax returns filed by defendants defining the business as a "proprietorship," as well as the absence of any partnership tax returns for the business, support the conclusion that the business was not a partnership. Defendants contend that the circumstances in the case at bar are similar to the circumstances in *McGurk v. Moore*, 234 N.C. 248, 67 S.E.2d 53 (1951).

In *McGurk*, the defendant was the sole owner and operator of the business, and the plaintiff merely made advances and loans of money to the defendant for use in the business. *See id.* at 253, 67 S.E.2d at 56. The only indication of a partnership was the fact that the plaintiff and the defendant shared profits. *See id.* The Court found that the plaintiff's share of the profits was received simply as compensation or interest for the use of his money by the defendant. *See id.* The Court explained that, pursuant to N.C.G.S. § 59-37 (1999), such profit-sharing does not constitute *prima facie* evidence of a partnership. *See McGurk*, 234 N.C. at 253, 67 S.E.2d at 56. Thus, the Court held there was no partnership between the parties.

The instant case is distinguishable from *McGurk* in a number of crucial ways. First, evidence of defendants' ownership interest in the business here is overwhelming. For the entire period in question, defendants owned the building, the property, the inventory, and the equipment. Defendants opened the bank account for the business and

at all times had authority to draw on this account. Defendants invested additional money on various occasions to pay for expenses incurred by the business, such as building payments and inventory. Brenda also took out an insurance policy, which policy identified her as the owner of the policy, doing business as Lowgap Grocery and Grill. In October of 1994, a month prior to selling the business, Albert executed a "Power of Attorney" appointing Ann as his "attorney-in-fact," and specifically giving Ann the authority to transfer to Hodges, the buyer, "my business located in Lowgap, North Carolina." Albert and Brenda each signed the closing statement for the sale of the business in November of 1994. The defendants clearly owned the business and, despite defendants' contentions to the contrary, for which they provide no authority, this ownership did not terminate simply because Ann took over the management of the business in June of 1993. Furthermore, although defendants may have intended that Ann would eventually become the owner of the business, they did not make loans directly to her for her to invest in the business, as did the plaintiff in *McGurk*. Rather, defendants purchased the business in their own names, and invited Ann to participate in the business by helping to manage the store.

Second, despite the absence of an express agreement to share profits or losses, and despite the apparent absence of actual profits during the operation of the business, it is undisputed that when defendants sold the business, they collected and deposited the proceeds, paid the outstanding debts and taxes, and then deposited the remaining $8,000.00 into their own personal checking account. Thus, the evidence indicated that defendants received the profits from the sale of the business. Third, both defendants testified as to their status as partners in the instant case. Albert testified that he was a "silent partner," and Brenda testified she was a "sleeper partner." In sum, the evidence overwhelmingly establishes that defendants were partners in the business and, therefore, the trial court did not err in concluding that defendants are jointly and severally liable, along with Ann, to plaintiff.

[2] Defendants' second and final argument is that the trial court erred in determining that plaintiff is entitled to interest on the principal amount due at the rate of 1.5% per month since November of 1994. A creditor who extends customer credit on an open-end credit account or similar plan may impose finance charges "at a rate in the aggregate not to exceed one and one-half percent (1½%) per month," N.C.G.S. § 24-11 (1999), provided that the debtor is given proper

notice that the creditor intends to impose such finance charges, *Insurance Agency v. Noland*, 30 N.C. App. 503, 506, 227 S.E.2d 169, 171 (1976). Proper notice requires the creditor to notify the person to whom the credit is extended of all the details and circumstances pertaining to the imposition of finance charges. *See id.* Such notification is sufficient if it occurs at the time the credit is initially extended, *see id.*, or if it occurs at any point prior to the time when the amounts on which the finance charges are applied become due, *see Hedgecock Builders Supply Co. v. White*, 92 N.C. App. 535, 544, 375 S.E.2d 164, 171 (1989). G.S. § 24-11 also requires that a bill for the balance due on an account "must be mailed to the customer at least 14 days prior to the date specified in the statement as being the date by which payment of the new balance must be made in order to avoid the imposition of any finance charge." G.S. § 24-11(d).

According to the trial court's fifth finding of fact, "each sales ticket and invoice that Harrell Oil delivered to Defendants for payment contained the following provision: 'NOTE: Bookkeeping and Service charges of 1½% per month will be added on all bills past due, plus reasonable attorney's fees if legal assistance is necessary to collect any past due balance.' " The evidence supports this finding, and, in fact, defendants have not assigned error to this finding. The evidence also showed that the first delivery of gas by plaintiff occurred in February of 1993, while the first time a finance charge was imposed was in June of 1993, and the significant finance charges in question did not actually begin to accrue until October of 1994. Thus, defendants had been receiving statements on a regular basis, and invoices upon each gas delivery, each containing a specific and detailed provision regarding the imposition of finance charges, for approximately four months before any finance charges were imposed, and for well over a year before the significant finance charges in question began to be imposed. Finally, Harrell testified that finance charges were never imposed on unpaid amounts until at least one entire month after the charges came due, and there was no evidence to contradict this testimony. The trial court did not err in concluding that plaintiff is entitled to interest on the amount due at the rate of 1.5% per month since November of 1994.

Affirmed.

Judges GREENE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL BROWN

No. COA00-133

(Filed 20 March 2001)

Appeal and Error— preservation of issues—failure to give notice of intent to appeal based on denial of motion to suppress

Although defendant contends the search of his person was without probable cause and that the evidence found during the subsequent search of his vehicle should have been suppressed since it was "fruit of the poisonous tree," this appeal is dismissed because: (1) defendant failed to present a record on appeal from which it can be determined that he complied with established case and statutory law concerning appeals made subsequent to a plea bargain which mandates that notice of intent to appeal be given to the trial court and prosecutor prior to entry of a guilty plea following denial of a motion to suppress, N.C.G.S. § 15A-979(b); and (2) counsel cannot correct the record by stipulating that appellant reserved the right to appeal.

Judge HUDSON dissenting.

Appeal by defendant from order entered 20 July 1999 by Judge Arnold O. Jones in Wayne County Superior Court. Heard in the Court of Appeals 22 January 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General William P. Hart and Agency Legal Specialist Gregory B. Rodgers, for the State.

Kevin F. MacQueen for defendant appellant.

SMITH, Judge.

On 29 January 1999, defendant was arrested for possession of a controlled substance after a search of his person and automobile revealed crack cocaine and a crack cocaine pipe. Defendant was indicted on 17 May 1999 for possession of a Schedule II controlled substance and being an habitual felon. On 1 July 1999, defendant moved to suppress evidence obtained as a result of the search. The motion was denied on 20 July 1999. On the same day, defendant pled guilty pursuant to a plea agreement to possession of cocaine and to

being an habitual felon and was sentenced to a term of seventy to ninety-three months' imprisonment. Defendant appeals.

Defendant's appeal concerns the constitutionality of the search without a warrant by the Goldsboro Police Department on 29 January 1999. Defendant contends that the search of his person was without probable cause, and that evidence found during the subsequent search of his vehicle should have been suppressed because it was "fruit of the poisonous tree." However, we do not reach the merits, because defendant failed to present a record on appeal from which we can determine that he complied with established case and statutory law, which mandates that notice of intent to appeal be given to the trial court and prosecution prior to entry of a guilty plea following denial of a motion to suppress.

N.C. Gen. Stat. § 15A-979(b) (1999) states that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." However, "[t]his statutory right to appeal is conditional, not absolute." *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *disc. review allowed in part*, 343 N.C. 126, 468 S.E.2d 790, *aff'd*, 344 N.C. 623, 476 S.E.2d 106 (1996). Pursuant to N.C. Gen. Stat. § 15A-979(b), "a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty." *McBride*, 120 N.C. App. at 625, 463 S.E.2d at 404.

Here, we have carefully reviewed the entire record, including the transcript, and note the absence of any notice whatsoever by defendant of his intent to appeal based on the trial court's denial of his motion to suppress. In his brief, defendant claims to have reserved this right. However, the page in the record referred to by defendant as evidence of his intent to appeal cites only the second page of the judgment, and does not constitute sufficient notice of his intent. We note that the State's brief asserts that defendant reserved his right to appeal. However, the State cites the Transcript of Plea as reference, and there is nothing in the Transcript of Plea to indicate that defendant was pleading guilty, but reserving his right to appeal.

"This Court . . . is bound by the record as certified and can judicially know only what appears of record." *State v. Williams*, 280 N.C. 132, 137, 184 S.E.2d 875, 878 (1971); and *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423 (1971). "It is the appellant's duty and responsibility to

see that the record is in proper form and complete." *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644-45 (1983); *see also State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241 (1969), *death sentence vacated*, 403 U.S. 948, 29 L. Ed. 2d 859 (1971). Here, from the record presented, we cannot determine that defendant has complied with the rules concerning appeals made subsequent to a plea bargain.

In her dissent, Judge Hudson contends that, because the State approved the proposed record on appeal, and the "Organization of Trial Tribunal" in the record contained a statement that defendant pled guilty but reserved his right to appeal the denial of his motion to suppress, then the statement became part of the record, and defendant did preserve his right of appeal. However, counsel cannot correct the record proper by stipulation. *Mason v. Commissioners of Moore*, 229 N.C. 626, 628, 51 S.E.2d 6, 8 (1948). Thus, it is not enough that counsel states or stipulates that appellant reserved the right to appeal. That portion of the record on appeal reflecting the proceedings in the trial court must show that appellant has the statutory right to appeal. *McBride*, 120 N.C. App. at 625, 463 S.E.2d at 404 (defendant must notify the State and the trial court of his intent to appeal the denial of a motion to suppress prior to pleading guilty or he waives the right to appeal); N.C. Gen. Stat. § 15A-979(b). Furthermore, we note that the "Organization of Trial Tribunal" is merely a statement in the record for informational purposes and is not binding on the parties. See Drafting Committee Note, North Carolina Rules of Appellate Procedure, 287 N.C. 671, 696 (1975) ("The office of this item is simply to permit routine confirmation by the appellate court of the subject matter jurisdiction or "competence" of the particular trial judge and tribunal . . . .").

Accordingly, the appeal is dismissed without prejudice to defendant's right to seek an evidentiary hearing in superior court determining whether or not the guilty plea was entered reserving defendant's right to appeal the denial of his motion to suppress. If it is determined that defendant pled guilty while properly reserving his right to appeal, review may then be sought by petition for writ of certiorari filed with this Court.

Dismissed.

Chief Judge EAGLES concurs.

Judge HUDSON dissents.

HUDSON, Judge dissenting.

It is clear that "when a defendant intends to appeal from a suppression motion denial pursuant to [N.C.G.S. § 15A-979(b) (1999)], he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized," otherwise he waives the provisions of the statute providing an appeal of right. *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 795 (1980). In the instant case, the "Organization of Trial Tribunal" appearing in the record states, in pertinent part: "The Defendant then plead guilty to the charge of Possession of a Controlled Substance and admitted to Habitual Felon Status, reserving his right to appeal the Court's denial of Defendant's motion to suppress pursuant to [G.S. § 15A-979(b)]." Defendant gave notice of appeal, which is also included in the record on appeal, and the same trial judge who accepted the plea appointed counsel to perfect the appeal. As evidenced by the "Notice of Approval of Defendant-Appellant's Proposed Record on Appeal," signed by an attorney for the State on 10 January 2000, and appearing in the record, the State expressly approved the record on appeal, including the statements appearing in the "Organization of Trial Tribunal." In addition, the State expressly concedes in its brief that defendant reserved his right to appeal. While I agree with the majority that these two factors may not establish as a matter of fact that defendant did reserve his right to appeal before the plea negotiations were finalized, as clearly as if it were written on the plea form, I believe these two factors are sufficient to satisfy the policy underlying the rule set forth in *Reynolds*.

The holding in *Reynolds* was based on the following reasoning:

> "Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained."

Reynolds, 298 N.C. at 397, 259 S.E.2d at 853 (quoting *Lefkowitz v. Newsome*, 420 U.S. 283, 289, 43 L. Ed. 2d 196, 202 (1975)). The Court further opined that in adopting G.S. § 15A-979(b), the legislature could not have intended to allow a defendant to contest a plea bargain in a situation in which the State gets "trapped" into agreeing to a plea bargain without any knowledge that the defendant intends to appeal the denial of his suppression motion. *Id.* The Court emphasized that what was lacking was a "clear understanding and expecta-

tion" on the part of the State and the Court at the time of the sentencing proceeding that the defendant intended to appeal the denial of his motion to suppress. *Id.* at 396, 259 S.E.2d at 853.

Furthermore, the majority cites to *Mason v. Commissioners of Moore*, 229 N.C. 626, 51 S.E.2d 6 (1948), for the proposition that the alleged omission at issue cannot be corrected by counsel by stipulation. However, *Mason* clearly raised an entirely different question than that posed by the instant case, in that it involved the jurisdictional effect of a failure to include Notice of Appeal in the record. In *Mason*, the record did not show that plaintiffs had excepted to the judgment entered, or had appealed therefrom, or had given any notice of appeal. The Court explained that without such entries, "this Court has no jurisdiction and is without authority to consider the questions attempted to be presented." *Id.* at 628, 51 S.E.2d at 7. For this reason, the purported appeal was dismissed. The instant case does not involve a failure to include in the record an entry showing that appeal has been taken, nor does the instant case involve a jurisdictional issue. Rather, the issue is whether defendant waived his appeal of right provided by G.S. § 15A-979(b) by failing to give notice, before plea negotiations were finalized, of his intention to appeal from the suppression motion denial. *See Reynolds*, 298 N.C. at 397, 259 S.E.2d at 853. In *State v. McBride*, 120 N.C. App. 623, 463 S.E.2d 403 (1995), *aff'd*, 344 N.C. 623, 476 S.E.2d 106 (1996), this Court discussed the distinction between Notice of Appeal and notice of intent to appeal:

> A Notice of Appeal is distinct from giving notice of intent to appeal. Notice of intent to appeal prior to plea bargain finalization is a rule designed to promote a "fair posture for appeal from a guilty plea." Notice of Appeal is a procedural appellate rule, required in order to give "this Court jurisdiction to hear and decide a case."

Id. at 625, 463 S.E.2d at 405 (citations omitted). The underlying issue, therefore, is whether this case comes before us upon a "fair posture for appeal," and this issue involves consideration of whether the State had a "legitimate expectation of finality in the conviction" that was based upon defendant's guilty plea. *See Reynolds*, 298 N.C. at 397, 259 S.E.2d at 853. I do not believe an appeal can be said to involve an unfair posture where the State has consented to the record containing a statement in the "Organization of Trial Tribunal" that defendant has reserved his right to appeal, and where the State in its own brief concedes that defendant reserved his right to appeal.

Finally, I believe considering defendant's appeal on the merits at this time would "prevent further expenditure of this Court's time and other expenses by the State." *State v. Morris*, 41 N.C. App. 164, 166, 254 S.E.2d 241, 242, *cert. denied*, 297 N.C. 616, 267 S.E.2d 657 (1979). As a practical matter, given that the State does not contest that defendant reserved his right to appeal before plea negotiations were finalized, all that will be achieved by dismissing this appeal and allowing defendant to seek an evidentiary hearing on the issue is an unnecessary delay in addressing the merits of defendant's appeal, and additional expenditures by the State.

For the reasons set forth herein, I respectfully dissent.

SPRINGER-EUBANK COMPANY, B.J. WILLIAMSON, INC., SMITH BROS. GAS CO., AND WALANE GAS COMPANY, INC., PLAINTIFFS v. FOUR COUNTY ELECTRIC MEMBERSHIP CORPORATION, AND FOUR COUNTY SERVICEPLUS, INC., DEFENDANTS

No. COA00-326

(Filed 20 March 2001)

Utilities— electric membership cooperative—distribution of natural gas

The trial court correctly dismissed as moot a declaratory judgment action seeking an injunction barring an electric membership cooperative from distributing propane gas where the General Assembly enacted legislation during the action which permitted electric membership corporations to continue present and former involvement in the sale and distribution of propane products.

Appeal by plaintiffs from order entered 13 October 1999 by Judge Ben F. Tennille in New Hanover County Superior Court. Heard in the Court of Appeals 25 January 2001.

Rountree & Seagle, L.L.P., by George Rountree, III, J. Harold Seagle, and Charles S. Baldwin, IV, for plaintiff-appellants.

Crisp, Page & Currin, L.L.P., by Cynthia M. Currin, and Johnson & Lambeth, by Robert White Johnson, for defendant-appellee Four County Electric Membership Corporation.

Moore & Van Allen, by Joseph W. Eason and Jonathan D. Sasser, for defendant-appellee Four County ServicePlus, Inc.

MARTIN, Judge.

Plaintiffs, who are four independent distributors and suppliers of propane gas in southeastern North Carolina, filed this action seeking a declaratory judgment and injunctive relief permanently enjoining defendants from distributing and supplying propane gas in that geographic area and requiring defendants to "divest themselves of their interests in" Four County Propane, L.L.C. ("Propane"). Defendant Four County Electric Membership Corporation ("Four County") is a non-profit corporation, existing and operating pursuant to the provisions of Chapter 117 of the North Carolina General Statutes, which distributes electric power to customers in Duplin, Sampson, Bladen, Pender, Columbus and Onslow counties. Defendant Four County ServicePlus, Inc. ("ServicePlus") was incorporated in 1997 and is a wholly-owned subsidiary of Four County. ServicePlus maintains a five member board of directors, three of whom are both outside directors and independent of Four County. It has its own officers, bylaws, accounting books, bank account and minutes. In August 1998, ServicePlus entered into a joint venture with Jenkins Gas and Oil Company ("Jenkins") forming a limited liability company, Propane, for the purpose of propane gas distribution. Both ServicePlus and Jenkins had a 50% interest in Propane.

Plaintiffs allege that defendants' conduct in distributing propane gas in eastern North Carolina is unlawful. Plaintiff Springer-Eubank Company alleges it lost twenty-two customers to Propane; the remaining plaintiffs allege that their market value has decreased as a result of Propane's entry into the market.

Both sides moved for summary judgment. While the motions were pending, the North Carolina General Assembly enacted Session Law 1999, Sec. 180, which amended G.S. § 117-18.1 and clarified the right of electric membership cooperatives to engage in activities related to the sale of propane. In July 1999, as a response to the amendment, ServicePlus sold its interest in Propane to Four County. Defendants then moved to dismiss plaintiffs' claims. The trial court entered an order dismissing plaintiffs' claims for lack of subject matter jurisdiction because the issue had been rendered moot by the passage of Session Law 1999, Sec. 180. Plaintiffs appeal this order and defendants cross-appeal earlier determinations by the trial court.

Plaintiffs assign error to the trial court's dismissal of their claims against ServicePlus and Four County. Plaintiffs contend Four County's activity in the propane gas business exceeds both its statutory and charter powers and is therefore unlawful.

" 'An act by a private . . . corporation is *ultra vires* if it is beyond the purposes or powers expressly or impliedly conferred upon the corporation by its charter and relevant statutes and ordinances.' " *Miesch v. Ocean Dunes Homeowners Ass'n, Inc.*, 120 N.C. App. 559, 563, 464 S.E.2d 64, 67 (1995), *disc. review denied*, 342 N.C. 657, 467 S.E.2d 717 (1996) (quoting *Rowe v. Franklin County*, 318 N.C. 344, 348-49, 349 S.E.2d 65, 68-69 (1986)). Four County's articles of incorporation, filed in December 1937, provide that it was "granted permission to form an Electric Membership Corporation" and state:

> [t]he corporation shall possess and be authorized to exercise and enjoy all of the powers, rights, and privileges granted to or conferred upon corporations of the character of this corporation by the laws of the State of North Carolina or hereinafter in force.

Four County's articles of incorporation, therefore, authorize it to exercise the powers and fulfill the purposes provided by statute to electric membership corporations.

The pertinent statute in this case is Chapter 117, Article 2, Section 18.1 of the North Carolina General Statutes. G.S. § 117-18.1(b), as amended by Session Law 1999, Sec. 180, provides:

> [a]n electric membership corporation may not form or organize a separate business entity to engage in activities involving the distribution, storage or sale of oil, as defined in G.S. 143-215.77(8), specifically including liquefied petroleum gases, but may acquire, hold, dispose of, and operate any interest in an existing business entity already engaged in these activities, subject to the other provisions of this section.

The trial court interpreted this provision as authorizing Four County's ownership of an interest in Propane. Because the relief sought by plaintiffs was injunctive, the trial court determined that the claims became moot upon its enactment.

Alleged errors in statutory interpretation are reviewable *de novo*. *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 499 S.E.2d 462, *disc. review denied*, 348 N.C. 692, 511 S.E.2d 643 (1998), *cert. denied*, 525 U.S. 1103, 142 L.Ed.2d 770 (1999). On appeal,

plaintiffs raise two issues of statutory interpretation: (1) whether Four County's activities constitute "form[ing] or organiz[ing]" a separate business entity or constitute "acquir[ing] or hold[ing]" an interest in an existing business entity, and (2) whether the statute applies retroactively in this instance.

Plaintiffs contend Four County's activity in the propane gas business is unlawful because such activity constituted the forming and organizing of a separate business entity, prohibited by the statute. According to plaintiffs, Four County entered into Propane as a new joint venture and therefore formed and organized a separate business. At the root of plaintiffs' argument is the assumption that this Court should "pierce the corporate veil" and view ServicePlus' activity in the propane market as that of Four County. Because we conclude that the statute authorizes Four County's involvement in the propane industry and applies retroactively, we need not determine whether ServicePlus' actions are, in fact, those of Four County.

"Where the language of a statute is clear and unambiguous . . . the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citation omitted). G.S. § 117-18.1(b) provides that an electric membership corporation "may acquire, hold, dispose of, and operate any interest in an *existing business entity* already engaged in these activities." (emphasis added). Propane was formed as a limited liability company in August 1998 for the purpose of distributing propane gas, and had four employees by October 1998. Thus, applying the clear and unambiguous language of the statute, Propane was an existing business which distributed propane gas upon the effective date of the statutory amendment.

Plaintiffs next contend Propane was nevertheless not a *lawfully* existing business at the time the amended statute took effect. They contend Four County was not authorized under the previous statute to engage in the distribution, storage or sale of propane gas, and therefore Four County's activities were unlawful. They argue the amended statute does not act retroactively to make those prior illegal activities lawful.

"It is a well established principal [sic] of law in this State that a statute is presumed to have prospective effect only and should not be construed to have a retroactive application unless such an intent is clearly expressed or arises by necessary implication from the terms of the legislation." *Wilson Ford Tractor, Inc. v. Massey-Ferguson,*

Inc., 105 N.C. App. 570, 573, 414 S.E.2d 43, 45, *affirmed*, 332 N.C. 662, 422 S.E.2d 576 (1992) (citations omitted). The statute does not expressly state that it operates retroactively; however, retroactive application of this statute under the facts of this case arises by implication from the language of the provision. The statute, as amended, provides: "an electric membership corporation . . . may acquire, *hold*, dispose of, and operate any interest in an existing business entity already engaged in these activities. . . ." N.C. Gen. Stat. § 117-18.1(b) (emphasis added). We believe the General Assembly's inclusion of the word "hold" is instructive. Although not defined in the statute, the word "hold" is defined in Black's Law Dictionary 731 (6th ed. 1990), as pertinent here, as "[t]o keep; to retain; to maintain possession of or authority over." Use of the word "hold" in the statute therefore evidences an acknowledgment by the General Assembly that electric membership corporations may already have interests in the sale or distribution of propane gas and that it desired to authorize their retention of such interests. We must therefore conclude that the General Assembly intended the statute to have retroactive application in this instance and that it authorizes Four County's past interest, if any, in Propane. As the trial court stated in its order, "[i]t would be illogical to hold that Four County could not continue to hold an interest, which the amendment now permits it to acquire, just because such interest was acquired prior to the amendment." Because we have held that the statutory amendment has retroactive application under the facts of this case, it is unnecessary for us to consider or determine whether or not Four County's activity, if any, in the propane industry prior to the amendment's enactment was lawful.

In this action, plaintiffs sought only declaratory and injunctive relief. Having held that the amended statute permits electric membership corporations to continue present and former involvement in the sale and distribution of propane products, we conclude the trial court was correct in determining it no longer had subject matter jurisdiction because the issue is moot.

> Whenever during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law. If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action.

Simeon v. Hardin, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994) (citation omitted). In the case before us, the question originally in controversy between the parties was answered by the General Assembly's enactment of Session Law 1999, Sec. 180. Accordingly, the claim against Four County is moot. Because plaintiffs' claim against ServicePlus is derivative of their claim against Four County, it is also moot. We therefore affirm the trial court's dismissal of all claims and need not address defendants' cross-assignments of error.

Affirmed.

Judges TIMMONS-GOODSON and THOMAS concur.

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES OBO LINDA RATTEREE, PLAINTIFF V. GERALD HAMLETT, DEFENDANT

No. COA00-138

(Filed 20 March 2001)

Child Support, Custody, and Visitation— support modification—not a clerical error—affected substantive rights—beyond trial court's authority

The trial court did not have authority under N.C.G.S. § 1A-1, Rule 60(a) to enter an order purportedly modifying its prior child support order entered nine years earlier that registered a South Carolina order and now attempts to add in its order that the prior South Carolina child support order is specifically nullified, because: (1) the modified order did not correct a clerical error under N.C.G.S. § 1A-1, Rule 60(a), but substantially changed the earlier order; and (2) the revisions impermissibly affected plaintiff mother's substantive rights to receive child support arrearages under a foreign consent judgment.

Appeal by plaintiff from order entered 30 November 1999 by Chief Judge James W. Morgan in Cleveland County District Court. Heard in the Court of Appeals 20 February 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Gerald K. Robbins and Associate Attorney General Brenda Eaddy, for plaintiff appellant.

Horn, Pack & Brown, P.A., by Becky J. Brown, for defendant appellee.

McCULLOUGH, Judge.

Two minor children were born to the marriage of plaintiff Linda Rutledge (now, Ratteree) and defendant Gerald Hamlett. Following their separation, plaintiff and defendant reached an agreement whereby plaintiff received custody of the two children. Defendant had reasonable visitation rights with the children and agreed to pay $450.00 each month for their support beginning 15 October 1984. The Family Court for York County, South Carolina (Family Court), granted a divorce to the parties by decree filed 9 October 1984, which incorporated the parties' agreement. By Order filed 20 July 1989, the Family Court granted the motion of the South Carolina Department of Social Services to restore the case to active status and to require defendant to resume making child support payments as previously ordered; the matter of defendant's arrearage was held in abeyance.

Following the entry of the 20 July 1989 order, defendant moved to Cleveland County, North Carolina. The following year, the South Carolina Department of Social Services made a request on behalf of plaintiff that the 20 July 1989 order be registered in North Carolina pursuant to the provisions of the Uniform Reciprocal Enforcement of Support Act (URESA). Defendant was notified of the request for registration and was represented by counsel at a hearing on the request. By order filed on 4 December 1990, a District Court Judge in Cleveland County ordered that the South Carolina order of 20 July 1989 be registered and that defendant pay the ordered amount of $450.00 per month beginning 15 December 1990. Defendant moved the Cleveland County District Court for a reduction in his child support obligation based on a change in his financial condition. That motion was granted by order entered on 30 January 1991 by District Court Judge James W. Morgan, whose order reduced defendant's child support obligation to $70.00 per week, and reduced his arrearage since the order was registered in North Carolina to $285.00. By Order filed 22 May 1991, Judge Morgan reduced defendant's support obligation to $40.00 per week, plus $5.00 per week on his arrearages. There were no appeals or requests to reconsider either of Judge Morgan's orders.

By letter dated 30 September 1996, an agent of the Paternity and Support Unit of the Cleveland County Department of Social Services notified Child Support Enforcement in South Carolina and plaintiff that it was closing the child support case because the parties' younger child had become eighteen years old, and defendant had paid all arrearages. Plaintiff notified defendant that he still owed a child support arrearage, and the South Carolina Family Court ordered defendant's wages withheld to satisfy his child support obligation and arrearage. Defendant responded that both children had reached the age of majority, and that he owed no arrearage in his support obligation.

The South Carolina Family Court concluded that North Carolina had "effectively modified" the 20 July 1989 South Carolina order, and that defendant had satisfied his obligation under the North Carolina order. On appeal, the South Carolina Court of Appeals held that the South Carolina Code

> clearly provides that a support order made by a court of this State is not nullified by a support order made by a court of another state unless specifically provided by the court. In this case, neither of the North Carolina orders specifically nullified the original South Carolina order. Section 20-7-1110 permits the existence of multiple support orders while requiring an obligor's payments be credited against amounts accruing under other orders.

Ratteree v. Hamlett, 330 S.C. 321, 325, 498 S.E.2d 888, 890 (1998). Accordingly, the South Carolina Court of Appeals reversed the order of the Family Court and remanded the case for a determination of defendant's accrued arrearage under the South Carolina order. *Id.* at 326, 498 S.E.2d at 891.

Defendant then filed a motion in the Cleveland County District Court pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure, asking that the Court correct its order of 30 January 1991 by adding a paragraph specifically nullifying the South Carolina judgment to the decretal portion of the order. By order entered 30 November 1999, Chief District Court Judge Morgan found that he intended to modify and nullify the South Carolina order in his order entered in 1991, and that his failure to use specific language accomplishing that purpose was a "clerical error." Judge Morgan concluded that his January 1991 order should be corrected, and amended it by completely rewriting the first paragraph of the decretal portion of his

order to provide that "the South Carolina Order is specifically nullified . . . ." Plaintiff appealed, assigning errors.

Plaintiff contends that the trial court's purported modification of its order entered nine years earlier did not correct a "clerical error," but substantially changed the earlier order, thereby prejudicially affecting her rights under the South Carolina child support order. We agree and vacate the order of the trial court.

Rule 60 of the North Carolina Rules of Civil Procedure is entitled "Relief from judgment or order." N.C. Gen. Stat. § 1A-1, Rule 60 (1999). Rule 60(a) allows a court to correct clerical errors in a judgment or order at any time, stating in pertinent part that:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders.

Id. This Court has consistently held that Rule 60(a) applies to clerical omissions or errors only, and may not be used to change the substantive rights of the parties. *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985), *disc. review denied*, 316 N.C. 377, 342 S.E.2d 895 (1986); *Insurance Co. v. Johnson*, 41 N.C. App. 299, 301, 254 S.E.2d 643, 644 (1979); *Snell v. Board of Education*, 29 N.C. App. 31, 33, 222 S.E.2d 756, 757 (1976).

In *Hinson*, plaintiff-wife sought a divorce from bed and board, custody, alimony and child support. She and defendant-husband entered into a consent judgment whereby plaintiff received exclusive possession of the marital residence, assuming all liability under the judgment for the mortgage, tax, insurance, and other payments arising on the property. The judgment further provided that "[u]pon a sale of said residence, the proceeds shall be divided equally by the parties." *Hinson*, 78 N.C. App. at 614, 337 S.E.2d at 663. Two years later, plaintiff filed a motion pursuant to Rule 60(a), seeking a correction to the judgment. She alleged that "the judgment should have provided that she be responsible for payments on the mortgage only while she resided in the house and that the sale proceeds should be divided equally after payment of the existing mortgage indebtedness." *Id.* at 614-15, 337 S.E.2d at 663. Otherwise, argued plaintiff, she could be forced to pay the entire mortgage indebtedness out of her share of the sale price. The trial court agreed that the oversight had been a cleri-

cal error and entered an order under Rule 60(a), adding the language "for so long as plaintiff continues to reside in the marital residence" following the name of the mortgage lender in the section where plaintiff's debts were listed, and inserting the word "net" before the word "proceeds" in the quoted sentence.

On appeal, this Court stated that "[w]e have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error" and determined that "[t]he relief granted . . . here clearly was substantive in nature and therefore not available under Rule 60(a)." *Id.* at 616, 337 S.E.2d at 664. Accordingly, the Court held that the trial court was without authority under Rule 60(a) to enter the order.

Here, the trial court substantially altered its earlier 30 January 1991 order, which provided in pertinent part:

> That the defendant's support obligation be and is hereby reduced and the defendant is ordered to pay into the Office of the Clerk of Superior Court of Cleveland County the sum of $70.00 per week for the use and benefit of his minor children, with the first payment to be made on or before Friday, February 1, 1991, and a like payment each and every week thereafter until further Order of the Court.

The trial court's amended order entered 30 November 1999 reads:

> That the Defendant's support obligation be and is hereby reduced, *that the South Carolina Order is specifically nullified*, and Defendant is ordered to pay into the Office of the Clerk of Superior Court of Cleveland County the sum of $70.00 per week for the use and benefit of his minor children, with the first payment to be made on or before Friday, February 1, 1991, and a like payment each and every week thereafter until further order of the Court.

(Emphasis added.)

The trial court's amendment, rather than merely correcting a clerical error, clearly and substantially altered its earlier order. Further, the change by the trial court prejudiced the rights of plaintiff to receive the amount of child support ordered by the South Carolina Court by effectively reducing the amount of that arrearage to zero. *See Buncombe County, ex rel. Andres v. Newburn*, 111 N.C. App. 822, 827, 433 S.E.2d 782, 785, *disc. review denied*, 335 N.C. 236, 439 S.E.2d 143 (1993) (vacating an order amended under Rule 60(a) because the

revisions impermissibly affected plaintiff's substantive rights to receive child support arrearages under a foreign consent judgment). We hold that the trial court was without authority under Rule 60(a) to enter such an order. Since the order was beyond the authority of the trial court, it is hereby

Vacated.

Judges GREENE and HUDSON concur.

LUNDY LANGSTON, PLAINTIFF v. CHARLES E. JOHNSON, SR., DEFENDANT

No. COA00-28

(Filed 20 March 2001)

Judgments— directive not in decretal portion—valid

A judgment containing an unequivocal directive that defendant pay child support constituted a decree of the court even though the directive was not contained in the decretal portion of the judgment.

Judge McCullough concurring in the result.

Appeal by plaintiff from order filed 12 March 1999 by Judge Kenneth C. Titus in Durham County District Court. Heard in the Court of Appeals 13 February 2001.

Tracy Hicks Barley & Associates, P.A., by Tracy Hicks Barley, for plaintiff-appellant.

Frances P. Solari for defendant-appellee.

GREENE, Judge.

Lundy Langston (Plaintiff) appeals an order filed 12 March 1999, dismissing Plaintiff's motion for contempt against Charles E. Johnson, Sr. (Defendant).

The record shows that on 22 March 1991, Plaintiff filed a *pro se* verified complaint for divorce in Durham County, seeking an absolute divorce from Defendant and "further relief as the Court may deem

just and proper." Both parties were present at the hearing on Plaintiff's complaint. On 6 June 1991, the trial court filed a judgment containing the following pertinent findings of fact:

> 7. That there were two children, Tari Krystal Aquia Johnson, born November 20, 1974 and Charles Edward Johnson, Jr., born October 17, 1979, born of the marriage of . . . Plaintiff and Defendant.
>
> 8. That Plaintiff is granted sole physical custody of the children and Defendant is granted liberal visitation rights.
>
> 9. That both Plaintiff and Defendant are granted joint legal custody.
>
> 10. That Plaintiff is responsible for major medical for both children and Defendant will be responsible for amounts not covered.
>
> 11. That Defendant is responsible for life insurance for both children.
>
> 12. That both Plaintiff and Defendant are equally responsible for college tuition for both children.
>
> 13. That Defendant is to pay $340, monthly, in child support to Plaintiff.

The 6 June 1991 judgment concluded: "IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the bonds of matrimony heretofore existing between Plaintiff and Defendant be, and they . . . hereby are, dissolved, and Plaintiff and Defendant are granted an absolute divorce from each other."

On 31 July 1997, Plaintiff filed a Motion and Notice of Hearing for Modification of Child Support Order, which the trial court heard on 4 September 1997. The trial court subsequently ordered, *inter alia*, the following:

> 1. That . . . [D]efendant shall forward to [P]laintiff an amount of $31.00. This amount constitutes [D]efendant's current child support obligation through October, 1997, when the minor child, Charles Edward Johnson, Jr., born October 17, 1979, shall reach majority.
>
> . . . .

3. That . . . [D]efendant is only obligated to pay one-half of the tuition per the previous court order entered between the parties on June 6, 1991.

. . . .

7. That . . . [D]efendant shall reimburse . . . [P]laintiff for one-half of the daughter's Fall, 1997, tuition at North Carolina State University.

In May 1998, Plaintiff filed a Motion to Show Cause for Failure to Pay Child Support, alleging Defendant had violated the 6 June 1991 judgment by failing to pay child support. The trial court thereafter issued an Order to Show Cause for Failure to Pay Child Support, stating that "there was probable cause that . . . Defendant is in contempt of Court in that he failed to pay $22,100.00 . . . in child support to . . . Plaintiff as he was ordered to do in the Order entered by this Court on June 6, 1991."

On 15 December 1998, the matter came before the trial court. Upon reviewing the court file and prior to the parties' arguments, the trial court found that, although the 6 June 1991 judgment contained findings of fact regarding child support, it "decreed and ordered only that the bonds of matrimony between the parties be dissolved" and there was no valid order regarding child support. The trial court, therefore, concluded it lacked jurisdiction to hear Plaintiff's motion for contempt. Accordingly, Plaintiff's motion was dismissed "due to a lack of jurisdiction by the court."

The dispositive issue is whether the trial court's 6 June 1991 judgment contained a valid order for Defendant to pay child support when the order requiring Defendant to pay child support was not contained in the decretal portion of the judgment.

Generally, a judgment is in a form that contains findings, conclusions, and a decree. The decretal portion of a judgment is that portion which adjudicates the rights of the parties. *See* 46 Am. Jur. 2d *Judgments* § 99 (1994). The failure to follow this precise form, however, is not fatal to the judgment. *Id.* § 83. "The sufficiency of a writing claimed to be a judgment is to be tested by its substance rather than its form." *Id.*; *see In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (appellate court not bound by trial court's classification of matter as a conclusion of law or a finding of fact).

In this case, the 6 June 1991 judgment contains an unequivocal directive that Defendant pay child support in the amount of $340.00 per month. Although this directive was not contained in the decretal portion of the judgment, it nonetheless constitutes a decree of the trial court. To hold otherwise would place form over substance, which this Court is not required to do.

Reversed and remanded.

Judge HUDSON concurs.

Judge McCULLOUGH concurs in result in separate opinion.

McCULLOUGH, Judge, concurring in the result.

I would also reverse the trial court's order, but on the grounds of equitable estoppel. The 6 June 1991 judgment was explicitly recognized as a child support order by both parties who were present when it was entered. Defendant also signed the order, thereby acknowledging his awareness of its contents. Both plaintiff and defendant reared their children and otherwise managed their affairs for seven years as if a valid order were in place. A subsequent order filed 12 January 1998 also acknowledged the 6 June 1991 order as a valid child support order. In his reply to plaintiff's Motion to Show Cause, defendant stated that he had "not willfully refused to make monthly child support payments as required under the previous and last order in this matter of June 6, 1991" and further, that "the parties both did not modify or change the previously entered court order, but rather, worked with one another based upon verbal agreement and physical locality of the child."

Under the facts of this case, defendant is equitably estopped from denying the validity of the 6 June 1991 order regarding defendant's duty to pay child support. In *Chance v. Henderson*, 134 N.C. App. 657, 663, 518 S.E.2d 780, 784 (1999), this Court held that, although the consent order entered by the trial court was invalid, defendant's subsequent actions "ratified and validated the Order," such that defendant was estopped from challenging the judgment. Where a party engages in positive acts that amount to ratification resulting in prejudice to an innocent party, the circumstances may give rise to estoppel. *Howard v. Boyce*, 254 N.C. 255, 265-66, 118 S.E.2d 897, 905 (1961). Further, " '[a] party who, with knowledge of the facts, accepts the benefits of a transaction, may not thereafter attack the validity of the transaction

to the detriment of other parties who relied thereon.' " *Yarborough v. Yarborough*, 27 N.C. App. 100, 105-06, 218 S.E.2d 411, 415, *cert. denied*, 288 N.C. 734, 220 S.E.2d 353 (1975) (quoting 3 Strong's N.C. Index 2d *Estoppel* § 4); *see also Amick v. Amick*, 80 N.C. App. 291, 294-95, 341 S.E.2d 613, 615 (1986) (defendant estopped from denying validity of separation agreement where plaintiff relied upon and performed obligations pursuant to terms thereof). In the instant case, defendant explicitly recognized and complied with (at least to some extent) the terms of the 6 June 1991 order for seven years. Nothing in the record indicates that defendant objected to or repudiated the order before the trial court, *sua sponte*, rejected the judgment as invalid as to child support.

Further, it is a well-established principle of law in North Carolina that no appeal lies from one superior court judge to another. *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987). The same rule also applies to district court judges. *Johnson v. Johnson*, 7 N.C. App. 310, 313, 172 S.E.2d 264, 266 (1970). Accordingly, one district court judge may not correct errors of law committed by another; such errors may only be corrected by an appellate court. *See id.* The 12 January 1998 order clearly recognized the validity of the 6 June 1991 child support order. By rejecting the 6 June 1991 order as invalid as to child support, the trial court also implicitly and unacceptably modified the 12 January 1998 order regarding defendant's child support obligations. Defendant did not appeal the 12 January 1998 order, which specifically references defendant's child support obligations under the previous 6 June 1991 judgment.

Upon fully reviewing the pleadings, the orders, and the parties' subsequent behavior pursuant to the orders, it is clear that both parties intended that defendant should pay monthly child support. I would hold that defendant is equitably estopped from denying the validity of the 6 June 1991 order and accordingly reverse the trial court's dismissal of plaintiff's motion for contempt.

DANIEL WILLIAM LACOMB AND GAIL ANN LACOMB, PLAINTIFFS v. JACKSONVILLE DAILY NEWS COMPANY, DEFENDANT

No. COA00-501

(Filed 20 March 2001)

Libel and Slander— newspaper article—substantial accuracy

Summary judgment was correctly granted for defendant newspaper in a defamation action arising from a report that defendants had been arrested for contributing to the delinquency of two minors and had been accused of "encouraging cigarette smoking; beer drinking and engaging in sex acts involving a 15-year-old boy and 16-year-old girl." Although plaintiffs contend that the article indicated that they had been arrested for engaging in sex acts with two juveniles, the structure of the newspaper article is at least as clear as the warrant in conveying that plaintiffs were charged with encouraging juveniles to act in specific ways. Defendant is not held to a standard of absolute accuracy and this article, taken as a whole, is a substantially accurate report of the allegations in the arrest warrant.

Appeal by plaintiffs from order entered 10 December 1999 by Judge Charles Henry in Onslow County Superior Court. Heard in the Court of Appeals 1 February 2001.

Jeffrey S. Miller and John W. Ceruzzi, for plaintiff-appellants.

Smith Helms Mulliss & Moore, L.L.P., by John A. Bussian, and Jonathan E. Buchan, for defendant-appellee.

MARTIN, Judge.

Plaintiffs were arrested 6 November 1998 and each charged with misdemeanor counts of contributing to the delinquency of two minors. The warrants alleged that plaintiffs "knowingly" did "cause, encourage and aid" the named juveniles "to commit an act, drinking beer and smoking cigarettes, and engage in a sex act, whereby that juvenile could be adjudicated delinquent." On 10 November 1998, the Jacksonville Daily News (defendant) published a three paragraph story about the arrest of plaintiffs in the local "Blotter" section of the newspaper. The article stated in part: "The two were both accused of encouraging cigarette smoking; beer drinking and engaging in sex acts involving a 15-year-old boy and 16-year-old girl." On 25 May 1999,

all charges against plaintiff Daniel Lacomb were dismissed; plaintiff Gail Lacomb later pled no contest to one count of giving cigarettes to a minor.

Plaintiffs filed the present action for defamation against defendant, alleging that the wording of the article indicated the plaintiffs had been arrested for engaging in sex acts with two juveniles. On 10 December 1999, the trial court granted defendant's motion for summary judgment in Onslow County Superior Court. Plaintiffs appeal.

Summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2000). Summary judgment is intended for the expeditious disposition of cases on their merits where no genuine issues of material fact exist and only questions of law are involved. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). No genuine issues of fact exist in the present case; the only issue is one of law, i.e., whether defendant's reporting of plaintiffs' arrest was "substantially accurate" under the conditional "fair report privilege." We hold that it was and affirm summary judgment in defendant's favor.

Although the fair report privilege has never been explicitly defined by North Carolina case law, the privilege nonetheless exists to protect the media from charges of defamation. In *Kinloch v. News & Observer Pub. Co.*, 314 F. Supp. 602, 606 (E.D.N.C. 1969), *affirmed*, 427 F.2d 350 (4th Cir. 1970), the federal district court, citing North Carolina law in a case involving a newspaper report of a hearing before the Alcohol Control Board, referred to a conditional or qualified privilege which protects "publication of matters of public interest." This conditional privilege refers to the protection afforded a newspaper when the account of an incident is substantially accurate:

> The law does not require absolute accuracy in reporting. It does impose the word "substantial" on the accuracy, fairness and completeness. It is sufficient if it conveys to the persons who read it a substantially correct account of the proceedings.

Id. at 607. Indeed, the United States Supreme Court, in attempting to balance the protection of private individuals from defamatory state-

ments against the need to encourage First Amendment freedoms, has recognized that some error is inevitable in reporting and publishing. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789 (1974). The fair report privilege flows from the absolute privilege which attaches to statements made "in the due course of a judicial proceeding." *Jarman v. Offutt*, 239 N.C. 468, 472, 80 S.E.2d 248, 251 (1954). Official statements made in a judicial proceeding "will not support a civil action for defamation." *Id.* This privilege includes statements made in arrest warrants. *Jones v. City of Greensboro*, 51 N.C. App. 571, 584, 277 S.E.2d 562, 571 (1981), *overruled on other grounds, Fowler v. Valencourt*, 334 N.C. 345, 345 S.E.2d 530 (1993). "[S]tatements in pleadings and other papers filed in a 'judicial proceeding' which are relevant or pertinent to the subject matter in controversy are cloaked with this absolute privilege." *Id.*

Courts in other jurisdictions have articulated the privilege protecting the media when reporting on official arrests:

> Recovery is further foreclosed by the privilege a newspaper enjoys to publish reports of the arrest of persons and the charges upon which the arrests are based, as well as other matters involving violations of the law. This privilege remains intact so long as the publication is confined to a substantially accurate statement of the facts and does not comment upon or infer probable guilt of the person arrested.

Piracci v. Hearst Corporation, 263 F.Supp. 511, 514 (D.Md. 1966), *affirmed*, 371 F.2d 1016 (4th Cir. 1967). Substantial accuracy is therefore the test to apply when a plaintiff alleges defamation against a member of the media reporting on a matter of public interest, such as an arrest.

In the present case, each of the four arrest warrants present essentially identical language:

> I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully did knowingly, while at least 16 years of age, cause, encourage and aid [the named juvenile, the named juvenile's age], to commit an act, drinking beer and smoking cigarettes, and engage in a sex act, whereby that juvenile could be adjudicated delinquent.

The article printed by the Daily News stated in full:

Delinquency of a minor

Daniel William LaComb, 32 and Gail Ann Lacomb, 31, both of 909 Gattis Road, Jacksonville were both arrested by Jacksonville Police and charged with contributing to the delinquency of a minor.

The two were both accused of encouraging cigarette smoking; beer drinking and engaging in sex acts involving a 15-year-old boy and 16-year-old girl.

The misdemeanor violations allegedly occurred on Sept. 26. The two were arrested Friday, according to warrants at the Onslow County Magistrate's Office.

Plaintiffs contend the ambiguous wording in the article implies that plaintiffs themselves engaged in sexual acts with the juveniles.

Although defendant's punctuation and sentence structure may have been grammatically lacking, we do not agree with plaintiffs that the wording of the article failed to achieve "substantial accuracy." The wording of the original arrest warrant was somewhat ambiguous. The warrant alleges plaintiffs encouraged the juveniles to commit "an act," but lists three separate "acts." Moreover, the phrase "drinking beer and smoking cigarettes" is set apart with commas from the third allegation in the series, "engage in a sex act," giving the potential impression that the sex act may have been a separate allegation from the other acts.

The structure of the newspaper article, absent the semicolon, is at least as clear as the warrant in conveying that plaintiffs were charged with encouraging juveniles to act in specific ways. Although the semicolon is admittedly misused in the sentence, its use does not cause the article to fail the substantial accuracy test when compared to the warrant. The first sentence explicitly states that plaintiffs were charged with contributing to the delinquency of a minor. The third sentence explicitly states that the violations were misdemeanors. We reiterate that defendant is not held to a standard of "absolute accuracy," but rather must convey to those who read the newspaper "a substantially correct account" of the arrests described in the warrants. *Kinloch* at 607. Taken as a whole, the newspaper article is a substantially accurate report of the allegations in the arrest warrant. We therefore affirm the trial court's grant of summary judgment in favor of defendant.

Affirmed.

Judges THOMAS and JOHN concur.

STATE OF NORTH CAROLINA v. DAVID JAMES MESSER

COA00-228

(Filed 20 March 2001)

Sentencing— structured—extraordinary mitigation—no deviation from the range specified for the class of offense and prior record level

The trial court did not err at a sentencing hearing where defendant pleaded guilty as an habitual felon to the charge of felony possession of marijuana when the trial court determined that it lacked the authority to use extraordinary mitigation to deviate from the applicable structured sentencing ranges for a defendant convicted of a Class C felony with a prior record level IV, because: (1) N.C.G.S. § 15A-1340.13(b) provides that the trial court can only deviate from the range specified for the class of offense and prior record level where there is an applicable statute that authorizes such deviation, and there is no such statute for this case; (2) N.C.G.S. § 15A-1340.13(e) provides that deviations for aggravated or mitigated punishment are allowed only in the ranges of minimum and maximum sentences of imprisonment; (3) defendant is precluded from benefitting from extraordinary mitigation under N.C.G.S. § 15A-1340.13(h)(3) when the statute prohibits its use by a defendant who has five or more prior record level points, and defendant in this case stipulated to eleven prior record level points; and (4) N.C.G.S. § 15A-1340.13(g) does not allow a trial court to impose a shorter minimum term of imprisonment than that which is required for the class of offense and prior record level at issue based on a finding of extraordinary mitigation.

Appeal by defendant from judgment and commitment entered 10 February 1999 by Judge Timothy L. Patti in Buncombe County Superior Court. Heard in the Court of Appeals 26 January 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Stewart L. Johnson, for the State.

Belser & Parke, P.A., by David G. Belser, for defendant-appellant.

CAMPBELL, Judge.

On 10 February 1999, defendant entered a plea of guilty to the charge of felony possession of marijuana. Defendant also pleaded guilty to being an habitual felon. Defendant appeals the judgment and commitment entered pursuant to his guilty pleas. Defendant contends the trial court erred in its determination that it did not have discretion to deviate from the applicable structured sentencing ranges for a defendant convicted of a Class C felony with a prior record level IV. We hold that the trial court did not err.

Because the only assignment of error brought forward by defendant is directed at sentencing, we need not recite the circumstances surrounding defendant's arrest. The pertinent facts and procedural history are as follows: On 10 February 1999, defendant pleaded guilty as an habitual felon to the charge of felony possession of marijuana, and a sentencing hearing was held. Defendant stipulated to eleven prior record points, which placed him in prior record level IV. Following the presentation of evidence at the sentencing hearing, the trial court found the existence of two statutorily enumerated mitigating factors, as well as five additional factors in mitigation. The trial court determined that these mitigating factors outweighed the lack of factors in aggravation, and that a sentence in the mitigated range was justified. The trial court also found the existence of extraordinary mitigation, but determined it lacked the authority (which it indicated it would have exercised, if available) to use extraordinary mitigation to deviate from the applicable structured sentencing ranges for a defendant convicted of a Class C felony with a prior record level IV. The trial court imposed a minimum sentence of 80 months and a maximum sentence of 105 months, within the mitigated range for sentencing a Class C felon with a prior record level IV.

Defendant's sole assignment of error is that the trial court erred in determining it lacked the authority to use extraordinary mitigation to deviate from the applicable structured sentencing ranges for a defendant convicted of a Class C felony with a prior record level IV. We disagree.

The Structured Sentencing Act (Act), under which defendant was sentenced, states that "[t]he sentence shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment *shall* be within the range specified for the class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment." N.C. Gen. Stat. § 15A-1340.13(b) (1999) (emphasis added). Further, N.C. Gen. Stat. § 15A-1340.13(e) states that "[d]eviations for aggravated or mitigated punishment are allowed *only* in the ranges of minimum and maximum sentences of imprisonment . . . ." N.C. Gen. Stat. § 15A-1340.13(e) (1999) (emphasis added). This appeal requires interpretation of these two provisions of the Act.

The foregoing provisions make it clear that in determining the minimum term of imprisonment the trial court can only deviate from the range specified for the class of offense and prior record level where there is an applicable statute that authorizes such deviation. In the case *sub judice,* the defendant has failed to bring to the Court's attention any authority that would authorize the deviation defendant is seeking. In fact, there is no statute that authorizes such a deviation. Further, although the trial court is authorized to deviate from the presumptive sentence ranges upon a finding of mitigation, such deviation must stay within the ranges of punishment prescribed by the Act.

Defendant contends that a trial court's finding of extraordinary mitigation gives it discretion under N.C. Gen. Stat. § 15A-1340.13(g) to deviate from the applicable sentencing ranges for a defendant sentenced as a Class C felon with a prior record level IV. Defendant argues that N.C. Gen. Stat. § 15A-1340.13(g) does not expressly state that a trial judge does not have discretion to impose a sentence that deviates from the minimum range upon a finding of extraordinary mitigation, and, therefore, the statute must be construed without such a limitation. We find defendant's argument unpersuasive for two reasons.

First, defendant is precluded from benefitting from extraordinary mitigation by operation of N.C. Gen. Stat. § 15A-1340.13(h)(3), which prohibits a trial court from using extraordinary mitigation when a defendant has five or more prior record level points. N.C. Gen. Stat. § 15A-1340.13(h) (1999). In the case *sub judice,* defendant stipulated to eleven prior record level points.

Second, there is nothing in the language of N.C. Gen. Stat. § 15A-1340.13(g) that would permit a trial court to impose a shorter

minimum term of imprisonment than that which is required for the class of offense and prior record level at issue based on a finding of extraordinary mitigation. N.C. Gen. Stat. § 15A-1340.13(g) allows a trial court to use extraordinary mitigation as a means of imposing an intermediate punishment for a class of offense and prior record level which requires imposition of an active punishment, in situations where an active punishment would be manifestly unjust. N.C. Gen. Stat. § 15A-1340.13(g) (1999). Extraordinary mitigation is only intended as a tool for dispositional deviation, and not as a tool to reduce the minimum term of an active sentence. Therefore, defendant's reliance on N.C. Gen. Stat. § 15A-1340.13(g) is misplaced.

For the foregoing reasons, we hold that a trial court lacks the authority to use a finding of extraordinary mitigation to deviate from the applicable structured sentencing ranges for a defendant convicted of a Class C felony with a prior record level IV. Accordingly, we conclude that there is no error in the trial court's judgment and commitment.

Affirmed.

Judges WALKER and HUNTER concur.

ANNE H. CRAIG v. THE ASHEVILLE CITY BOARD OF EDUCATION

No. COA00-175

(Filed 20 March 2001)

1. Schools and Education— probationary teacher—contract not renewed—appeal

A claim against a board of education for lost wages, humiliation, and emotional distress by a probationary teacher whose contract was not renewed was properly before the superior court even though a statute set forth an appeal process because the alleged injury occurred in 1996 and the amendment creating the appeal process was in 1997. N.C.G.S. § 115C-325(n).

2. Appeal and Error— appealability—denial of summary judgment—governmental immunity

The denial of summary judgment was immediately appealable where defendant claimed governmental immunity as an affirmative defense.

3. Immunity— governmental—probationary teacher—contract not renewed—emotional distress—action not in tort

Governmental immunity did not bar a probationary teacher's claims for lost wages, humiliation, and emotional distress arising from her contract not being renewed because the action was based upon an allegation of a statutory violation rather than a suit in tort. N.C.G.S. § 115C-325(m)(2).

Appeal by defendant from order denying summary judgment entered 6 December 1999 by Judge Loto G. Caviness in Buncombe County Superior Court. Heard in the Court of Appeals 11 January 2001.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, by S. Luke Largess for plaintiff-appellee.

Roberts & Stevens, by Elizabeth N. Rich for defendant-appellant.

THOMAS, Judge.

The Asheville City Board of Education, defendant, appeals from a denial of its summary judgment motion. For the reasons discussed herein, we affirm the trial court.

The facts are as follows: Plaintiff Anne Craig began working as a probationary third-grade teacher at Isaac Dickson Elementary School in 1993. A probationary teacher is one who has not achieved career-teacher status, but is certificated. *See* N.C. Gen. Stat. § 155C-325(a)(5) (1999). At the end of plaintiff's third year, Dickson principal Robert McGrattan and assistant principal Elaine Poovey recommended the non-renewal of plaintiff's contract to Superintendent Karen Campbell. Campbell concurred with them in her recommendation to defendant, which declined to renew plaintiff's contract. Defendant then denied plaintiff's request for a hearing before the full board.

Plaintiff brought suit against defendant, seeking damages for lost wages, humiliation, emotional distress and other compensable injuries. She alleged the board's decision not to renew her contract

was arbitrary and capricious and unlawfully based on personal reasons, all in violation of N.C. Gen. Stat. § 115C-325(m)(2). Defendant moved for summary judgment, which the trial court denied.

[1] Although neither party briefs the question, an issue exists concerning plaintiff's appeal from the board's decision. The legislature amended Chapter 115C in 1997 and set forth a specific appeal process for claimants in plaintiff's circumstances. *See* N.C. Gen. Stat. § 115C-325(n) (1999). However, in the instant case, plaintiff's alleged injury occurred in 1996 when there was no special statutory appeal procedure for probationary teachers.

Claims alleging a violation of section 115C-325(m)(2) give rise to a right of action that should be resolved by the court and not the school board. *See Sigmon v. Poe*, 528 F.2d 311 (4th Cir. 1975). Thus, because the amendment to section 115C-325(n) was not yet codified, plaintiff's claim was properly before the superior court even though the complaint was filed approximately two years after the non-renewal decision by defendant. This brings us to the present argument.

[2] Defendant contends the trial court erred in denying its motion for summary judgment because it is entitled to governmental immunity. Governmental immunity is an affirmative defense that serves to bar the plaintiff's tort claims against a sovereign. *Johnson v. York*, 134 N.C. App. 332, 335, 517 S.E.2d 670, 672 (1999). Plaintiff, however, contends this issue is interlocutory and not immediately appealable because plaintiff is not asserting a tort claim.

A ruling is interlocutory if it does not determine the issues but directs some further proceeding preliminary to a final decree. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). In general, interlocutory orders are not immediately appealable to an appellate court. *State ex rel. Employment Security Commission v. IATSE Local 574*, 114 N.C. App. 662, 663, 442 S.E.2d 339, 340 (1994). However, an interlocutory order may be heard in appellate courts if it affects a substantial right. *See* N.C. Gen. Stat. § 1-277(a) (1999). This Court has held that denial of a motion for summary judgment grounded on governmental immunity affects a substantial right and is immediately appealable. *Schmidt v. Breeden*, 134 N.C. App. 248, 517 S.E.2d 171 (1999).

We thus find defendant's claim is immediately appealable to this Court because it has claimed governmental immunity as an affirma-

tive defense. *See Moore v. Evans*, 124 N.C. App. 35, 476 S.E.2d 415 (1996).

[3] As to defendant's assignment of error, however, we disagree. Defendant sought to dismiss all of plaintiff's claims via governmental immunity. Yet governmental immunity is only effective as an affirmative defense against tort claims. *See Hallman v. Charlotte-Mecklenburg Board of Education*, 124 N.C. App. 435, 477 S.E.2d 179 (1996); *Orange County v. Heath*, 282 N.C. 292, 294, 192 S.E.2d 308, 309 (1972); *see also* N.C. Gen. Stat. § 115C-42 (1999). Plaintiff's claim for damages involved only a statutory violation. No tort was alleged in her complaint.

Defendant argues that plaintiff's claim for a statutory violation should be treated as a tort claim because traditional tort remedies such as damages for emotional distress and future lost wages are requested. We note section 115C-325(m)(2) does not set out exclusive remedies. Accordingly, any remedy available to plaintiff would be based on common law. *See Buchanan v. Hight*, 133 N.C. App. 299, 305, 515 S.E.2d 225, 230 (1999). The question of available remedies is not now before the Court and, therefore, we do not pass judgment on what specific remedies would be available. We further note that because defendant cites no authority to support its argument, it is deemed waived. *See* N.C.R. App. P. 28(b)(5) (1999).

Governmental immunity does not bar plaintiff's claims since this is not a suit in tort but an allegation of a statutory violation. We affirm the trial court's denial of defendant's motion for summary judgment.

AFFIRMED.

Judges MARTIN and TIMMONS-GOODSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 MARCH 2001

BROWN v. McCORKLE No. 00-220	Mecklenburg (98CVD12874)	No error
BUNCOMBE COUNTY FRIENDS FOR ANIMALS, INC. v. BLANKENSHIP No. 00-112	Buncombe (99CVS3978)	Affirmed
COLLINS v. LUFFMAN No. 00-238	Surry (92CVD54)	Reversed
FERRETIZ v. PARKWAY FORD, INC. No. 00-218	Forsyth (98CVS7762)	Affirmed
IN RE LYONS No. 00-725	Rockingham (96J68)	Affirmed
MULLIS v. ALLSTATE INS. CO. No. 00-145	Mecklenburg (99CVS136)	Vacated and remanded
ONSLOW COUNTY ex rel. YOUNG v. MIDDLETON No. 00-314	Onslow (91CVD3063)	Appeal dismissed
STATE v. BOWMAN No. 00-619	Wake (98CRS059819)	No error
STATE v. DAVIS No. 00-429	Surry (98CRS8742)	No error
STATE v. DUNCAN No. 00-670	Onslow (99CRS3840) (99CRS3841)	No error
STATE v. ELLIOTT No. 00-274	Cumberland (98CRS13707)	No error
STATE v. HAYDEN No. 00-714	Craven (99CRS15308) (99CRS15513) (99CRS15514)	No error
STATE v. HUNNICUTT No. 00-539	Bertie (99CRS621) (99CRS622) (99CRS623) (99CRS624) (99CRS628) (99CRS661) (99CRS2227) (99CRS2229)	No error

STATE v. JOHNSON No.00-841	Forsyth (99CRS022681)	No error
STATE v. KNOWLES No. 00-799	Forsyth (99CRS25905) (99CRS54748) (99CRS54749) (99CRS36189) (99CRS36190) (99CRS36191) (99CRS36192)	No error
STATE v. MILLIGAN No. 00-210	New Hanover (98CRS2970)	Affirmed
STATE v. SARTORI No. 00-749	Buncombe (96CRS6111) (96CRS54809) (96CRS54810) (96CRS059327) (97CRS000003)	Affirmed
STATE v. SCHAPIRO No. 00-194	Forsyth (98CRS33112)	No error
STATE v. WILLIAMS No. 00-713	Mecklenburg (97CRS18297) (97CRS18298) (97CRS18299) (97CRS19563)	No error; motion for appropriate relief allowed; judgment vacated in 97CRS19563

KEVIN E. HILL, PLAINTIFF v. ROBERT L. HILL AND BOB HILL ENTERPRISES, INC., DEFENDANTS

No. COA00-381

(Filed 3 April 2001)

1. Conversion— gift of store from father to son—possession of assets insufficient

The trial court erred by failing to grant a directed verdict for defendants on a conversion claim arising from an alleged gift of a store from father to son where the record did not contain substantial evidence that the assets were gifted to plaintiff. Plaintiff may have had possession, but possession alone does not constitute delivery. Defendants were not divested of right, title, and control of the assets.

2. Malicious Prosecution— trespass—probable cause

The trial court erred by not granting defendants a directed verdict on plaintiff's claim for malicious prosecution in an action arising from the alleged transfer of a store from father to son and a subsequent trespass charge where the record did not contain substantial evidence that defendants instituted the trespass proceeding without probable cause. Based on the undisputed evidence, defendants had probable cause to believe plaintiff was on defendants' premises without authorization after being notified by defendants that plaintiff was not to remain on the premises.

3. Abuse of Process— trespass—legal purpose

The trial court erred by failing to grant a directed verdict for defendants on an abuse of process claim arising from the alleged transfer of a store from father to son and a subsequent trespass action where the undisputed evidence showed that the process was used for the legal purpose of removing plaintiff from property owned by defendants and keeping plaintiff off this property subsequent to his removal.

Judge TYSON dissenting.

Appeal by defendants from judgment filed 28 September 1999, amended judgment filed 12 November 1999, and from denial of motions for summary judgment, judgment notwithstanding the verdict or, in the alternative, for a new trial by Judge Carl L. Tilghman in Carteret County Superior Court. Heard in the Court of Appeals 30 January 2001.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C.R. Wheatly, Jr. and C.R. Wheatly, III, for plaintiff-appellee.

Mason & Mason, P.A., by L. Patten Mason, and Ward and Smith, P.A., by Kenneth R. Wooten, for defendant-appellants.

GREENE, Judge.

Robert L. Hill (Hill) and Bob Hill Enterprises, Inc. (collectively, Defendants) appeal an amended judgment filed 12 November 1999, awarding Kevin E. Hill (Plaintiff) $450,001.00.[1]

The record shows that on 14 October 1996, Plaintiff filed a complaint against Defendants, alleging claims, in pertinent part, for conversion, malicious prosecution, abuse of process, and punitive damages. Plaintiff presented evidence at trial that Hill is the sole stockholder of Bob Hill Enterprises, Inc. In 1995, Bob Hill Enterprises, Inc. owned several businesses, including Discount City (the store), an appliance and furniture store located in Havelock, North Carolina. Plaintiff, Hill's son, began working at the store when he was fourteen years old, and he became manager of the store upon graduating from high school in 1983. In 1995, he was working as the manager of the store.

In late 1995, Hill contacted Ellis Nelson (Nelson) at the certified public accounting firm of McGladrey & Pullen to inquire about the procedure for transferring ownership of the store to Plaintiff. The accounting firm then prepared documents necessary for Plaintiff to obtain a federal employer identification number in his name, doing business as Discount City Super Store. The accounting firm also prepared an application for Plaintiff to obtain a sales tax number from the State Revenue Department in his name, doing business as Discount City Super Store.

Plaintiff testified at trial that in December 1995, Hill told Plaintiff he wished to transfer ownership of the store to Plaintiff effective 1 January 1996. Hill agreed to gift to Plaintiff the entire store, including its accounts receivable, inventory, bank account, and use of the build-

1. We note that the judgment in this case, dated 28 September 1999, awarded Plaintiff $630,001.00 following remittitur of a jury verdict awarding Plaintiff $6,800,001.00. The trial court, however, filed an amended judgment on 12 November 1999, following further remittitur of the jury verdict. Defendants give notice of appeal from both the judgment and amended judgment. Additionally, Defendants appeal the trial court's denial of their motion for judgment notwithstanding the verdict or, in the alternative, a new trial.

ing owned by Bob Hill Enterprises, Inc. In early December 1995, Nelson sent Plaintiff a letter describing how the transfer would occur. In December 1995, Hill telephoned First Citizens Bank and told bank officials to transfer the store's account to Plaintiff's name, doing business as Discount City Super Store. Plaintiff subsequently went to First Citizens Bank for the purpose of transferring the store's checking account into his name, doing business as Discount City Super Store. Plaintiff ordered new checks and signature cards reflecting his name on the store's account held by First Citizens Bank.

Beginning 1 January 1996, Plaintiff continued to operate the store in the same manner he had operated it prior to that date. Plaintiff paid the store's bills, purchased inventory, and sold inventory. Plaintiff also filed sales tax reports and made sales tax payments in his name, doing business as Discount City Super Store, in January and in March of 1996; however, these sales tax payments were made for sales tax owed from sales made in 1995. Subsequent to 1 January 1996, all supplier accounts remained in the name of Bob Hill Enterprises, Inc. and all inventory was purchased using these accounts. Although Plaintiff set up an account in his name to purchase bedding for the store, the order for bedding was subsequently canceled. Prior to January 1996, the store's employees were paid by payroll checks issued from Bob Hill Enterprises, Inc. After 1 January 1996, Bob Hill Enterprises, Inc. no longer issued payroll checks to the store employees; rather, Plaintiff paid the employees from the store's bank account in Plaintiff's name. Plaintiff testified that during January 1996, Hill occasionally came to the store to give him advice and to discuss details regarding the transfer in ownership of the store. During this time period, Bob Hill Enterprises, Inc. owned the real property upon which the store was located, and Defendants did not enter into a lease with Plaintiff for the premises.

In February 1996, a dispute arose between Hill and Plaintiff regarding a payment received by the store for appliances sold in December 1995. As a result of the dispute, Hill telephoned Plaintiff and "cussed" at him. Hill subsequently arrived at the store and continued to "cuss" at Plaintiff and a physical altercation ensued. During the altercation, Hill told Plaintiff he was " 'out of here' " and that Hill would " 'cut [Plaintiff] out of [the] inheritance.' " Plaintiff then left the store. The following day, Plaintiff arrived at the store and continued to run the business as usual. Hill came to the store a few days later and informed Plaintiff he was closing the store. Plaintiff responded that Hill could not close the store because the store

belonged to Plaintiff. Hill left the store and for several weeks thereafter Plaintiff continued to run the store.

On 12 March 1996, Havelock Chief of Police Michael Campbell (Campbell) went to see Plaintiff at the store. Campbell informed Plaintiff that Hill, by letter, requested that Plaintiff be removed from the store. The letter, which Campbell showed to Plaintiff, advised Plaintiff that as of 31 January 1996, Plaintiff had been removed as director of Bob Hill Enterprises, Inc., that as of 1 February 1996, Plaintiff had been removed as secretary of Bob Hill Enterprises, Inc., that "effective immediately" Plaintiff's employment with Bob Hill Enterprises, Inc. was terminated, and that Plaintiff was requested to "vacate" the store. The letter further stated that Plaintiff's continued presence at the store "will be considered trespassing and appropriate legal action will be taken against [Plaintiff]." Plaintiff showed Campbell documents purporting to reveal Plaintiff's ownership of the store, including bank account and sales tax identification numbers. Campbell then left the store and did not force Plaintiff to vacate the premises.

The following day, 13 March 1996, a Havelock police officer came to the store with a warrant charging Plaintiff with trespass. The officer arrested Plaintiff and took him before a magistrate, who placed Plaintiff under a $2,000.00 secured bond. As a condition of the bond, Plaintiff was prohibited from going to the store, from going to any other stores owned by Bob Hill Enterprises, Inc., and from having contact with Hill. At the time Plaintiff was arrested and taken from the store, the store had approximately $190,000.00 in inventory and $100,000.00 in accounts receivable. Upon his release on bond, Plaintiff returned to the store to find that it was locked, with no employees or customers inside. The store locks had been changed, and a "no trespassing" sign was posted on the premises. Plaintiff never returned to the store again. Plaintiff was tried on the trespass charge in Craven County District Court and the case was dismissed for lack of State's evidence. Hill subsequently transferred some of the store's inventory to other stores belonging to Bob Hill Enterprises, Inc. and sold the remainder of the business.

At the close of Plaintiff's evidence, Defendants made a motion to dismiss Plaintiff's claims against them. The trial court denied the motion.

Defendants presented evidence at trial that Hill did not intend to give Plaintiff the store; rather, he intended to sell the store to

Plaintiff. Hill testified he did not give the store to Plaintiff on 1 January 1996 and no transfer of the assets was ever made.

At the close of all the evidence, Defendants renewed their motion to dismiss Plaintiff's claims and the trial court denied the motion. The jury subsequently returned verdicts in favor of Plaintiff for $190,000.00 in property damage based on Plaintiff's claim for conversion, $110,000.00 for malicious prosecution, $1.00 for abuse of process, and $6,500,000.00 in punitive damages. By entry of judgment dated 28 September 1999, the trial court reduced the punitive damage award by remittitur to $330,000.00. On 8 October 1999, Defendants filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial. The trial court denied both motions, but filed an amended judgment on 12 November 1999 further reducing the punitive damage award to $250,000.00, and reducing the malicious prosecution award to $10,000.00.

The issues are whether: (I) the record contains substantial evidence Defendants gifted the assets of the store to Plaintiff and, if not, whether a directed verdict should have been granted in favor of Defendants on Plaintiff's conversion claim; (II) the record contains substantial evidence Defendants instituted a criminal proceeding against Plaintiff for trespass without probable cause and, if not, whether a directed verdict should have been granted in favor of Defendants on Plaintiff's malicious prosecution claim; and (III) the record contains substantial evidence Defendants instituted an action for trespass against Plaintiff in order to obtain a result not properly obtainable and, if not, whether a directed verdict should have been granted in favor of Defendants on Plaintiff's abuse of process claim.

Initially, we note Defendants did not make a motion for directed verdict at trial; rather, Defendants made a motion to dismiss Plaintiff's claims at the close of Plaintiff's evidence and at the close of all the evidence. "Only in an action tried without a jury may the defendant move for an involuntary dismissal [under Rule 41 of the North Carolina Rules of Civil Procedure] on the ground that upon the facts and the law the plaintiff has shown no right to relief." *Beam v. Kerlee*, 120 N.C. App. 203, 213, 461 S.E.2d 911, 919 (1995), *cert. denied*, 342 N.C. 651, 467 S.E.2d 703 (1996). In this case, therefore, the proper motion for Defendants to make to challenge the sufficiency of the evidence would have been a motion for directed verdict. *See id.* We, nevertheless, elect to treat Defendants' motions to dis-

miss as motions for directed verdict in order to reach the merits of Defendants' appeal. *See Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999) (electing to treat improper motion for directed verdict as Rule 41(b) motion in order to pass on merits of trial court ruling).

A moving party is entitled to a directed verdict against the party bearing the burden of proof when, viewing the evidence in the light most favorable to the party bearing the burden of proof, there is no substantial evidence to support that party's claim. *Cobb v. Reitter*, 105 N.C. App. 218, 220, 412 S.E.2d 110, 111 (1992). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

I

[1] Defendants argue Plaintiff did not present substantial evidence Defendants gifted to Plaintiff the store merchandise, accounts receivable, equipment, furnishings, and records (the assets); thus, Defendants were entitled to a directed verdict on Plaintiff's conversion claim. We agree.

Plaintiff's claim for conversion is based on his alleged ownership of the assets, which Plaintiff claims were gifted to him by Defendants on 1 January 1996.[2] Plaintiff argues that subsequent to this gift, Defendants transferred some of the assets to other stores owned by Bob Hill Enterprises, Inc. and sold the remaining assets.

"Conversion is defined as 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.' " *Gallimore v. Sink*, 27 N.C. App. 65, 67, 218 S.E.2d 181, 183 (1975) (quoting *Wall v. Colvard, Inc.*, 268 N.C. 43, 49, 149 S.E.2d 559, 564 (1966)). Thus, a party cannot convert assets belonging to him.

"In order to constitute a valid gift, there must be present two essential elements: 1) donative intent; and 2) actual or constructive

2. Plaintiff's claim for conversion does not include a claim against Defendants for conversion of the store's bank account; thus, whether the bank account was gifted to Plaintiff is not at issue in this case. We, nevertheless, note the undisputed evidence shows Plaintiff retained possession of all funds in the store's bank account and Plaintiff, therefore, would have no ground to claim these funds had been converted by Defendants.

delivery." *Courts v. Annie Penn Memorial Hospital*, 111 N.C. App. 134, 138, 431 S.E.2d 864, 866 (1993). Delivery "must divest the donor of all right, title, and control over the property given." *Id.* Delivery of a gift " 'must be as perfect and as complete as the nature of the property and attendant circumstances will permit. . . . If actual delivery is impracticable, then there must be some act *equivalent* to it.' " *Huskins v. Huskins*, 134 N.C. App. 101, 105, 517 S.E.2d 146, 148 (1999) (emphasis added) (quoting 38A C.J.S. *Gifts* § 94 (1996)), *cert. denied*, 351 N.C. 355, — S.E.2d — (2000).

In this case, the evidence, viewed in the light most favorable to Plaintiff, shows: in December 1995, Hill expressed an intent to give Plaintiff the store on 1 January 1996; in January 1996, Plaintiff continued to operate the store as he always had done, which included selling inventory and placing orders for inventory; subsequent to 1 January 1996, all supplier accounts remained in the name of Bob Hill Enterprises, Inc.; Plaintiff set up an account in his name to purchase bedding for the store, though the order for bedding was subsequently canceled; beginning in January 1996, Plaintiff paid employees, who had previously been paid by Bob Hill Enterprises, Inc., out of the store account which had been transferred to Plaintiff's name in December 1995; the building occupied by the store was at all times owned by Bob Hill Enterprises, Inc.; and Plaintiff did not enter into any lease of the premises or pay any rent for the use of the premises. The evidence, which was not controverted, shows all store inventory purchased after 1 January 1996 was purchased using the supplier accounts of Bob Hill Enterprises, Inc. The record contains no evidence the ownership of inventory purchased prior to 1 January 1996 which remained in the store subsequent to that date was transferred to Plaintiff. Additionally, the record does not contain any evidence that ownership of accounts receivable or store equipment was transferred to Plaintiff from Bob Hill Enterprises, Inc. Finally, the real property itself, upon which the store was located, remained under the ownership of Bob Hill Enterprises, Inc. and Plaintiff did not enter into any lease for the use of the real property. Thus, the record does not contain any evidence that subsequent to 1 January 1996, the alleged date of the gift, Defendants were divested of "right, title, and control" over the assets. While Plaintiff may have had possession of the assets, possession alone does not constitute delivery. *Smith v. Smith*, 255 N.C. 152, 155, 120 S.E.2d 575, 578 (1961) (possession by donee insufficient to show delivery when there is no evidence donor "divest[ed] himself of all right and title to, and control of, the gift"). Although Plaintiff argues in his brief to this Court that the transfer of

the bank account to Plaintiff is some evidence the assets were delivered to him, Plaintiff's ownership of the bank account is not relevant to whether Plaintiff had "right, title, and control" over the assets. This is because Defendants could gift the bank account to Plaintiff without delivering to Plaintiff the other assets of the store. The record, therefore, does not contain substantial evidence the assets were gifted to Plaintiff. Accordingly, the trial court erred by failing to grant a directed verdict for Defendants on Plaintiff's conversion claim, as Defendants could not convert assets which belonged to them.

II

[2] Defendants argue the trial court erred by failing to grant Defendants a directed verdict on Plaintiff's claim for malicious prosecution. We agree.

"A person commits the offense of second degree trespass if, without authorization, he enters or remains on premises of another: (1) After he has been notified not to enter or remain there by the owner . . . ." N.C.G.S. § 14-159.13 (1999).

"In order to recover in an action for malicious prosecution, plaintiff must establish that defendant: (1) instituted, procured or participated in the criminal proceeding against plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of plaintiff." *Williams v. Kuppenheimer Manufacturing Co.*, 105 N.C. App. 198, 200, 412 S.E.2d 897, 899 (1992). Probable cause is " 'the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution.' " *Id.* at 201, 412 S.E.2d at 900 (quoting *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978)). When the facts are not in dispute, the question of whether probable cause exists is a question of law. *Id.*

In this case, the undisputed evidence shows Bob Hill Enterprises, Inc. owned the premises upon which the store was located; Plaintiff did not enter into a written or unwritten lease with Bob Hill Enterprises, Inc. to occupy the premises; on the day prior to his arrest for trespass, Plaintiff received written notification that "effective immediately" he was no longer employed by Bob Hill Enterprises, Inc.; and the written notification requested that Plaintiff "vacate" the premises and notified Plaintiff that his continued presence at the store would be "considered trespassing." Based on this undisputed evidence, Defendants had probable cause to believe Plaintiff was on Defendants' premises without authorization after

being notified by Defendants that Plaintiff was not to remain on the premises. The record, therefore, does not contain substantial evidence Defendants instituted the trespass proceeding without probable cause. Accordingly, Defendants were entitled to a directed verdict on Plaintiff's malicious prosecution claim.

III

[3] Defendants argue the trial court erred by failing to grant a directed verdict in favor of Defendants on Plaintiff's abuse of process claim. We agree.

Abuse of process is " 'the malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable under it is attended to be secured.' " *Fowle v. Fowle*, 263 N.C. 724, 728, 140 S.E.2d 398, 401 (1965) (quoting *Melton v. Rickman*, 225 N.C. 700, 703, 36 S.E.2d 276, 278 (1945)). Evidence is insufficient to support an action for abuse of process when the process instituted "was used only for the purpose for which it was intended, and the result accomplished was warranted and commanded by the writ." *Id.*

In this case, the process instituted against Plaintiff by Defendants was a criminal charge of second-degree trespass. The undisputed evidence shows the process was used for the lawful purpose of removing Plaintiff from property owned by Defendants and keeping Plaintiff off of this property subsequent to his removal. This result was permitted based on the warrant for Plaintiff's arrest and his subsequent bond. The record, therefore, does not contain substantial evidence of Plaintiff's abuse of process claim. Accordingly, Defendants were entitled to a directed verdict on Plaintiff's abuse of process claim.

Because directed verdicts should have been granted in favor of Defendants on Plaintiff's claims for conversion, malicious prosecution, and abuse of process, we reverse the trial court's 28 September 1999 judgment and 12 November 1999 amended judgment. Furthermore, because we reverse these judgments, we need not address Defendants' additional assignments of error.

Reversed.

Judge JOHN concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

I would hold that the trial court did not err in denying defendants' motions to dismiss and judgment notwithstanding the verdict, or new trial, on plaintiff's claims for conversion, malicious prosecution, and abuse of process. I would therefore reach defendants' additional assignments of error to the following trial court rulings: (1) the admission of rebuttal testimony from Hill's ex-wife; (2) the failure to allow counsel for the parties to make closing arguments on the issue of punitive damages; (3) the admission of hearsay statements; and (4) the failure to find that plaintiff's counsel violated the North Carolina Rules of Professional Conduct by referring to Hill as a "liar".

I would hold that defendants received a trial free of prejudicial error. Accordingly, I respectfully dissent.

I. Denial of motions to dismiss

I disagree with the majority's opinion that the trial court erred in denying defendants' motions to dismiss at the close of plaintiff's evidence, and at the close of all evidence. The standard of review for this Court on the trial court's denial of a motion for directed verdict is "whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury." *Fulk v. Piedmont Music Center*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000) (citing *Abels v. Renfro Corp.*, 335 N.C. 209, 214-15, 436 S.E.2d 822, 825 (1993)) (emphasis supplied).

A directed verdict should be granted in favor of the moving party only where " 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and 'if the credibility of the movant's evidence is manifest as a matter of law.' " *Law Offices of Mark C. Kirby, P.A. v. Industrial Contractors, Inc.*, 130 N.C. App. 119, 123, 501 S.E.2d 710, 713 (1998) (quoting *Lassiter v. English*, 126 N.C. App. 489, 493, 485 S.E.2d 840, 842-43, *disc. review denied*, 347 N.C. 137, 492 S.E.2d 22 (1997)).

The majority fails to review the evidence in the light most favorable to plaintiff, nor does it afford plaintiff the benefit of every reasonable inference to be drawn therefrom. I cannot agree that the credibility of the evidence in this case is manifest as a matter of law, or that the evidence so clearly establishes the matters at issue that no

reasonable inference to the contrary may be drawn. The jury's verdict in favor of plaintiff, and the trial court's denial of judgment notwithstanding the verdict, or new trial, establishes that reasonable inferences to the contrary were, in fact, drawn by those who viewed the witnesses, heard the testimony, and personally examined the evidence presented at trial.

The vast majority of the evidence presented was witness testimony. The testimony was often contradictory. I cannot agree with the majority that the credibility of the crucial and sometimes contradictory evidence in this case is so clear that it can be ruled upon as a matter of law. The effect of the majority is to usurp the jury's function in weighing credibility of the witnesses and the other evidence presented.

A. Evidence of gift

I disagree with the majority that the evidence of gift, viewed in the light most favorable to plaintiff, conclusively establishes that there is no reasonable inference that Hill gifted the store to plaintiff, thereby precluding plaintiff's claim for conversion. Both the trial court and the finders of fact found to the contrary.

"In order to constitute a valid gift, there must be present two essential elements: 1) donative intent; and 2) actual or constructive delivery." *Huskins v. Huskins*, 134 N.C. App. 101, 104, 517 S.E.2d 146, 148 (1999), *cert. denied*, 351 N.C. 355, —— S.E.2d —— (2000). There is "no absolute rule as to the sufficiency of a delivery which is applicable to all cases." *Id.* at 105, 517 S.E.2d at 148. Delivery may be actual, constructive, or symbolic, and must only be " 'as perfect and as complete as the nature of the property and attendant circumstances will permit.' " *Id.* (quoting 38A C.J.S. Gifts § 94 (1996)).

The evidence presented showed that in late 1995, Hill contacted Ellis Nelson at the certified public accounting firm of McGladrey & Pullen to inquire about the procedure for transferring the store to plaintiff. Mr. Nelson sent Hill a letter in November 1995 detailing the procedure for transferring the store to plaintiff. The accounting firm prepared documents by which plaintiff obtained a federal employer identification number in his name, doing business as ("d/b/a") "Discount City Super Store." The accountants also prepared an application for the State Revenue Department for a sales tax number in plaintiff's name, d/b/a Discount City Super Store. Said application was filed and the tax number was issued.

Plaintiff testified that in December 1995, Hill told plaintiff he wished to transfer the store to plaintiff's name effective 1 January 1996. Plaintiff testified that Hill agreed to gift to plaintiff the entire store, including its accounts receivable, inventory, bank account, and use of the building owned by the Corporation. On 7 December 1995, McGladrey & Pullen sent plaintiff a letter describing how the transfer would occur.

Plaintiff testified that the transfer process began in December 1995 when Hill contacted First Citizens Bank. Hill told bank officials to transfer the store's account to plaintiff, d/b/a Discount City Super Store. Thereafter, plaintiff went to First Citizens Bank and the store's checking account was transferred to plaintiff's ownership. Plaintiff ordered new checks and executed signature cards reflecting plaintiff's ownership of the store.

Michael Thompson, a Vice-President at the First Citizens Bank in Havelock verified his signature on a bank document stating the following:

> In late December, 1995, per a phone conversation with Bob Hill of Bob Hill Enterprises, Inc., First Citizens was authorized to change the name of the account to 27822 70469 from Bob Hill Enterprises, Inc., DBA Discount City to Discount City Super Store, which is the name Kevin E. Hill assumed for his business.

(emphasis supplied).

Joseph Simpson, store employee, testified to a conversation he had with Hill wherein Mr. Simpson told Hill about a customer complaint. Hill responded that "starting first of the year, you can refer all of [the complaints] to [plaintiff] because the store is going to be his and all of the headaches that come with it."

Beginning 1 January 1996, plaintiff operated the store, paid the store's bills, and employees' wages and social security taxes, purchased and sold new inventory, and filed sales tax reports in the name of Kevin E. Hill d/b/a Discount City Super Store. Plaintiff testified that during January 1996, Hill came by the store occasionally to give plaintiff advice on running the store. At no time during these visits did Hill indicate that he had not transferred the store to plaintiff, or that the business still belonged to the corporate defendant. Rather, after 1 January 1996, Hill regularly discussed with plaintiff the details of the transfer and of setting up the new accounts in plaintiff's name. There is no evidence that Hill ever expressed a belief that he

maintained control over the store prior to the disagreement and ensuing physical altercation between plaintiff and Hill on 5 February 1996.

Prior to January 1996, the store's employees were paid by payroll checks issued from the corporate defendant. After 1 January 1996, the Corporation no longer issued payroll checks to the store employees. Plaintiff paid all store employees from store accounts that had been transferred into his name. Mr. Simpson testified that he received his last pay check from the Corporation in December 1995. He testified that he was told by an employee of the corporate defendant that the reason for the change was that "the store is [plaintiff's] January 1st. [Hill] gave it to [plaintiff] and he will be paying you from now on."

The majority's opinion relies heavily on the fact that after 1 January 1996, the store's new inventory was still being purchased from supplier accounts under the corporate defendant's name. The fact that not all accounts had been officially changed to plaintiff's name only five weeks into a transfer of a business does not support a conclusion that a valid transfer of the business did not occur. *See Huskins v. Huskins*, 134 N.C. App. at 105, 517 S.E.2d at 148 (there is "no absolute rule as to the sufficiency of a delivery which is applicable to all cases."). Delivery may be actual, constructive, or symbolic, and must only be " 'as perfect and as complete as the nature of the property and attendant circumstances will permit.' " *Id.* (quoting 38A C.J.S. Gifts § 94 (1996)) (emphasis supplied).

Plaintiff testified that various purchase accounts and supplier accounts were in the process of being changed to plaintiff's name, and that sale revenues were placed in the store's account under plaintiff's ownership. Plaintiff testified that the paperwork on changing ownership on all accounts was in the process of being completed when plaintiff was arrested for trespass and prevented from returning to the store, at Hill's direction. The majority's reliance on supplier accounts is misplaced.

The majority's focus on the fact that no lease was executed for the premises between plaintiff and Hill is also misplaced. Assuming no lease existed, that issue is irrelevant to whether Hill gifted the business and all of its assets to plaintiff. The presence of a gratuitous lease, given the familial relationship between the parties, is not unusual, nor is it of consequence to the issue of a valid gift of the business, which is personal property.

Also unpersuasive is defendants' argument that Hill did not have the authority to transfer the store to plaintiff because the store was owned by the Corporation. The evidence establishes that Hill was the Corporation's sole stockholder and sole member of its board of directors. He had complete authority and dominion over the functioning of his business, and he maintained the ability to transfer the corporate assets as he deemed necessary. I would also overrule this assignment of error.

This Court must view this evidence in the light most favorable to plaintiff, giving plaintiff the benefit of every reasonable inference to be drawn therefrom. *See Fulk*, 138 N.C. App. at 429, 531 S.E.2d at 479. The evidence was sufficient to warrant the jury's consideration on the issues of Hill's intent to give plaintiff the business as of 1 January 1996, and Hill's actual or constructive delivery of that business to plaintiff as of that date. The majority must assume that every item in the store, including plaintiff's checks and bank records, belonged to defendants in order to defeat plaintiff's claim for conversion, when viewed in the light most favorable to plaintiff. I would hold that plaintiff's claim, based on conversion of the store's assets, was appropriately submitted to the jury.

B. Malicious prosecution

I disagree with the majority's holding that the jury was not entitled to consider the issue of malicious prosecution. In order to survive a motion for directed verdict on a claim of malicious prosecution, a plaintiff must show evidence that the defendant " '(1) instituted, procured or participated in the criminal proceeding against [the] plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of [the] plaintiff.' " *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (quoting *Williams v. Kuppenheimer Manufacturing Co.*, 105 N.C. App. 198, 200, 412 S.E.2d 897, 899 (1992)). A plaintiff may establish the element of malice by showing that the defendant "was motivated by personal spite and a desire for revenge" or that the defendant acted in a manner showing " 'reckless and wanton disregard' " for the plaintiff's rights. *Moore v. City of Creedmoor*, 345 N.C. 356, 371, 481 S.E.2d 14, 24 (1997) (quoting *Jones v. Gwynne*, 312 N.C. 393, 405, 323 S.E.2d 9, 16 (1984)).

On this claim, plaintiff produced evidence that a dispute arose between plaintiff and Hill in February 1996. Plaintiff claimed that he needed to pay supplier invoices from $17,000.00 paid by the United

States government for appliances sold by the store to the Department of Defense in December 1995. Plaintiff testified that, prior to transfer of the store, it was customary for the Corporation to deposit all revenues into the account of the particular store from which the sales were made. Plaintiff testified that the corporate cashier called him and told him a $17,000.00 check was there for him to retrieve. Plaintiff went to the corporate office on 5 February 1996 to get the check, but upon arrival, was told that Hill had instructed the cashier not to give plaintiff the check.

Plaintiff testified that, upon his return to the store, Hill called to berate him for attempting to retrieve the check. Plaintiff testified that Hill "cussed" at him and told plaintiff the money was Hill's. Plaintiff responded that the money was for merchandise sold, and that the money was needed to pay the bills. Plaintiff testified that Hill was "cussing [him] out so bad" that he hung up the phone.

Hill arrived at the store moments later. Plaintiff testified that Hill continued to "cuss" at him, while plaintiff informed Hill that the money belonged in the store's account and was needed to pay bills. Plaintiff testified that Hill swung at him with his fists. A physical altercation ensued, in front of the store's employees, during which Hill told plaintiff he was "out of here" and that Hill would "cut [plaintiff] out of [the] inheritance." Plaintiff left the store to avoid further spectacle.

The following day, plaintiff arrived at the store and continued to run the business as usual. Hill came to the store days later and informed plaintiff that he was closing the store. Plaintiff responded that Hill could not close the store because the store belonged to plaintiff. Hill left the store. For several weeks afterward, plaintiff ran the store as usual.

On 12 March 1996, the Havelock Chief of Police, Michael Campbell, came to see plaintiff at the store. Chief Campbell informed plaintiff that Hill had requested by letter that plaintiff be removed from the store. The letter advised plaintiff that as of 1 February 1996, plaintiff's employment with the Corporation was terminated and he was required to vacate the premises. Plaintiff showed Chief Campbell the documents revealing plaintiff's ownership of the store, including the bank account and sale's tax identification numbers.

Plaintiff testified that, upon viewing plaintiff's documentation, Chief Campbell responded, "I am not going to do this. . . . This is

wrong . . . . I am going to go back and tell [Hill] that I am not going to tell you to leave the premises or remove you from here." Chief Campbell then warned plaintiff that if Hill "sees a magistrate and convinces him somehow . . . the Havelock police might have to come back."

The following day, 13 March 1996, a Havelock police officer came to the store with a warrant charging plaintiff with trespass. The officer arrested plaintiff at the store and took him to the magistrate, Thomas Mylett. Magistrate Mylett placed plaintiff under a $2,000.00 secured bond. As a condition of the bond, plaintiff was prohibited from going to the store, from going upon any of the Corporation's property, and from having contact with Hill. Plaintiff testified that at the time he was arrested and taken from the store, the store had approximately $190,000.00 in inventory, and $100,000.00 in accounts receivable.

Upon his release on bond, plaintiff returned to the store to find that it was locked, with no employees or customers inside. The store locks had been changed, and "no trespass" signs were posted on the premises. Plaintiff never returned to the store again. He testified that Hill transferred some of the store's inventory to other stores that still belonged to the Corporation, and sold the remainder of the business. Plaintiff was tried on the trespass charge in Havelock District Court. The case was dismissed for lack of State's evidence.

I would hold that, viewing this evidence in the light most favorable to plaintiff, as we are required to do, sufficient evidence exists of each element of plaintiff's malicious prosecution claim to submit the issue to the jury. The evidence is conclusive that Hill initiated the prosecution, and that the charge was eventually dismissed in favor of plaintiff. The evidence further established that on 12 March 1996, Chief Campbell came to the store to remove plaintiff from the premises upon Hill's request. Upon review of the documentation of Kevin's ownership, Chief Campbell did not remove Kevin. Instead, he stated to Kevin that he was "not going to do this," that removing plaintiff from the store was "wrong," and that he would tell Hill that plaintiff could not be removed from the premises.

Nevertheless, plaintiff was arrested and physically removed from the store at Hill's request on 13 March 1996. Plaintiff was placed under a $2,000.00 secured bond at Magistrate Mylett's office, and detained for several hours. Plaintiff's bond was conditioned upon his

not returning to any corporate premises, including plaintiff's own store, and having no contact with Hill. Evidence was introduced to show that the warrant and bond were issued as a result of Hill's personal relationship with Magistrate Mylett, as Chief Campbell had warned.

After being released on bond, plaintiff returned to the store to find that "no trespass" signs had been posted. The store locks had been changed, and plaintiff was unable to gain access to the store. Plaintiff was unable to obtain his records or personal effects from the store. The store's inventory was transferred to other stores still owned by the Corporation. After his arrest, plaintiff never re-entered the store. He lost his inventory, his accounts receivable and records, and he lost any interest he had in the business, which defendants later sold.

This evidence, viewed as to give plaintiff the benefit of every reasonable inference, is sufficient to overcome a motion for directed verdict on the elements of probable cause and malice. Defendants used criminal process to obtain a *de facto* injunction prohibiting plaintiff from accessing the store. Plaintiff's arrest, detention, and prosecution enabled Hill to obtain the desired result without having to submit to civil process. The majority's ruling on this issue as a matter of law again disregards the proper standard of review, which requires that a motion for directed verdict be denied where, in the light most favorable to plaintiff, there exists a reasonable inference to the contrary. See, *e.g.*, *Fulk*, *supra*; *Abels*, *supra*; *Law Offices of Mark C. Kirby, P.A.*, *supra*; *Lassiter*, *supra*. Again, the jury's verdict on this issue, and the trial court's rulings, establish the presence of a reasonable inference to the contrary.

I am also unpersuaded by defendants' argument that plaintiff cannot obtain compensatory damages for malicious prosecution where plaintiff failed to show pecuniary loss. This again assumes that everything in the store belonged to defendants, including the store's checkbook and bank records, which undisputedly belonged to plaintiff. At the time of plaintiff's arrest, the store had approximately $190,000.00 in inventory and $100,000.00 in accounts receivable. Defendants changed the store locks and prohibited plaintiff from recovering any of the store's assets. After the trial at which plaintiff's trespass charge was dismissed, the store no longer existed. I would overrule defendants' assignment of error.

C. Abuse of process

I disagree with the majority that the trial court erred in submitting plaintiff's claim for abuse of process to the jury where the evidence was insufficient to support the claim. Our Supreme Court described the tort of abuse of process in *Fowle v. Fowle*, 263 N.C. 724, 140 S.E.2d 398 (1965):

> '[A]buse of process is the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process after issuance to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable under it is attended to be secured.'

Id. at 728, 140 S.E.2d at 401 (quoting *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 236 (1945).

The same evidence that supports plaintiff's malicious prosecution claim applies here. This evidence tends to establish that defendants used the criminal process for the ulterior purpose of prohibiting plaintiff from accessing the store. During the hours that plaintiff was detained by Magistrate Mylett, the store locks were changed and the store was closed. Plaintiff no longer had access to the store or its contents. In essence, the prosecution, detention, and bond functioned as defendants' opportunity to resolve the ownership dispute in their favor. When considered in the light most favorable to plaintiff, this evidence is sufficient to allow the jury to consider the issue.

II. Admission of rebuttal testimony

Defendants also assign error to the trial court's admission of rebuttal testimony from Hill's ex-wife and plaintiff's mother, Evelyn Mallnauskas. Specifically, defendants argue that Ms. Mallnauskus' testimony was improper because she was not named on the pre-trial order witness list, and her testimony was not rebuttal testimony, but was offered for the sole purpose of "inflaming the jury."

Ms. Mallnauskus was called as a witness in response to defendants' calling of Rhonda Hill Collins. Ms. Collins also was not designated as a witness on the pre-trial order. Ms. Collins, daughter of Hill, and Ms. Mallnauskus, testified to witnessing a physical fight between her parents, which she described as "a mutual fight." Ms. Mallnaukus was called in rebuttal and testified that Hill was the aggressor in their physical fights, and that he had broken her nose with his fist.

"Whether to admit evidence not listed in a pretrial order is entrusted to the discretion of the trial court. . . . The trial court's decision will not be reviewed unless an abuse of discretion is shown." *Beam*, 120 N.C. App. at 214, 461 S.E.2d at 920 (citing *Pittman v. Barker*, 117 N.C. App. 580, 588, 452 S.E.2d 326, 331 (1995)). Defendants have failed to show any such abuse of discretion. Ms. Mallnauskus was called in rebuttal to the defense's witness, who was also not listed on the pre-trial order.

Defense counsel generally objected to Ms. Mallnauskus testifying on grounds that it was only for the purpose of inflaming the jury. The trial court correctly limited the testimony to rebuttal purposes. Despite defense counsel's initial general objection, at no time during direct examination did counsel object to any specific question or answer as being outside the trial court's instruction. The transcript reveals that Ms. Mallnauskus testified about matters defendants elicited initially through Collins' testimony. I would overrule this assignment of error.

III. Closing arguments on punitive damages

Defendants assign error to the trial court's failure to "allow counsel for the parties to make a jury argument regarding the punitive damage issue." The record reveals that neither party ever requested or moved the trial court to allow for such arguments. Defendants also did not object at trial to the absence of arguments pertaining to punitive damages. *See* N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). I would hold that defendants failed to preserve this argument for our review.

IV. Introduction of hearsay statements

Defendants argue that the trial court erred in allowing plaintiff to testify at various times to what bank officials told him regarding transfer of the store's account from the corporate name to plaintiff's name. Defendants argue that such statements were for the purpose of proving the truth of the transfer of the account, and thus, were prejudicial hearsay.

In reviewing the admission of the evidence at trial, "[t]he burden is on the appellant not only to show error but also to show that the

error was prejudicial and probably influenced the jury verdict." *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 280, 354 S.E.2d 767, 773 (1987). "Where evidence is properly admitted through one witness, the defendant will not be heard to complain that the same evidence, improperly admitted through a different witness, was prejudicial error." *State v. Kimble*, — N.C. App. —, —, 535 S.E.2d 882, 888 (2000) (citing *State v. Washington*, 131 N.C. App. 156, 163-64, 506 S.E.2d 283, 288 (1998) (error in admitting hearsay testimony harmless where improper testimony was repetitive of properly admitted testimony of other witnesses at trial)).

I would hold that any error in allowing plaintiff's testimony was harmless, in light of the testimony of First Citizens Bank Vice-President, Mr. Thompson, and the accompanying documents introduced. Mr. Thompson's testimony clearly established that a transfer of the store account occurred at Hill's direction. Mr. Thompson verified his signature on a bank document stating that the account was transferred from the corporate name to plaintiff as a result of a December 1995 phone call from Hill. Any statements made by plaintiff which were offered to show that the transfer occurred at Hill's direction were cumulative or repetitive and were not prejudicial to defendants.

V. Violation of Rules of Professional Conduct

Defendants also assign error to the trial court's failure to find that plaintiff's counsel violated the State Rules of Professional Conduct. Specifically, defendants argue that counsel's use of the word "liar" to describe Hill in a written response to defendants' motion for judgment notwithstanding the verdict was a violation of Rule 3.4(e) of the Rules of Professional Conduct. Under this rule, an attorney is prohibited from stating in trial a personal opinion as to a party's culpability or credibility.

However, plaintiff's counsel did not make the statement before the jury, or "in trial." The statement was written and submitted to the trial court following the jury's verdict after defendants moved for judgment notwithstanding the verdict and in response to a question from the trial court. In *Stiller v. Stiller*, 98 N.C. App. 80, 82-83, 389 S.E.2d 619, 620 (1990), this Court rejected the appellant's argument that counsel's sending of letters to the trial court after conclusion of the hearing unduly influenced the court and violated various Rules of Professional Conduct. We stated:

> Although the letters arguably may contain remarks and references that were not absolutely necessary to carry out the court's business, plaintiff has failed to show that these remarks resulted in 'undue influence' on the trial court. Additionally, we note that if plaintiff feels that defendant's counsel has violated a Rule of Professional Conduct the appropriate forum for that inquiry is the State Bar.

Id.

Defendants failed to forecast any evidence that plaintiff's counsel's describing Hill as a "liar" in a document to the trial court in any way unduly influenced the court's ruling on defendants' post-trial motions. In fact, following the alleged violation, the trial court further significantly remitted the jury's award in favor of defendants. Defendants have also failed to show how the trial court's failure to find a violation was more than harmless error. *See H.B.S. Contractors, Inc. v. Cumberland County Board of Educ.*, 122 N.C. App. 49, 56, 468 S.E.2d 517, 522, *disc. review improvidently granted*, 345 N.C. 178, 477 S.E.2d 926 (1996) (even if trial court erred in failing to find violation of Rules of Professional Conduct, remedy is unavailable unless appellant "can establish the error was prejudicial and, without the error, a different result would likely have ensued."). I would overrule this assignment of error.

I would hold that defendants received a fair trial, free from prejudicial error. I respectfully dissent.

ROBIN DAVIDSON, PLAINTIFF v. UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, DEFENDANT

No. COA00-16

(Filed 3 April 2001)

1. Tort Claims Act— negligence—affirmative duty of care—special relationship

The Industrial Commission erred in a claim against defendant under the Tort Claims Act by concluding that defendant university did not have an affirmative duty of care arising out of a special relationship toward a student athlete who was a member of

a school-sponsored intercollegiate team and was injured while practicing a cheerleading stunt for the school's JV cheerleading squad because: (1) the university depended upon the cheerleading program for a variety of benefits such as cheerleading at JV basketball games, women's basketball games, and wrestling events, representing the university at a trade show, and entertaining alumni before games; (2) the cheerleaders acted as representatives of the school at official athletic events; (3) the cheerleaders received significant benefits from the university as a result of participating in the cheerleading program such as receiving school uniforms purchased by the school, receiving transportation by the university, using university facilities and equipment for practices, and satisfying one hour of the school's physical education requirement; and (4) the university exerted a considerable degree of control over its cheerleaders.

2. Tort Claims Act— negligence—affirmative duty of care—voluntary undertaking to advise and educate regarding safety

The Industrial Commission erred in a claim against defendant under the Tort Claims Act by concluding that defendant university did not have an affirmative duty of care toward a student athlete who was a member of a school-sponsored intercollegiate team and was injured while practicing a cheerleading stunt for the school's JV cheerleading squad based on defendant's voluntary undertaking to advise and educate the cheerleaders regarding safety because: (1) defendant has acknowledged that it assumed certain responsibilities with regard to teaching the cheerleaders about safety; and (2) the conduct of various employees of the university implicitly establishes that the university had undertaken to advise and educate the cheerleaders regarding safety.

Appeal by Plaintiff from order entered 29 September 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 January 2001.

Anderson & Anderson, by Michael J. Anderson, for plaintiff-appellant.

Michael F. Easley, Attorney General, by E. Harry Bunting, Special Deputy Attorney General, and Allison Smith Corum, Assistant Attorney General, for defendant-appellee.

HUDSON, Judge.

Robin Davidson (plaintiff) appeals from the "Decision and Order for the Full Commission" (the Order) filed by the North Carolina Industrial Commission (the Commission) on 29 September 1999. We reverse and remand.

I.

The evidence presented to the Commission tended to show the following facts. During the 1984-85 school year, plaintiff was a sophomore at the University of North Carolina at Chapel Hill (defendant), and a member of the school's junior varsity cheerleading squad (the JV squad). The JV squad began practicing a stunt called a "two-one-chair" pyramid approximately three or four weeks before Christmas vacation. The two-one-chair pyramid typically involves two male cheerleaders standing side by side on the floor, a third male cheerleader standing on their inside shoulders with one arm extended straight up, and a female cheerleader who is lifted up to sit on the hand of the third male cheerleader. Initially, Leslie Greene was chosen to perform in the top position of the pyramid for the JV squad, but she had injured her ankle and was unavailable to perform the stunt. Emily Blount was chosen to perform in the top position in place of Greene, but during the first week that the squad attempted to perform the pyramid, Blount fell from the pyramid and injured her tail-bone. As a result, plaintiff was chosen to perform in the top position, despite the fact that she weighed about twenty pounds more than Blount.

On 15 January 1985, the JV squad was warming up on the hardwood floor of Carmichael Auditorium prior to a women's basketball game. Although the squad typically used mats during practices, the squad did not use mats in Carmichael Auditorium during games or while warming up before games, and mats were not used on this occasion. During the warm-up, the squad attempted the two-one-chair pyramid with plaintiff in the top position. Plaintiff reached the top of the pyramid but became unstable and began falling backward. As the pyramid leaned backward, the cheerleader holding plaintiff pushed her forward and plaintiff fell approximately thirteen feet. Because the pyramid had leaned backward at first, the spotters were out of position. As plaintiff landed, the spotters were unable to prevent her shoulders and head from hitting the hardwood floor. Plaintiff suffered permanent brain damage and serious bodily injury as a result of the fall.

Conflicting testimony was offered regarding the number of spotters used for the pyramid at the time of the accident. John Graham, a JV squad member at the time of the accident, testified that there were only two spotters: himself and a female cheerleader, Jeanette Everette. However, Jay Tobin, who was the co-captain of the JV squad along with plaintiff at the time of the accident, testified that there were three spotters: Graham, a second male cheerleader in front of the pyramid, and Everette behind the pyramid. There was also conflicting testimony regarding whether the squad was prepared to perform the pyramid on this date. Graham testified that he had been nervous about the stunt because Everette, who was only a few pounds heavier than plaintiff, had only practiced spotting the stunt for one week. Graham was also nervous because he had only been on the squad for four months and had no prior cheerleading experience. However, Tobin testified that the pyramid had been very steady during practices before that night, and that plaintiff appeared to be very comfortable with the pyramid.

The university did not provide a coach for either the JV squad or the varsity squad during the 1984-85 school year. The varsity squad had an administrative advisor, Mary L. Sullivan, who worked for UNC on a part-time basis. Sullivan was responsible for uniforms, travel plans, discipline, and making sure the varsity squad members achieved a certain minimum GPA. Sullivan was not hired as a coach, and she had not received any formal training to be a coach. Sullivan saw the JV squad members only when they practiced in the same gym as the varsity squad, but even at these times Sullivan did not actively interact with the JV squad. In fact, plaintiff could not recall having ever met Sullivan.

The JV squad members, without a coach or an advisor, taught themselves how to perform stunts, and received no safety training or instruction. The squad members made decisions on their own as to when they were ready to perform certain stunts. The squad members were not provided any training in order to make such evaluations. There were no specific individuals to whom the JV squad members were supposed to report regarding injuries, such as Blount's injury, or to whom the squad members were supposed to turn for help in evaluating stunts that needed improvement. The squad received occasional guidance from the varsity cheerleaders, including the captain of the varsity squad, Robert Stallings, but the JV squad was not formally supervised by the varsity squad. Stallings testified that, as the captain of the varsity squad, he had no formal responsibilities toward the JV squad.

Up through January of 1985, UNC had not adopted guidelines regarding the experience required to join either cheerleading squad, the skill level required to perform particular stunts, or safety in general. Stallings testified that UNC "never shared with [the cheerleaders] information regarding safety and technical cheerleading skills." UNC sent the varsity squad members to summer camps run by the Universal Cheerleaders Association (UCA) where they learned cheerleading skills and safety techniques, and where they were exposed to the UCA guidelines for cheerleading and safety. The JV squad members, however, were not sent to cheerleading camps, and the UCA guidelines were never officially adopted by UNC.

UNC provided both squads with school uniforms, transportation to away games and other events, and access to university facilities and equipment. In addition, a student's participation on the JV or varsity squad allowed the student to opt out of one hour of physical education credit. The JV squad, in addition to cheering at JV basketball games, women's basketball games, and wrestling events, represented UNC at a trade show, and regularly entertained the Rams Club (consisting of contributors to the university) prior to games. Plaintiff testified that the cheerleaders were considered representatives, or ambassadors, of the school, and that they had to abide by certain standards of conduct, such as maintaining a minimum GPA and refraining from drinking in public.

Donald Boulton was the Vice Chancellor and Dean for Student Affairs at UNC from 1972 through 1995, and during the 1984-85 academic year the cheerleading squads were the responsibility of the Office of Student Affairs. Student Affairs maintained a budget of approximately $11,000.00 for both cheerleading squads during the 1984-85 school year. The varsity squad advisor, Sullivan, answered directly to Boulton, and Sullivan testified that Boulton exercised supervisory authority indirectly over the varsity squad through her. Prior to 1984, the cheerleading squads had been the responsibility of the Department of Student Life; Frederic Schroeder was the Director of Student Life during this time. Boulton acknowledged that the cheerleaders represented the school in official athletic events.

Unbeknownst to the JV cheerleaders, there had been considerable concern expressed by members of the UNC faculty and staff regarding the safety of cheerleading stunts, and pyramids in particular, prior to plaintiff's accident. For example, on 3 October 1980, the Associate Vice Chancellor for Student Affairs, James Cansler, wrote a memo to Dean Boulton expressing his concern about cheerleading

safety in regard to both varsity and JV cheerleaders. Cansler recounted that four UNC cheerleaders had been injured in 1980, at least one of whom was injured when she fell from a pyramid. Cansler also stated that because cheerleaders represented the school at official athletic events and at public relations events, and because they were selected by a university sanctioned process, UNC should consider forming a special commission to study whether certain cheerleading routines were too dangerous to be permitted. No such commission was ever formed. On 29 April 1981, Schroeder wrote a letter to the coach of the cheerleading squad at the time stating that multi-level pyramids should be prohibited due to the danger to participants. On 25 August 1981, and again on 18 February 1982, Schroeder wrote to the co-captains of the varsity squad expressing his concern regarding the safety of certain cheerleading stunts, including pyramids, and expressing his opinion that the varsity squad should adopt safety guidelines and should tailor the stunts each year to the particular abilities of the members of the squad. Although Schroeder testified that he intended this information to be communicated to the JV squad by the varsity squad, the letters do not mention the JV squad, and Schroeder conceded that he does not know whether the information was, in fact, imparted to the JV squad.

In 1983, the Atlantic Coast Conference (ACC) adopted a policy prohibiting cheerleaders from engaging in pyramids "more than two high." Schroeder wrote a letter in October of 1983 to the Director of Athletics for UNC, asking for clarification of the phrase "more than two high" in the ACC prohibition. In response, Schroeder received a letter from the Assistant Athletic Director at UNC, stating that the ACC had decided to make "any interpretations concerning cheerleaders an institutional decision," and asking Schroeder and the Department of Student Life to "take charge of any future decisions with regard to the safety and well-being" of the cheerleading squads. It is not clear whether the ACC had actually rescinded the prohibition against pyramids "more than two high," or whether it had simply decided to allow the individual ACC schools to interpret this prohibition for their own squads.

Dean Boulton received a copy of each of the letters mentioned above. Boulton acknowledged that he was aware, as of 1981, that multi-level pyramids, "in the hands of people improperly prepared," were viewed as dangerous. He also acknowledged that he was aware of the growing body of concern regarding cheerleading stunts, and that he knew the ACC had banned pyramids higher than two levels at

one point in 1983. Boulton testified that UNC generally provides "education on safety" for all of its students in all of their activities, and that "the University['s] responsibility for student activities is to provide them with the information that they need relative to safety." He also stated that UNC sought "to advise and educate" students in their activities and to "present this information and instruct them."

Boulton testified that the varsity cheerleaders were provided with safety instructions at the UCA summer camps, and that the varsity squad "had the opportunity to hear safety regulations from the gymnastics coach, from their advisors, from a variety of sources." However, Boulton conceded that he did not know whether the JV squad in 1984-85 received any safety instruction from the school. When asked who would have had the responsibility of evaluating whether the JV squad members were competent to perform certain stunts, Boulton stated that he could not recall. When asked whether there was any effort on the part of UNC to enforce the UCA guideline that pyramids over two persons high should not be performed on a basketball court without the use of tumbling mats, Boulton stated, "I don't recall." Boulton also conceded that he did not know whether the JV squad received information regarding the ACC recommendations against pyramids over two levels high, or whether the JV squad was informed of Schroeder's concerns regarding pyramid stunts. Boulton acknowledged that UNC did not take a position regarding pyramids over two persons high following the ACC ban in 1983. Boulton testified that the process of evaluating cheerleading safety guidelines did not begin until approximately January of 1984, and that no guidelines were implemented until the summer of 1985, a few months after plaintiff's injury.

Plaintiff acknowledged that, prior to the accident, she understood that there was a risk she might fall from the top of the pyramid and that the spotters might not catch her. Plaintiff also testified that she expected UNC to look out for her, and that she expected the cheerleaders would receive sufficient training from UNC. Both plaintiff and Tobin testified that they had no knowledge that members of the UNC faculty and staff had expressed concern regarding the safety of cheerleading stunts. Tobin testified that he had no knowledge that the ACC had recognized the danger of pyramids higher than two levels and had, at one time, officially prohibited them. Tobin also testified that he had never seen the UCA guidelines, and that he had never been told that the guidelines recommended not performing a pyramid over two levels high on a hard floor without mats.

In sum, the evidence showed that the varsity squad members, who were older, more skilled, and more experienced, were provided with a supervisor, were provided with safety instruction through the UCA camps, were informed of the known risks involved in performing pyramids, and were admonished to create and abide by specific safety guidelines. However, the JV squad members, who were younger, less skilled, and less experienced, did not have a supervisor, received no safety training, received no information regarding risks involved in performing pyramids, and were left on their own to make decisions regarding safety procedures.

Robert Stallings, the co-captain of the varsity squad in 1984-85, was a JV cheerleader in 1982-83, and a varsity cheerleader for the following three years. Stallings worked for UCA during three summers while attending UNC, during which summers he taught high school and college cheerleaders how to perform various cheerleading stunts, including pyramids, and also taught safety in performing those stunts. In his second and third summers at UCA, Stallings was a head instructor, responsible for teaching all of the cheerleading teachers at the weekly camps. Stallings was subsequently hired as the coach for the UNC at Wilmington cheerleading squad for the academic years of 1988-89 and 1989-90, and he has coached a high school squad in Alabama every year since 1990. Since graduating in 1986, Stallings has remained on UCA's payroll as a cheerleading consultant and choreographer.

Stallings opined that UNC should have implemented formal guidelines for cheerleading safety, such as the UCA guidelines, and that UNC should have provided a qualified, knowledgeable coach for both the varsity and JV squads during the 1984-85 school year. Stallings further testified that the two-one-chair pyramid is the most difficult pyramid that can be performed at that height, and that it should not have been performed on a hardwood floor without mats at any time. Defendant's expert witness, Lance Wagers, testified that it was fairly common for cheerleading teams at the university level in 1985 to have an administrative advisor rather than a formal coach, and to have little guidance with regard to developing skills and stunts.

II.

In December of 1987, plaintiff filed a claim against defendant pursuant to the Tort Claims Act, N.C.G.S. §§ 143-291 to -300.1 (1999), alleging negligence on the part of nine individuals, including Sullivan

and Boulton. Deputy Commissioner Richard B. Ford first heard the case and filed a Decision and Order in favor of plaintiff on 2 February 1998. Defendant appealed to the Full Commission. The Full Commission reversed, making the following findings:

> 9. Defendant did not owe plaintiff a duty to provide coaching or faculty supervision to monitor the activities and stunts of the cheerleading squad, nor did defendant owe plaintiff a duty to prohibit 2½-tier pyramid stunts. This absence of an affirmative duty is not only reasonable in terms of defendant's responsibilities, but also serves to protect student autonomy.
>
> 10. Plaintiff failed to produce sufficient evidence that any named employee of defendant breached any duty owed to her or was negligent.

The Commission also reached the following conclusion as a matter of law:

> Defendants' named employees did not breach any legal duty owed to plaintiff, nor did they commit any acts of negligence which proximately resulted in plaintiff's injuries; therefore, plaintiff is not eligible to recover under the [Tort Claims Act].

On appeal, plaintiff challenges the Commission's findings, including findings 9 and 10, as well as the Commission's legal conclusion. In reviewing a decision of the Industrial Commission in a case arising under the Tort Claims Act, we are limited to addressing (1) whether the Commission's findings of fact are supported by any competent evidence, and (2) whether the findings of fact support the Commission's conclusions of law and decision. *See, e.g., Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). Whether a defendant owes a plaintiff a duty of care is a question of law. *See Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 897 (1955). Here, the Commission's findings 9 and 10, although designated "findings of fact," are conclusions of law to the extent they conclude that defendant did not owe an affirmative duty of care to plaintiff. The Commission's designation of a finding as either a "finding of fact" or a "conclusion of law" is not conclusive. *See Martinez v. Western Carolina University*, 49 N.C. App. 234, 239, 271 S.E.2d 91, 94 (1980). Thus, we review the legal conclusion that defendant did not owe plaintiff an affirmative duty of care to see whether this conclusion is supported by the findings of fact.

We note that plaintiff asks this Court to hold that plaintiff's claim is not barred by the doctrines of contributory negligence or assumption of risk. However, the Commission did not reach these issues because it found defendant had not breached a duty to plaintiff. Therefore, these issues are not properly before us on appeal. In addition, plaintiff asks this Court to find that portions of the testimony offered by Lance Wagers, defendant's expert witness, should be excluded. Plaintiff did not assign error to the Commission's admission of this testimony and, as a result, may not raise this issue on appeal. *See* N.C.R. App. P. 10(a).

III.

[1] The issue presented is whether a university has an affirmative duty of care toward a student athlete who is a member of a school-sponsored, intercollegiate team. At the outset of our analysis, we note that this is an issue of first impression in North Carolina. However, to the extent that established principles of tort law in our State are applicable to the instant case, those principles are authoritative and control our analysis.

Actions to recover for negligence under the Tort Claims Act are guided by the same principles applicable to negligence actions against private parties. *See Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988). Therefore, plaintiff in the instant case must establish the following elements: (1) that UNC owed plaintiff a duty of care under the circumstances; (2) that actions or omissions by at least one of the named employees of UNC constituted a breach of that duty; (3) that the breach was the actual and proximate cause of plaintiff's injury; and (4) that plaintiff suffered damages. *See id.*; *Cucina v. City of Jacksonville*, 138 N.C. App. 99, 102, 530 S.E.2d 353, 355, *disc. review denied*, 352 N.C. 588, — S.E.2d — (2000). The Commission concluded that defendant owed no "affirmative duty" of any kind to plaintiff and, therefore, that defendant did not breach any duty of care. This conclusion constitutes reversible error because defendant did owe an affirmative duty of care to plaintiff as a matter of law.

"Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law." *Pinnix*, 242 N.C. at 362, 87 S.E.2d at 897. Thus, the preliminary question is whether defendant owed a duty of care to plaintiff under the circumstances. Traditionally, courts have distinguished between negligence claims

based on affirmative acts and those based on omissions. *See* David A. Logan and Wayne A. Logan, *North Carolina Torts* § 1.20, at 8 (1996) (hereinafter Logan). Within the context of the Tort Claims Act, recovery may be had in cases involving both negligent acts and omissions as a result of an amendment to G.S. § 143-291 in 1977 that substituted the word "negligence" in place of "negligent act." *See Phillips v. N.C. Dept. of Transportation*, 80 N.C. App. 135, 136, 341 S.E.2d 339, 340 (1986); Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts* § 19.42.11.2, at 306 (1st ed. 1991) ("The state can now be held liable for negligent omissions and failures to act, thus greatly extending the scope of liability and the claimant's ability to recover damages.").

In cases involving omissions, negligence may arise where a "special relationship" exists between the parties. *See King v. Durham County Mental Health Authority*, 113 N.C. App. 341, 345, 439 S.E.2d 771, 774, *disc. review denied*, 336 N.C. 316, 445 S.E.2d 396 (1994). A helpful description of the category of cases in which an affirmative duty to act is imposed upon a defendant as a result of a special relationship is set forth in a leading treatise on the law of torts:

> During the last century, liability for [omissions] has been extended still further to a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action. In such relationships the plaintiff is typically in some respect particularly vulnerable and dependant upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare. In addition, such relations have often involved some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain. . . . There is now respectable authority imposing the same duty upon a shopkeeper to his business visitor, upon a host to his social guest, upon a jailor to his prisoner, *and upon a school to its pupil.*

W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 56, at 373-74, 376-77 (5th ed. 1984) (emphasis added). Thus, where the alleged negligence is premised on a defendant's failure to protect a plaintiff from a harm that the defendant did not directly create, as in the instant case, the defendant may be held liable if a special rela-

tionship existed between the parties sufficient to impose upon the defendant a duty of care.

We believe the factual circumstances and policy considerations in this case warrant the conclusion that a special relationship existed between the parties. Various scholars, authorities, and courts in other jurisdictions considering the issue before us have recognized that special relationships are most often premised upon the existence of mutual dependance. *See* Edward H. Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*, 2 Sports Law J. 25, 39 (1995) (hereinafter Whang); Restatement (Second) of Torts § 314A, cmt. b (1965); *University of Denver v. Whitlock*, 744 P.2d 54, 59-61 (Colo.1987) (noting that dependence is a basis for recognizing a special relationship giving rise to a duty of care); *Beach v. University of Utah*, 726 P.2d 413, 415-16 (Utah 1986) (noting that "the essence of a special relationship is dependence by one party upon the other or mutual dependence between the parties"). Here, UNC depended upon the cheerleading program for a variety of benefits. The JV squad was responsible for cheerleading at JV basketball games, women's basketball games, and wrestling events. The JV squad represented UNC at a trade show, and often entertained the Rams Club before games. Plaintiff testified, and Boulton acknowledged, that the cheerleaders acted as representatives of the school at official athletic events. Likewise, the cheerleaders received significant benefits from UNC as a result of participating in the cheerleading program. They were provided school uniforms purchased by the school. They were provided transportation by UNC, and they used university facilities and equipment for practices. Participation on the JV or varsity squad allowed the student to satisfy one hour of the school's physical education requirement.

We also find it significant that UNC exerted a considerable degree of control over its cheerleaders. Typically, schools exert a high degree of control over many aspects of a student athlete's life. *See* Whang at 43. Here, UNC cheerleaders had to abide by certain standards of conduct, such as maintaining a minimum GPA and refraining from drinking alcohol in public. Such control affects our analysis in at least two ways. First, the argument that a duty of care should not be imposed upon a school because it may stifle student autonomy is considerably less compelling where the school already exerts significant control over the students in question. Second, when a school exerts significant control over students as a result of their participation in a school-sponsored athletic activity, the stu-

dents may have higher expectations with regard to the protection they will receive from the school. Here, plaintiff testified that she expected UNC to look out for her, and that she expected the cheerleaders would be adequately trained. Such expectations can result in the assumption by a student that, in the absence of any warning from the school that particular activities pose a significant risk, such activities have been determined to be safe. This kind of assumption may then prevent the student from making an independent assessment of the risk posed by those activities. *See Whitlock*, 744 P.2d at 60 (explaining how increased control by a university can interfere with a student's ability to make independent decisions regarding safety).

We find support for our conclusion in the decisions of other jurisdictions that have addressed similar issues. For example, in *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir.1993), the Third Circuit held that a special relationship existed between the defendant college and the plaintiff, who was a student participating in a scheduled practice for an intercollegiate lacrosse team sponsored by the college. The court placed emphasis on the fact that the college actively recruited the student, finding that this fact revealed the extent to which the student's participation on the team benefitted the school. *See id.* at 1368.

We emphasize that our holding is based on the fact that plaintiff was injured while practicing as part of a school-sponsored, intercollegiate team. Our holding should not be interpreted as finding a special relationship to exist between a university, college, or other secondary educational institution, and every student attending the school, or even every member of a student group, club, intramural team, or organization. We agree with the conclusion reached by other jurisdictions addressing this issue that a university should not generally be an insurer of its students' safety, and that, therefore, the student-university relationship, standing alone, does not constitute a special relationship giving rise to a duty of care. *See Whitlock*, 744 P.2d at 61; *Baldwin v. Zoradi*, 123 Cal.App.3d 275, 176 Cal.Rptr. 809 (1981); *Beach*, 726 P.2d at 416.

As a result of the special relationship between the parties in the instant case, defendant and its employees had an affirmative duty to exercise that degree of care which a reasonable and prudent person would exercise under the same or similar circumstances. *See, e.g., Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992). Because

the Commission did not make findings or conclusions as to whether any or all of the alleged omissions of defendant breached this duty of care, it must now do so. In determining whether defendant breached this duty, the circumstances to be considered include, but are not limited to, plaintiff's age, plaintiff's skill level, and the age and skill level of all the JV squad members. *See Fisher v. Northwestern State University*, 624 So.2d 1308 (La.App. 3 Cir.1993), *cert. denied*, 631 So.2d 452 (La.1994) (holding that the special relationship between a school and a student cheerleader required the school to provide supervision that was reasonable and commensurate with the age of the student and the attendant circumstances).

Careful consideration should also be given to the various alleged omissions, articulated by plaintiff throughout the record, which may have constituted negligence on the part of defendant. These omissions include, but are not necessarily limited to: failure to train in safety techniques and cheerleading skills; failure to provide a coach or supervisor; failure to provide safety equipment (including but not limited to mats); failure to evaluate the skill level of the squad members each year to determine the stunts to be performed; failure to evaluate the physical condition of the squad members before practices and games; failure to institute cheerleading guidelines; and failure to specifically prohibit pyramids above a certain height.

We note that the Order makes no reference to the substance of the expert testimony offered by the parties. In determining the amount of supervision and instruction that would have been reasonable and commensurate with plaintiff's age, plaintiff's skill level, and the attendant circumstances, the Commission should consider the opinions set forth in the testimony of the witnesses qualified to provide an expert opinion. Opinions on the applicable standard of care were offered by Marc A. Rabinoff, Ed.D., Lance Wagers, and Robert Stallings. The Commission indicated in its Order that it considered the testimony of all three witnesses and all objections regarding these witnesses. Although Stallings was not formally tendered as an expert witness during his deposition, the Commission made no indication that any of the testimony offered by these witnesses was excluded, and, therefore, we presume that the Commission found all three witnesses to be qualified to provide expert opinions on the applicable standard of care. *See State v. White*, 340 N.C. 264, 293-94, 457 S.E.2d 841, 858, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995) (holding that formal tendering of witness as expert is not required and that trial court's finding as to a witness' qualification to

testify as an expert is implicit in court's admission of testimony). Furthermore, we presume defendant would not dispute that Stallings is qualified to render an expert opinion, since UNC employed Stallings as the coach of the UNC at Wilmington cheerleading squad for two years in 1988-89 and 1989-90.

IV.

[2] We have addressed defendant's affirmative duty, arising from the special relationship between the parties, to provide that degree of care which a reasonable and prudent person would exercise under the same or similar circumstances. In addition, the undisputed evidence shows that defendant voluntarily undertook to advise and educate the cheerleaders regarding safety. We believe that this "voluntary undertaking" by defendant established a separate duty of care owed to plaintiff as a matter of law, independent of the duty of care arising from the special relationship.

The voluntary undertaking theory has been consistently recognized in North Carolina, although it is not always designated as such. *See Pinnix*, 242 N.C. at 362, 87 S.E.2d at 897 (recognizing that a duty of care "may arise generally by operation of law under application of the basic rule of the common law which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care"); *Davidson and 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) (recognizing that "[t]he law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm and calls a violation of that duty negligence"). The undertaking theory has been described as follows:

> Akin to the special relationship exceptions is the "undertaking" theory implicated when a defendant voluntarily "undertakes" to provide needed services to the plaintiff when otherwise she would have no obligation. The agreement may arise from a binding contract between the parties or from a gratuitous promise, unenforceable in contract.

Logan § 2.20, at 27. Furthermore, the voluntary undertaking doctrine has been applied in other jurisdictions under similar circumstances. *See Furek v. University of Delaware*, 594 A.2d 506 (Del.1991) (holding that, pursuant to Restatement (Second) of Torts § 323, a university may be liable for a student's injuries during fraternity hazing

activities when the university knows of the dangers involved in such activities and undertakes to regulate the activities).

Here, defendant has acknowledged that it assumed certain responsibilities with regard to teaching the cheerleaders about safety. Dean Boulton testified: "Our position, in terms of extracurricular activities and our student activities, is to advise and educate. We have never been in a position where we were enforcing on any student group unless they were breaking the law. Our job was to present this information and instruct them." Boulton further explained that "the University['s] responsibility for student activities is to provide them with the information that they need relative to safety."

Furthermore, the conduct of various employees of the university implicitly establishes that the university had undertaken to advise and educate the cheerleaders regarding safety. For example, Schroeder's 29 April 1981 letter to the coach of the cheerleading squad stated that he felt multi-level pyramids should be prohibited due to the danger to participants. Schroeder's 25 August 1981 letter to the co-captains of the varsity cheerleading squad urged them to adopt certain safety guidelines, and his letter in February of 1982 to the varsity squad expressed his belief that the squad had agreed to abide by particular safety guidelines. In addition, Schroeder acknowledged receiving the letter from the Assistant Athletic Director at UNC, asking Schroeder to "take charge of any future decisions with regard to the safety and well-being" of the cheerleading squads. Boulton received a copy of each and every letter discussed herein regarding cheerleading safety, and the absence of any documented objection by Boulton in response to these letters evidences an implicit approval of the university's undertaking to address this issue. Furthermore, Boulton testified that the school, through Schroeder and the Department of Student Affairs, had the responsibility to insure that the information regarding cheerleading safety, contained in Schroeder's 29 April 1981 letter to the cheerleading coach, was communicated to the cheerleading squads.

In sum, the evidence is uncontroverted that defendant voluntarily undertook to advise and educate cheerleaders in regard to safety. Therefore, we hold that defendant owed plaintiff a duty of care upon which a claim of negligence may be based, independent of the duty arising from the special relationship between the parties. Because the Commission failed to identify this duty of care arising from defendant's voluntary undertaking, the Commission did not specifically

address whether defendant breached this duty, and upon remand the Commission must do so.

V.

The order of the Industrial Commission denying plaintiff's claim is reversed, and we remand to the Commission for further consideration of the evidence. *See Bailey v. Dept. of Mental Health*, 272 N.C. 680, 684, 159 S.E.2d 28, 31 (1968) (remanding case to Industrial Commission to consider evidence "in its true legal light" because factual findings of Commission occurred under a "misapprehension of law"). On remand, the Commission must reconsider the evidence in light of our holding that, because of the special relationship between the parties, defendant owed plaintiff an affirmative duty to exercise that degree of care which a reasonable and prudent person would exercise under the same or similar circumstances. The Commission then must find all facts pertinent to this issue, and determine whether defendant, through any of its named agents, breached this duty.

In addition, the Commission must reconsider the evidence in light of our holding that defendant voluntarily undertook, and was therefore legally obligated, to advise and educate the JV squad members regarding safety. The Commission must find all facts pertinent to this issue, and determine whether defendant, through any of its named agents, breached this duty. Should the Commission find and conclude that defendant breached either or both of these duties to plaintiff, it must proceed to make findings and conclusions as to proximate cause, contributory negligence, assumption of risk, and whether any omission by defendant constituted willful and wanton conduct.

Reversed and remanded.

Chief Judge EAGLES and Judge SMITH concur.

BRENDA HENRY AND FOSTER HENRY INDIVIDUALLY, AND BRENDA HENRY AS GUARDIAN AD LITEM FOR CRYSTAL HENRY, A MINOR CHILD, PLAINTIFFS v. SOUTHEASTERN OB-GYN ASSOCIATES, P.A., JAMES L. PRICE, M.D., AND LAIF LOFGREN, M.D., DEFENDANTS

No. COA00-37

(Filed 3 April 2001)

Medical Malpractice— relevant standard of care—"similar community" rule

The trial court did not err in a medical malpractice case by directing verdict in favor of defendants based on the trial court's conclusion that plaintiffs failed to present competent medical testimony establishing the relevant standard of care under N.C.G.S. § 90-21.12 for prenatal and obstetrical care, because: (1) N.C.G.S. § 90-21.12 adopted the "similar community" rule to avoid the adoption of a national or regional standard of care for health providers; (2) the testimony of a doctor practicing in Spartanburg, South Carolina failed to show he was familiar with the standard of care in Wilmington or similar communities; and (3) a national standard cannot be applied to defendants' conduct in this case concerning the prenatal care of a patient with gestational diabetes and the delivery of an infant suffering from shoulder dystocia.

Judge GREENE concurring

Judge HUDSON dissenting.

Appeal by plaintiffs from order entered 20 September 1999 by Judge Russell J. Lanier, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 13 February 2001.

Britt & Britt, P.L.L.C., by William S. Britt, for plaintiff appellants.

Walker, Clark, Allen, Herrin & Morano, L.L.P., by O. Drew Grice, Jr., and Robert D. Walker, Jr., for defendant appellees.

McCULLOUGH, Judge.

Plaintiffs Mr. and Mrs. Henry brought this medical malpractice action on behalf of themselves and their daughter, Crystal Henry, seeking recovery for the allegedly negligent prenatal and obstetrical care rendered by defendants. At trial, plaintiffs tendered one expert

witness: Dr. Chauhan, an OB-GYN specialist practicing in Spartanburg, South Carolina, and licensed in South Carolina and Georgia. After finding that plaintiffs failed to present competent medical testimony establishing the relevant standard of care, the trial court granted directed verdict in defendants' favor. Plaintiffs appealed from this judgment.

Plaintiffs argue that the trial court erred in excluding their medical expert's testimony as to the applicable standard of care, and, as a result, subsequently directing verdict in favor of defendants. We find no error by the trial court and therefore affirm directed verdict for defendants.

Plaintiffs contend that, although Dr. Chauhan was unfamiliar with the medical community in Wilmington, North Carolina, where defendants practice and the alleged malpractice occurred, he could nevertheless competently testify to the prevailing standard of prenatal and obstetrical care in Wilmington because he was familiar with the applicable national standard of care. Plaintiffs further argue that Dr. Chauhan was familiar with the standard of care in Spartanburg, South Carolina, and that this standard would be the same standard applied at Duke Hospital in Durham, North Carolina, or at UNC-Hospital in Chapel Hill, North Carolina. Thus, argue plaintiffs, Dr. Chauhan could testify to the applicable standard of care in Wilmington even though he was unacquainted with its medical community.

N.C. Gen. Stat. § 90-21.12 prescribes the relevant standard of care in a medical malpractice action:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical . . . care, the defendant shall not be liable . . . unless . . . the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in *the same or similar communities* at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12 (1999) (emphasis added). The report of a study commission recommending adoption of N.C. Gen. Stat. § 90-21.12 makes clear that the legislature intended to avoid a national standard of care for North Carolina health care providers:

> The North Carolina Supreme Court has gone only as far as a "same or similar communities" standard of care, and the Commission recommends that this concept be enacted into the General Statutes to avoid further interpretation by the Supreme Court which might lead to regional or national standards for all health care providers.

North Carolina Professional Liability Insurance Study Commission, Report to the Gen. Assembly of 1976, 32 (1976). This Court has also stated that "[b]y adopting the 'similar community' rule in G.S. 90-21.12 it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care for health providers . . . ." *Page v. Hospital*, 49 N.C. App. 533, 535, 272 S.E.2d 8, 10 (1980). *See also Thompson v. Lockert*, 34 N.C. App. 1, 4-5, 237 S.E.2d 259, 261, *disc. review denied*, 293 N.C. 593, 239 S.E.2d 264 (1977) (specifically rejecting the application of a general or national standard of care for even a "highly trained and certified specialist"); Robert G. Byrd, *The North Carolina Medical Malpractice Statute*, 62 N.C.L. Rev. 711, 734, 740 (1984) (noting that the "North Carolina General Assembly's apparent purpose in codifying the same or similar community standard for health care providers was to foreclose judicial adoption of a regional or national standard" and that such an adoption would be "inconsistent with North Carolina case law and statutes").

After reviewing Dr. Chauhan's testimony in its entirety, we find that the record indicates he failed to testify in any instance that he was familiar with the standard of care in Wilmington or similar communities. Although Dr. Chauhan testified that he was familiar with the national standard of care, there is no evidence that the national standard of care is the standard practiced in Wilmington. See *Tucker v. Meis*, 127 N.C. App. 197, 198, 487 S.E.2d 827, 829 (1997) ("Although [the expert witness] testified that he was familiar with the standard of care in North Carolina, he failed to make the statutorily required connection to the community in which the alleged malpractice took place or to a similarly situated community."). Moreover, there is no evidence in the record that the standard of care practiced in Wilmington is the same standard that prevails in Durham or Chapel Hill, or that these communities are the "same or similar."

In *Tucker*, a recent case remarkably similar to the one before us, plaintiffs sought to recover from defendants physician and hospital "for an allegedly negligently repaired episiotomy performed on [plaintiff patient] following child birth in Winston-Salem, North

Carolina." *Tucker*, 127 N.C. App. at 197, 487 S.E.2d at 828. The trial court found, and this Court affirmed, that plaintiffs' expert witness could not establish the standard of care, and that therefore directed verdict for defendants was proper. Because plaintiffs' witness was familiar only with the standard of care in North Carolina, rather than the standard of care in Winston-Salem, his testimony was "irrelevant." *Tucker*, 127 N.C. App. at 199, 487 S.E.2d at 829. The *Tucker* Court further noted that the "same or similar communities" standard "allows for consideration of the effect that variations in facilities, equipment, funding, etc., throughout the state might have on the standard of care." *Id.* Thus, it is clear that the concept of an applicable standard of care encompasses more than mere physician skill and training; rather, it also involves the physical and financial environment of a particular medical community. The *Tucker* Court concluded that "the problem with [plaintiffs' expert witness'] testimony was not that he had not practiced in North Carolina; rather, it was his failure to testify that he was familiar with the standard of care in Winston-Salem or similar communities." *Id.*

Plaintiffs nevertheless argue that a uniform standard of care governs prenatal and obstetrical care to which Dr. Chauhan could competently testify. Plaintiffs note that, "if the standard of care for a given procedure is 'the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community[.]' " *Marley v. Graper*, 135 N.C. App. 423, 428, 521 S.E.2d 129, 134 (1999) (quoting *Haney v. Alexander*, 71 N.C. App. 731, 736, 323 S.E.2d 430, 434 (1984), *cert. denied*, 313 N.C. 329, 327 S.E.2d 889 (1985)), *cert. denied*, 351 N.C. 358, 542 S.E.2d 214 (2000). This Court, however, has recognized very few "uniform procedures" to which a national standard may apply, and to which an expert may testify. *See, for example*, *Haney*, 71 N.C. App. at 736, 323 S.E.2d at 434 (allowing expert medical witness to testify that taking and reporting vital signs of a deteriorating patient was the same for nurses in accredited hospitals across the country); *Page*, 49 N.C. App. at 536, 272 S.E.2d at 10 ("nursing practices in connection with patients' use of a bedpan are so routine and uncomplicated that the standard of care should not differ appreciably between . . . neighboring counties").

The case before us concerns the prenatal care of a patient with gestational diabetes and the delivery of an infant suffering from shoulder dystocia. Such a scenario involves medical procedures considerably more complicated than the taking of vital signs or the place-

ment of bedpans. Accordingly, a national standard cannot be applied to defendants' conduct.

Furthermore, plaintiffs' reliance upon *Marley* is misplaced. In *Marley*, plaintiffs contended that the trial court erred in allowing testimony by defendants' expert witness, who stated that the defendant physician "*met* the standard of care for plastic surgery not only in [Greensboro] but anywhere in the United States." *Marley*, 135 N.C. App. at 430, 521 S.E.2d at 134 (emphasis added). Affirming the trial court, this Court stated that "[a]lthough the [expert] witness did not testify that he was familiar with the standard of care for Greensboro, the testimony he did provide *obviated the need for such familiarity*." *Id.* (emphasis added). The Court explained that, because the expert testified that defendant's performance "met the highest standard of care found anywhere in the United States," the Court reasoned that "if the standard of care for Greensboro matched the highest standard in the country, [defendant's] treatment of [plaintiff] met that standard; if the standard of care in Greensboro was lower, [defendant's] treatment of [plaintiff] exceeded the area standard." *Marley*, 135 N.C. App. at 430, 521 S.E.2d at 134. Thus, the testimony was "sufficient to meet the requirements of section 90-21.12," and the trial court did not err in allowing the witness to testify. *Id.*

In the instant case, plaintiffs failed to establish that their expert was familiar with the standard of care practiced in Wilmington or a similar community. Further, unlike *Marley*, Dr. Chauhan would have testified that defendants *failed* to meet the national standard of care, creating an obvious need for the establishment of the applicable standard through proper testimony. Even if Dr. Chauhan was familiar with the standard of care in Chapel Hill or Durham, there was no evidence that a similar standard of care prevailed in Wilmington. "N.C.G.S. § 90-21.12 mandates that the relevant standard of care is that of the community where the injury occurred (or similar communities) and not that of the state as a whole." *Tucker*, 127 N.C. App. at 198, 487 S.E.2d at 829. To adopt plaintiffs' argument, this Court would have to ignore the plain language of N.C. Gen. Stat. § 90-21.12 and its evidentiary requirement that the "similar community" rule imposes, as well as well-established case law. This we decline to do. *See Baynor v. Cook*, 125 N.C. App. 274, 277, 480 S.E.2d 419, 421, *disc. review denied*, 346 N.C. 275, 487 S.E.2d 537 (1997) (rejecting plaintiff's assertion that our law "allows a doctor's conduct to be judged against a national standard of care when the standard of care is the same across the country"); *In re Dailey v. Board of Dental*

Examiners, 60 N.C. App. 441, 443, 299 S.E.2d 473, 475 (1983) (noting that "[i]t is clear from the wording of [N.C. Gen. Stat. § 90-21.12] that the test is not that of a statewide standard of health care"); *Tucker*, 127 N.C. App. at 197, 487 S.E.2d at 829; *Thompson*, 34 N.C. App. at 4, 237 S.E.2d at 261.

As Dr. Chauhan was unfamiliar with the relevant standard of care, his opinion as to whether defendants met that standard is unfounded and irrelevant, and thus we hold that the trial court properly excluded Dr. Chauhan's testimony. There being no other expert witnesses to establish defendants' negligence, defendants were entitled to a directed verdict as a matter of law. In light of our holding, we need not address further argument by defendants. The trial court is hereby

Affirmed.

Judge GREENE concurs with separate opinion.

Judge HUDSON dissents.

GREENE, Judge, concurring.

I agree with Judge McCullough that Dr. Chauhan's testimony failed to establish Dr. Chauhan was familiar with the standard of practice of health care providers situated in Wilmington or "similar communities" at the time of the alleged negligent acts and that a directed verdict was, therefore, properly granted in favor of defendants. I write separately to emphasize that testimony regarding a uniform standard of care may be used to establish the applicable standard of care in a specific community *only* when the alleged negligent treatment of the plaintiff occurred in an accredited hospital.

In *Rucker v. High Point Mem'l Hosp., Inc.*, 285 N.C. 519, 206 S.E.2d 196 (1974), the North Carolina Supreme Court held that an expert's testimony regarding the standard of care for the treatment of gunshot wounds *in accredited hospitals* in the United States was sufficient to establish the applicable standard of care for such treatment in an accredited hospital located in High Point. *Id.* at 527-28, 206 S.E.2d at 201-02. The *Rucker* court emphasized it was "not dealing with a local country doctor[,]" [but] "with a *[d]uly accredited hospital* and a member of its staff." *Id.* at 527, 206 S.E.2d at 201. Thus, the teaching of *Rucker* is limited to cases involving the standard of

care practiced in accredited hospitals when a plaintiff's alleged negligent treatment took place in an accredited hospital. Indeed, this Court has held that the teaching of *Rucker* is "applicable only to the standard of care of 'accredited hospitals' in the treatment of a wound, the treatment for which was shown to be standard in 'accredited hospitals' throughout the United States." *Thompson v. Lockert*, 34 N.C. App. 1, 4, 237 S.E.2d 259, 261, *disc. review denied*, 293 N.C. 593, 239 S.E.2d 264 (1977). Admittedly, this Court has stated that "if the standard of care for a given procedure is 'the same across the county, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community.' " *Marley v. Graper*, 135 N.C. App. 423, 428, 521 S.E.2d 129, 134 (1999) (quoting *Haney v. Alexander*, 71 N.C. App. 731, 736, 323 S.E.2d 430, 434 (1984), *cert. denied*, 313 N.C. 329, 327 S.E.2d 889 (1985)), *cert. denied*, 351 N.C. 358, — S.E.2d — (2000). The cases relied upon by the *Marley* court in stating this general rule, however, are cases involving the standard of care in accredited hospitals when the plaintiff's alleged negligent treatment took place in an accredited hospital. *Id.* The general rule stated in *Marley* is thus limited to cases involving the standard of care for treatment that takes place in an accredited hospital. Additionally, as noted by the majority, *Marley* involved the relevancy of testimony by a *defendant's* expert that the defendant's treatment of the plaintiff met the highest standard of care for such treatment nationwide. *Id.* at 430, 521 S.E.2d at 134. Thus, the issue addressed in *Marley* is distinguishable from the issue before this Court in the case *sub judice*.

The dissent appears to agree that the applicable standard of care under N.C. Gen. Stat. § 90-21.12 is the standard of care practiced in "the same or similar communities" where the act giving rise to the plaintiff's cause of action occurred. The dissent would, nevertheless, permit "the jury to consider factual evidence of the existence of a national standard of care in the process of determining the standard of care in the community in question." The dissent states "[s]uch evidence is clearly some evidence of the standard of care in the community in question." I disagree. Under section 90-21.12, the relevant inquiry is what standard of care is *actually practiced* in the community in question or "similar communities." The existence of a national standard of care has no relevance to this inquiry absent testimony the national standard of care is *actually practiced* in the community or communities in question. A jury, therefore, would be unable to find as fact based solely on testimony regarding the existence of a national standard of care that the national standard of care is *actually prac-*

ticed in the relevant community or communities. Additionally, the dissent's reliance on *Baynor v. Cook*, 125 N.C. App. 274, 480 S.E.2d 419, *disc. review denied*, 346 N.C. 275, 487 S.E.2d 537 (1997), is not persuasive. The issue presented in *Baynor* was whether the plaintiff was entitled to a jury instruction regarding the existence of a national standard of care, and this Court held the plaintiff was not entitled to such an instruction. *Id.* at 277, 480 S.E.2d at 421. In *Baynor*, the issue of whether the trial court properly allowed the plaintiff's experts to testify as to the existence of a national standard of care, without testimony that the national standard of care was actually practiced in the relevant community or communities, was not before this Court.

HUDSON, Judge dissenting.

In the case at bar, plaintiffs' expert witness was prepared to testify at trial that the standard of care for prenatal treatment in Wilmington, North Carolina in 1990 was the same as the standard of care for prenatal treatment in any other location in the United States, and that he was familiar with this standard. He was further prepared to testify that defendants failed to employ certain fundamental medical procedures in their rendering of prenatal care. However, the trial court excluded this testimony at trial on the grounds that the expert had testified during his deposition that he did not know anything about Wilmington, North Carolina, the city in which defendants practice. Because his testimony was excluded in large part, the trial court granted defendants' motion for a directed verdict. The issues on appeal are (1) whether the trial court erred in excluding the expert's testimony at trial, and (2) whether such testimony, had it been admitted, would have satisfied the "same or similar" community standard pursuant to N.C.G.S. § 90-21.12 (1999). I believe the trial court erred in excluding the testimony, and that the testimony would have satisfied the statute.

In medical malpractice actions against individual health care providers, G.S. § 90-21.12 requires that testimony must be presented concerning the standard of care in "the same or similar communities." *See Thompson v. Lockert*, 34 N.C. App. 1, 5, 237 S.E.2d 259, 261 (1977) (clarifying distinction between actions against individual "health care providers," including "physicians and surgeons," and actions against accredited hospitals). I believe this statutory requirement may be satisfied in at least three ways. It is clear that the statute is satisfied where an expert witness testifies that he is familiar with

the standard of care in the community in question as a result of practicing in that community. It is also clear that the statute is satisfied where an expert witness testifies that he is familiar with the standard of care in the community in question as a result of practicing in a similar community. In addition, I believe the statute is satisfied where an expert witness testifies that he is familiar with the standard of care in the community in question as a result of the existence of, and his familiarity with, a standard of care for the treatment in question that is uniform across the country, and which does not vary depending upon the community.

This third approach to establishing the applicable standard of care in actions against individual health care providers may, at first blush, appear to be the equivalent of applying a national standard of care. And, as the majority aptly notes, it is clear that the legislature, in codifying the same or similar community approach in G.S. § 90-21.12, specifically intended not to adopt a national standard of care. However, I believe there is a crucial, albeit subtle, distinction between adopting a national standard of care as a matter of law, and allowing a party to present evidence of a national standard of care as a matter of fact. Without adopting a national standard of care as a matter of law, I believe G.S. § 90-21.12 permits the jury to consider factual evidence of the existence of a national standard of care in the process of determining the standard of care in the community in question.

This distinction was addressed in *Baynor v. Cook*, 125 N.C. App. 274, 480 S.E.2d 419 (1997), a medical malpractice action against individual doctors and their private partnerships. In *Baynor*, the plaintiff presented two expert witnesses who testified that there was a uniform standard of care across the country for the diagnosis and treatment of a thoracic aortic rupture (TAR), and that the defendant doctor, located in Beaufort County, had deviated from this standard of care. The defendants presented multiple expert witnesses who testified that they were familiar with the standard of care of an emergency room physician in Beaufort County, and that the defendant doctor had not deviated from this standard of care. *Id.* at 275-76, 480 S.E.2d at 420. At the close of the trial, the plaintiff requested the trial court to instruct the jurors that if they found a national standard of care existed for the diagnosis and treatment of TARs, they could hold the defendants to this national standard of care in determining whether the defendants had been negligent. *Id.* at 276, 480 S.E.2d at 420. The trial court denied this request and, instead, instructed the

jury on the standard of care as mandated by G.S. § 90-21.12 and set forth in the Pattern Jury Instructions for North Carolina. *Id.* On appeal the plaintiff argued that the trial court committed reversible error in denying her request for an instruction on the national standard of care. We concluded that the trial court's denial of the plaintiff's request was not error because North Carolina has not adopted a national standard of care as a matter of law. *Id.* However, we also noted that

> the jury heard testimony that the community standard in Beaufort County for the treatment of TARs is the same across the country. *The trial court properly allowed plaintiff's experts to testify that based on their familiarity with the national standard of care as related to a common medical issue (TARs), this standard of care did not vary depending on the community.*

Id. at 278, 480 S.E.2d at 421 (emphasis added).

These comments clarify that a plaintiff may satisfy G.S. § 90-21.12 by offering the testimony of an expert who asserts that (1) the standard of care for the treatment in question is uniform across the country and does not vary depending upon the community, and (2) he is familiar with this national standard. Such evidence is clearly some evidence of the standard of care in the community in question. When this type of evidence is offered by a plaintiff, I believe it should be presented to the jury for consideration, as it was in *Baynor*, and not excluded by the trial court. This comports with the language of the statute itself, which provides that a defendant in an action for medical malpractice shall not be liable "unless *the trier of the facts is satisfied by the greater weight of the evidence* that the care of such health care provider was not in accordance with" the applicable standard of care. G.S. § 90-21.12 (emphasis added). The statute expressly contemplates a determination by the jury, rather than the trial court, as to whether the greater weight of the evidence presented by the parties establishes a breach of the applicable standard of care.

Furthermore, admitting such evidence for consideration by the jury is not the same as adopting a national standard of care as a matter of law. If our State had adopted a national standard of care as a matter of law, the standard of care actually practiced in a defendant's community would be irrelevant to the legal analysis, even if that standard of care were lower than the national standard of care. Thus,

a local doctor could be found negligent even where his treatment conformed to the standard of care practiced among the doctors in his community. On the other hand, the same or similar community approach, which we have adopted in North Carolina, recognizes that there are often differences in the standards of care practiced in different communities. Under the same or similar community approach, these differences are relevant and central to the legal analysis because the jury must ultimately determine the applicable standard of care in each particular case. However, in making this determination, there is no reason why a jury should not be allowed to consider factual evidence of a national standard of care for the medical procedure in question.

Here, the named defendants are two individual doctors and their private partnership association. At trial, plaintiffs offered the expert medical testimony of Dr. Sunseet P. Chauhan. Dr. Chauhan had been deposed by defendants prior to trial. At the deposition, Dr. Chauhan testified that the only information he had about the medical community in which defendants practiced was the fact that it is located in the United States of America. He also testified that he had not undertaken a comparison of this community with any other community with which he was familiar. However, Dr. Chauhan testified that the standard of care in Wilmington, North Carolina in 1990 for the type of prenatal care at issue was the same as that in any other location in the United States, and that this standard did not vary depending upon the community.

Prior to trial, the court denied a motion by defendants to exclude the testimony of Dr. Chauhan based on his lack of familiarity with the local community in question. At trial, counsel for defendants noted that plaintiffs had not supplemented Dr. Chauhan's deposition testimony following the deposition, and therefore, pursuant to N.C.R. Civ. P. 26, requested that the trial court limit Dr. Chauhan's testimony to information contained in his deposition. The trial court indicated that it would rule on any objections to Dr. Chauhan's testimony as they were made during the trial.

Dr. Chauhan took the stand and testified before the jury that he is board certified in the areas of obstetrics, gynecology, and maternal-fetal medicine, with a speciality in high-risk pregnancy. He testified that he practices in Spartanburg, South Carolina, and teaches medical residents from the Medical University of South Carolina located in Charleston. Dr. Chauhan was admitted as an expert witness. The fol-

lowing questioning transpired during the direct examination of Dr. Chauhan:

> Q. [A]re you familiar with the standard of care for board certified obstetricians/gynecologists practicing in Wilmington, North Carolina, or similar communities, in December of 1990?
>
> A. Yes, sir.
>
> MR. WALKER: Objection, deposition.
>
> THE COURT: Okay. I'm going to sustain the objection.
>
> . . .
>
> Q. All right. In terms of 1990, do you have an opinion . . . as to whether or not the standards of practice for board certified physicians in Wilmington, or similar communities, in 1990 would have been the same in not only Wilmington but throughout North Carolina?
>
> MR. WALKER: Objection. Deposition, if Your Honor please.
>
> THE WITNESS: Yes, sir.
>
> THE COURT: Sustained.
>
> . . .
>
> Q. Doctor, do you have an opinion . . . as to whether or not the standards of practice for board certified OB/GYN physicians practicing in Wilmington, North Carolina . . . would be the same as that of a board certified physician practicing at Duke or Chapel Hill, or anywhere in North Carolina in 1990?
>
> MR. WALKER: Objection, if Your Honor please.
>
> THE WITNESS: Yes.
>
> MR. WALKER: Not only 26 but the deposition itself.
>
> THE COURT: Overruled.
>
> Q. Do you have such an opinion?
>
> A. Yes, I do.
>
> Q. What is that opinion?
>
> MR. WALKER: Objection.
>
> THE COURT: I'm going to sustain that.

Q. Doctor, would those standards be the same as the standards of board certified physicians practicing in Spartanburg or in Georgia in 1990?

MR. WALKER: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, it would be. . . .

Q. Doctor, state whether or not the standards of practice for the board certified obstetricians/gynecologists in [Portsmouth Naval Hospital] would have been the same at Camp Lejeune in 1990, to the best of your knowledge?

MR. WALKER: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, they would be.

. . .

Q. Based on your knowledge of those standards, would those standards, in your opinion, be applicable to Wilmington, North Carolina, in 1990?

MR. WALKER: Objection.

THE COURT: Sustained. He's already testified he doesn't know a thing about Wilmington.

The jury was then excused from the courtroom, and the trial court judge explained his perspective to the parties:

[H]ow can you compare an apple if the only thing you've looked at is oranges? I mean, from what I read in this deposition, this gentleman has never been to Wilmington, he'd never talked with anybody from Wilmington at the time of his deposition, that he didn't know anything about Wilmington at the time of the deposition, and then, subsequent to that, there's been no supplementation of his answers from the deposition as were requested or required. That's where I see the problem.

In the absence of the jury, Dr. Chauhan was called back to the stand for voir dire questioning, at which time the following testimony transpired:

> Q. Dr. Chauhan, how can you say you're familiar with the standards of care in Wilmington or similar communities if you have not done a comparison with any communities that you're familiar with versus Wilmington?
>
> . . .
>
> A. The reason is, because the thing I found what was lacking in the care, or below the standard of care, is so fundamental it's applicable everywhere. . . . These are simple guidelines which everyone should follow across the country.

The trial court took the position that because Dr. Chauhan had testified during his deposition that he knew nothing about Wilmington, and because plaintiffs had not supplemented this testimony following the deposition, Dr. Chauhan could not testify as to his familiarity with the standard of care for board certified obstetricians and gynecologists practicing in Wilmington in 1990. I believe the exclusion of this testimony by the trial court was based upon a misunderstanding of the law, and constitutes reversible error. The applicable standard of care may be established by any of the three methods discussed above, and Dr. Chauhan was prepared to establish the applicable standard of care by testifying as to his familiarity with a national standard of care for prenatal treatment that does not vary depending on the community. An expert witness need not be familiar with the particular community in question. He need only be familiar with the applicable standard of care in that community. *See Warren v. Canal Industries*, 61 N.C. App. 211, 215-16, 300 S.E.2d 557, 560 (1983) (holding, in action against a private clinic and an individual doctor, that it is not necessary for the witness testifying as to the standard of care to have actually practiced in the same community as the defendant as long as the witness is familiar with the applicable standard of care). This principle was recently applied in *Marley v. Graper*, 135 N.C. App. 423, 521 S.E.2d 129 (1999), *cert. denied*, 351 N.C. 358, 542 S.E.2d 214 (2000). *Marley* involved a medical malpractice action against individual doctors. Therefore, although the concurring opinion is correct in noting that the cases cited in *Marley* for this proposition may have involved accredited hospitals, the holding in *Marley* itself is clear precedent for the application of this principle to actions against individual doctors. I do not believe that *Marley* can be distinguished simply on the grounds that it involved the testimony of a defendant's expert, rather than a plaintiff's expert. There is no logical reason to treat the testimony of a defendant's expert witness

differently than the testimony of a plaintiff's expert witness in terms of the type of evidence required by G.S. § 90-21.12 for establishing the applicable standard of care.

As the majority opinion points out, where an expert testifies regarding a uniform standard of care across the country, it is vital that he also specifically testify that he is familiar with the standard of care in the community in question or similar communities based on his assertion that the uniform standard is, in fact, the standard practiced in the community in question. *See Tucker v. Meis*, 127 N.C. App. 197, 487 S.E.2d 827 (1997) (holding that this requirement applies to cases in which an expert bases his opinion upon either a purported state-wide standard of care or a purported national standard of care); *Howard v. Piver*, 53 N.C. App. 46, 52, 279 S.E.2d 876, 880 (1981). In *Tucker*, we described this necessary element as "the statutorily required connection" between a purported uniform or state-wide standard of care and the same or similar community rule mandated by G.S. § 90-21.12. *Id.* at 198-99, 487 S.E.2d at 829. However, I disagree with the assertion that Dr. Chauhan "failed to testify in any instance that he was familiar with the standard of care in Wilmington or similar communities." Dr. Chauhan testified during his deposition that he was familiar with the applicable standard of care in Wilmington in 1990. His testimony was based on his assertion that the standard of care for prenatal treatment in Wilmington, North Carolina in 1990 was the same as that in any other location in the United States, and that he was familiar with this uniform standard. This is precisely the "statutorily required connection" discussed in *Tucker*. In my view, the only reason this testimony was not admitted at trial is because the trial court incorrectly ruled that Dr. Chauhan's deposition testimony precluded him from testifying at trial as to his familiarity with the standard of care for prenatal treatment in Wilmington in 1990.

Because plaintiffs could not establish the applicable standard of care without the excluded testimony of Dr. Chauhan, the trial court granted defendants' motion for directed verdict at the close of plaintiffs' evidence. I believe this constitutes reversible error as well. Had Dr. Chauhan's testimony been admitted at trial, as I believe it should have been, defendants would not have had grounds for a directed verdict in their favor. In considering a motion for directed verdict, the question presented is whether the evidence, viewed in the light most favorable to the non-movant, is sufficient to submit the case to the jury. *Clark v. Perry*, 114 N.C. App. 297, 304, 442 S.E.2d 57, 61 (1994). Where an expert testifies that the standard of care for a particular

type of treatment is uniform across the country and does not vary depending on the community, and further testifies that he is familiar with this uniform standard of care, such testimony is admissible and should be considered by the jury. *See Baynor*, 125 N.C. App. at 278, 480 S.E.2d at 421. This is especially the case where the nature of the treatment in question is relatively simple. *See Wiggins v. Piver*, 276 N.C. 134, 138, 171 S.E.2d 393, 395-96 (1970); *Howard*, 53 N.C. App. at 51-52, 279 S.E.2d at 880. In the instant case, Dr. Chauhan's testimony indicated that the alleged negligence by defendants included the failure to undertake certain medical procedures that are considered basic and fundamental in the area of prenatal treatment.

For the reasons stated herein I respectfully dissent. I would reverse the trial court's order granting defendants' motion for a directed verdict. I would remand for a new trial, and hold that Dr. Chauhan's testimony as to his familiarity with the standard of care for prenatal treatment in Wilmington in 1990 is admissible at trial.

STATE OF NORTH CAROLINA v. RICKY C. LYTCH

No. COA00-38

(Filed 3 April 2001)

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

The short-form murder indictment did not violate defendant's due process rights.

2. Evidence—murder—cartridges and a knife—foundation

The trial court did not err by admitting into a first-degree murder prosecution an ammunition magazine, cartridges and a knife found in a trailer park where defendant lived and where the bodies were discovered. Although defendant contended that the State failed to prove precisely where the bullets were found or otherwise lay a proper foundation, the lack of evidence conclusively showing where the bullets were discovered goes to the weight rather than the admissibility of the evidence and the brief time lapse between the murders and the discovery of the bullets, the proximity to defendant's last known residence, and the fact

that one of the bullets was at one time in the murder weapon establishes relevancy. No gap existed in the chain of evidence which would preclude admission. A magazine containing the type of ammunition used to shoot the victims and a steak knife identical to the murder weapon were relevant.

3. Evidence—prior assault—prior attempted robbery—admissible

The trial court did not err in a first-degree murder prosecution by admitting evidence of an assault and attempted robbery that occurred two days before the murders where the closeness in both geography and time, the similar nature of the assault, and the connection between the bullets found at both scenes presented sufficient similarities for the evidence's admissibility.

4. Homicide— first degree murder—instructions—prior attempted robbery—evidence of specific intent

The trial court did not err in a first-degree murder prosecution by instructing the jury that it could consider a prior attempted robbery and shooting as evidence of specific intent. The jury could correctly consider the prior attempted robbery and shooting as evidence that defendant intended to rob the victims in this case. Moreover, even if the court misled the jury as to the relevance of the prior shootings to premeditation and deliberation, defendant was also convicted under the felony murder rule.

5. Evidence—polygraph—not admissible

The trial court did not err in a first-degree murder prosecution by not admitting evidence from a polygraph tending to show that defendant was not involved in the offenses charged.

6. Witnesses—limited—substance of testimony admitted

The trial court did not err in a first-degree murder prosecution by limiting the testimony of a defense witness regarding statements by fellow prisoners with whom defendant was incarcerated where the court admitted the substance of the proffered testimony.

7. Evidence—testimony of inmate—collateral matter—bias toward prosecution

The trial court did not err in a first-degree murder prosecution by allowing the State to present testimony establishing that an inmate's favorable testimony for defendant was rendered only

after the State spurned his assistance. Although defendant contended that this testimony related to a collateral matter, the testimony exposed the witness's bias against the prosecution.

Judge GREENE concurring.

Judge HUDSON dissenting.

Appeal by defendant from judgments entered 28 May 1999 by Judge B. Craig Ellis in Cumberland County Superior Court. Heard in the Court of Appeals 20 February 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General Norma S. Harrell, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Charlesena Elliott Walker, for defendant appellant.

McCULLOUGH, Judge.

On the morning of 8 October 1996, Will Campbell came home from work and found the bodies of two men, Ellis Chappelle Land, and Jameel Rashad Land, in the kitchen of his trailer located at the Berwick Trailer Park in Fayetteville, North Carolina. Mr. Campbell had been friends with the men, who were cousins, and who often visited Mr. Campbell at his residence. It was later determined that Chappelle Land (Chappelle) died from a gunshot wound to his upper chest, while Jameel Land (Jameel) died from a knife wound to his chest. The Cumberland County Sheriff's Department took defendant Ricky Lytch into custody several days later in connection with the matter.

Defendant was tried on two counts of first-degree murder during the 10 May 1999 Criminal Session of Cumberland County Superior Court. Evidence at trial tended to show that the Land cousins used drugs and sometimes sold them as well; defendant admitted purchasing marijuana from Chappelle on at least one occasion. Evidence also showed that two days before the double homicide, defendant was involved in a planned attempt to assault and rob known drug dealers. During the assault, which occurred at 414 Adams Street in Fayetteville, defendant and two other men fired their guns, injuring several people. An analysis of shell casings found at the Adams Street shooting revealed that two of the nine-millimeter bullets had been fired by the same gun that fired the bullets found beside the Land cousins' bodies.

Further, evidence showed that a nine-millimeter ammunition magazine and a knife identical to the one used to kill Jameel were discovered in a trailer where defendant had been staying. The manager of the Berwick Trailer Park also delivered to police three nine-millimeter bullets found within the trailer park. Like the cartridges found at the Adams Street shootings, one of these bullets had at one time been in the same gun that fired the bullets found at the murder scene.

On 26 May 1999, the jury found defendant guilty of two counts of first-degree murder on the basis of malice, premeditation and deliberation, as well as under the felony murder rule. Although defendant was tried capitally, the jury recommended, and defendant received, two sentences of life imprisonment without parole. Defendant appealed to this Court.

Plaintiff contends on appeal that the trial court erred by (I) denying defendant's motion for a mistrial where the short-form indictments failed to allege premeditation and deliberation; (II) denying defendant's motion to suppress three nine-millimeter bullets; (III) admitting into evidence a knife and a loaded magazine recovered from defendant's last known residence; (IV) admitting evidence of defendant's involvement in an assault and attempted robbery on Adams Street; (V) instructing the jury that it could consider the Adams Street shootings as evidence that defendant had the specific intent for the crimes charged; (VI) denying defendant's motion to introduce evidence from a polygraph test; (VII) barring hearsay evidence by a defense witness; and (VIII) denying defendant's motion *in limine* and overruling his objections to testimony by a witness. We will address defendant's arguments in turn.

[1] Defendant contends that the use of the short-form murder indictments authorized by N.C. Gen. Stat. § 15-144 (1999) did not give him sufficient notice and violated his rights to due process, notice, fundamental fairness, and trial by jury. Defendant argues that the short-form murder indictments failed to properly safeguard his rights because the indictments omitted elements of the first-degree murder offense, thereby depriving him of adequate notice. Defendant cites as authority for his position the recent decisions of the United States Supreme Court in *Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350 (1998), and *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999).

Defendant's argument is without merit. 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. *State v. Kilpatrick*, 343 N.C. 466, 472, 471 S.E.2d 624, 628 (1996); *State v. Avery*, 315 N.C. 1, 12-14, 337 S.E.2d 786, 792-93 (1985). Moreover, our Supreme Court recently reconsidered the short-form indictment in light of the *Almendarez-Torres* and *Jones* decisions and reaffirmed its constitutionality. *State v. Wallace*, 351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43 (2000) (examining *Jones* and *Almendarez-Torres* "in light of our overwhelming case law approving the use of short-form indictments" and finding a "lack of a federal mandate to change that determination"); *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000), *cert. denied*, — U.S. —, 148 L. Ed. 2d 797 (2001) (noting that the short-form indictment is sufficient to charge first-degree murder on the basis of any of the theories referenced on the short-form indictment). Thus, the short-form indictment does not violate defendant's due process rights, and we overrule defendant's first assignment of error.

[2] Defendant next argues that three loose nine-millimeter cartridges turned over to investigators by the manager of the trailer park where defendant lived and where the bodies were discovered should have been excluded from evidence because, defendant contends, the State failed to prove precisely where the bullets were found or otherwise establish a proper foundation for their admittance at trial. As such, defendant argues that the cartridges were irrelevant and should have been excluded. We disagree.

Rule 401 of our evidence code defines as relevant all "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). Further, "all relevant evidence is [generally] admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (1999). In criminal cases, "every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020, 16 L. Ed 2d 1044 (1966).

The three nine-millimeter bullets at issue were provided to Lieutenant Donald Smith of the Cumberland County Sheriff's Department and Special Agent Errol Jarman of the North Carolina State Bureau of Investigation by Ms. Peggy Cox, manager of the Berwick Trailer Park, on 10 October 1996, only two days after the double homicide. She also delivered to the officers a shirt and a mag-

azine containing several nine-millimeter cartridges. While the officers declined to take the shirt, they did receive the other items, placing them into evidence envelopes on which they noted and initialed the date and location of receipt. Although Ms. Cox died before trial and was therefore unavailable to testify, the maintenance man who discovered the magazine and shirt testified that he found the items at a unit denoted as the 5318 Bellview unit, and that he immediately delivered these items to Ms. Cox. When placed under arrest, defendant admitted to staying in the Bellview unit the night before the murders occurred. Whether the shells were loose in the shirt or had been taken out of the magazine is not clear from the record; however, the officers' testimony establishes that the three loose shells were obtained at the Berwick Trailer Park. Finally, ballistics tests revealed that one of the three bullets had at one time been in the same weapon that fired the expended cartridges found alongside the victims' bodies and that fired two of the expended cartridges recovered at Adams Street.

In *State v. Felton*, 330 N.C. 619, 637-38, 412 S.E.2d 344, 356 (1992), the trial court properly admitted four bullets recovered from a discarded water heater near defendant's home. Although the bullets in question were the same type of bullets found in the victim's body, there was no evidence conclusively linking the bullets found in the water heater to the murder weapon. Nevertheless, the Court concluded that presence of

> four .25 caliber CCI bullets with rifling characteristics matching the lethal bullet is clearly relevant as circumstantial evidence linking defendant to evidence directly related to the crime. The lack of evidence that defendant actually fired the bullets into the water heater, the uncertain length of time the bullets had been in the water heater, the popularity of CCI bullets, and the fact that several types of .25 caliber guns could have produced the rifling characteristics at issue, impact the weight of the evidence, not its admissibility.

Id. at 638, 412 S.E.2d at 356. In the instant case, the lack of evidence conclusively showing where in the trailer park the bullets were discovered impacts the weight of the evidence, not its admissibility. The brief time lapse between the murders and discovery of the bullets, the proximity to defendant's last known residence and the fact that one of the bullets was at one time in the murder weapon establishes the evidence's relevancy. *See also State v. White*, 349 N.C. 535, 553, 508 S.E.2d 253, 265 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d

779 (1999) (holding that nine-millimeter shell casings that matched empty casings found beside the two murder victims and discovered in an area near a motel in Arizona where defendant was staying were relevant and admissible); *State v. Thompson*, 332 N.C. 204, 221-22, 420 S.E.2d 395, 404-05 (1992) (approving the admission of a pistol into evidence found several miles from the murder scene in a ditch after a storm two days after the murder). As for the chain of custody, no gap existed that precluded the bullets' admission. In *State v. Boyd*, 287 N.C. 131, 143, 214 S.E.2d 14, 20-21 (1975), chain of custody evidence similar to that proffered in the instant case was sufficient to allow the items into evidence in view of the notations made by law enforcement officers and other circumstances surrounding receipt of the items. Thus we conclude that an adequate foundation was laid to allow the admission of this evidence. We hold that the trial court correctly admitted evidence of the three nine-millimeter bullets, and we overrule defendant's assignment of error.

Defendant next contends that the trial court improperly admitted evidence of a loaded nine-millimeter magazine and a knife found at defendant's residence, arguing that there was insufficient evidence to connect him with the items. Again, we must disagree with defendant. Mr. Bobby Turner, a maintenance man at the trailer park, testified that he found the ammunition magazine in question lying on top of a shirt inside a trailer formerly rented to a Ms. Clara Rose. Ms. Rose testified that defendant was staying at her trailer at the time of the murders, a fact defendant also admitted. Further, law enforcement officials found a Brazilian steak knife with a black plastic handle and the word "Tramontina" inscribed on the blade on the kitchen counter in the same trailer. Ms. Rose identified the knife as similar to ones she used in her trailer. The knife blade found in Jameel's chest and a knife handle found at the murder scene fit together into the same type of knife, with identical markings, as the knife found in Ms. Rose's trailer. We determine that the magazine containing the same type of ammunition as the bullets used to shoot the victims and the steak knife identical to one of the murder weapons were relevant and properly admitted. This assignment of error is overruled.

[3] Defendant next argues that evidence of an assault and attempted robbery that took place two days before the murders was irrelevant and unduly prejudicial. Evidence at trial tended to show that on 6 October 1996, defendant was involved in a planned attempt to rob known drug dealers. The assault took place at 414 Adams Street in Fayetteville. Defendant and three other men demanded the victims'

drugs and money, and upon being refused, shot and wounded three people. Three expended nine-millimeter casings were found at and around the Adams Street house.

Analysis of the unfired bullets obtained from Ms. Cox, the expended cartridges found next to Jameel's and Chappelle's bodies, and the expended cartridges found at the Adams Street shootings showed that one of the bullets turned over by Ms. Cox had been in the same gun that fired two of the three cartridges retrieved from Adams Street and those recovered at the murder scene.

While evidence of defendant's prior misconduct may not be admitted to show that he has the propensity 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), such evidence may be admitted to show defendant's "motive, opportunity, intent, preparation, plan, knowledge, [or] identity." N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). To be admissible, the misconduct must be sufficiently similar to that of the charged offense. *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *cert. allowed, judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

In *State v. Hoffman*, 349 N.C. 167, 184, 505 S.E.2d 80, 90 (1998), *cert. denied*, 526 U.S. 1053, 143 L. Ed. 2d 522 (1999), evidence of a prior bank robbery during which defendant merely sat in a car outside the bank was nevertheless admitted at defendant's trial for murder and a jewelry store robbery where he was the sole perpetrator. The Court noted that defendant used a sawed-off shotgun, ski mask and white Nissan in the bank robbery, while the jewelry store robber-murderer wore a ski mask and carried a sawed-off shotgun, with a white Nissan having been seen nearby. Both robberies occurred in small towns outside of Charlotte during business hours. The Court held that the two incidents were sufficiently similar to admit evidence of the earlier crime to show identity.

In the instant case, there were also sufficient similarities between the Adams Street shootings and the murders to admit the evidence. Like the Adams Street victims, Chappelle was a known drug dealer from whom defendant had purchased marijuana in the past. There was also evidence that Jameel sold drugs, and that he possessed cocaine the day before the murder. When Mr. Campbell arrived home and discovered the bodies, however, he could not find any drugs in the trailer. The closeness in both geography and time, the similar nature of the assault, and the connection between the bullets found

at both scenes present sufficient similarities for the evidence's admissibility. We hold that the evidence was relevant and did not unduly prejudice defendant. As such, the trial court correctly admitted this evidence at trial, and we overrule defendant's assignment of error.

[4] Defendant then argues that the trial court's charge to the jury impermissibly instructed them that they could consider the Adams Street shootings as evidence that defendant had the specific intent for the crimes charged. Defendant contends that, because there was no evidence that defendant intended or attempted to kill anyone during the Adams Street shootings, the incident would be inadmissible to show his intent to kill the Land cousins. Defendant concedes, however, solely for the purposes of this argument, that "the State's evidence was sufficient to prove his intent to assault and rob under the theory of acting in concert." Defendant was convicted for first-degree murder under both a theory of premeditation and deliberation and the felony murder rule. The trial court did not state that the Adams Street shootings related to premeditation and deliberation, but rather that the evidence was received for "the purposes of showing the *identity* of the person who committed the crime charged in this case . . . that the defendant had a *motive* for the commission of the crime charged in this case; [and] that the defendant had the *intent* . . . ." (Emphasis added.) Accordingly, the jury could correctly consider the Adams Street shootings as evidence that defendant intended to rob Chappelle and Jameel under the felony murder rule. Further, even if the trial court misled the jury as to the relevance of the Adams Street shootings to show premeditation and deliberation, defendant's convictions and judgments would not be affected. Since defendant was also convicted under the felony murder rule, it would not have mattered if the trial court had "failed to give any instructions concerning premeditation and deliberation." *State v. Farmer*, 333 N.C. 172, 194, 424 S.E.2d 120, 133 (1993). We subsequently overrule this assignment of error.

[5] Defendant also contends that the trial court erred by denying evidence from a polygraph test tending to show that defendant was not involved in the offenses charged. Defendant acknowledges, however, that "polygraph evidence is [not] admissible in any trial" in North Carolina, *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983), and thus his claim that the trial court erred in not admitting such has no merit. "Defendant has presented us with no compelling reason to alter our long-standing holdings that evidence concerning polygraph

testing is inadmissible." *State v. Fleming*, 350 N.C. 109, 136, 512 S.E.2d 720, 739, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). We therefore overrule defendant's assignment of error.

[6] Next, defendant argues that the trial court committed prejudicial error in limiting the testimony of a defense witness regarding specific statements by fellow prisoners with whom defendant was incarcerated. Mr. Lucas Ismond, a former jail mate of defendant's, testified for the State that defendant admitted killing Chappelle and Jameel. Defendant sought to respond to this evidence by offering the testimony of Mr. Mitchell Quarterman, another fellow inmate. Although the trial court sustained as hearsay the State's objections to specific statements by Mr. Quarterman to Mr. Ismond, it allowed the substance of the information to come in by permitting the witness to testify that Mr. Ismond asked Mr. Quarterman to write things down for him about defendant's case. Further, Mr. Quarterman testified that inmates had discussed defendant's case in detail, and that they joked about defendant's case being a means of getting out of jail.

In *State v. Brown*, 327 N.C. 1, 17-18, 394 S.E.2d 434, 444 (1990), the Court upheld the cross-examination of a witness concerning prison rumors where no objection had been made on hearsay grounds. The Court noted, however, that "timely objection made on proper grounds may well have drawn a different ruling." *Id.* at 17, 394 S.E.2d at 444. Because the trial court in the instant case admitted the substance of the proffered testimony, there was no prejudice to defendant; even though certain specific statements were excluded, "no prejudice arises from the erroneous exclusion of evidence when the same or substantially the same testimony is subsequently admitted into evidence." *State v. Hageman*, 307 N.C. 1, 24, 296 S.E.2d 433, 446 (1982), *accord State v. Burke*, 342 N.C. 113, 120, 463 S.E.2d 212, 217 (1995). Given that the trial judge allowed the essential information proffered by defendant into evidence, we conclude that there was no prejudice in excluding the statements to which objections were sustained. We therefore overrule this assignment of error as well.

[7] Finally, defendant argues that the trial court erred when it allowed two of Mr. Quarterman's former attorneys to testify that Mr. Quarterman expressly authorized them to approach the prosecution about making a deal based on his testifying against defendant, an offer the State declined. Defendant contends that the attorneys' testimony related to a collateral matter that, having been denied by Mr.

Quarterman in his own testimony, could not be proven extrinsically, while the State argues that the testimony relates to defendant's bias since his offer was rejected.

It is well established in North Carolina that

> [a] witness may be cross-examined by confronting him with prior statements inconsistent with any part of his testimony . . . . If the matters inquired about are collateral, but tend "to connect him directly with the cause or the parties" or show his bias toward either, the inquirer is not bound by the witness's answer and may prove the matter by other witnesses, but not before he has confronted the witness with his prior statement so that he may have an opportunity to admit, deny or explain it.

State v. Green, 296 N.C. 183, 192-93, 250 S.E.2d 197, 203 (1978); *see also State v. Westall*, 116 N.C. App. 534, 548, 449 S.E.2d 24, 32, *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994) (approving the admission of testimony about collateral matters where the witness was closely connected to defendant).

In this case, Mr. Quarterman's bias toward the prosecution was exposed to the jury through his former lawyers' testimony, whose statements implied that Mr. Quarterman's favorable testimony for defendant was rendered only after the State spurned his assistance. Under the rule as set forth above, the testimony was properly admitted, and this assignment of error is also overruled.

We hold that defendant had a fair trial before a jury of his peers and that it was free from prejudicial error. In that trial we find

No error.

Judge GREENE concurs with separate opinion.

Judge HUDSON dissents.

GREENE, Judge, concurring.

Defendant argues the short-form murder indictment by which defendant was indicted in this case violates his due process rights under the United States Constitution. I acknowledge this Court is bound by our Supreme Court's decision in *State v. Wallace*, 351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43, *cert. denied*, —— U.S. ——, 148 L. Ed. 2d 498 (2000), holding the short-form murder indictment is

constitutional. I write separately to nevertheless state my continued belief that the short-form murder indictment does not comply with the requirements of due process and the right to notice under the Sixth Amendment of the United States Constitution. *See State v. Riley*, 137 N.C. App. 403, 416-17, 528 S.E.2d 590, 599 (Greene, J., dissenting), *disc. review denied and cert. denied*, 352 N.C. 596, — S.E.2d — (2000), *cert. denied*, — U.S. —, 148 L. Ed. 2d 681 (2001). Premeditation and deliberation are elements of first-degree murder in North Carolina. *State v. Hamby and State v. Chandler*, 276 N.C. 674, 678, 174 S.E.2d 385, 387 (1970), *death sentence vacated on other grounds*, 408 U.S. 937, 33 L. Ed. 2d 754 (1972). As the short-form murder indictment does not include the elements of premeditation and deliberation, N.C.G.S. § 15-144 (1999), the short-form murder indictment does not charge each element of the offense and, thus, is unconstitutional, *see Jones v. United States*, 526 U.S. 227, 232, 243 n.6, 143 L. Ed. 2d 311, 319, 326 n.6 (1999) (holding that when a "fact is an element of an offense rather than a sentencing consideration," it must be "charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt"); *Hamling v. United States*, 418 U.S. 87, 117, 41 L. Ed. 2d 590, 620 (1974) (indictment must contain elements of offense charged).

Judge HUDSON, dissenting.

I believe the admission into evidence of three loose cartridges, one of which had been in the same gun used to shoot the victims, was error, in that the only evidence regarding the source of the cartridges is that they were found somewhere in Berwick Trailer Park. The maintenance man who discovered a magazine in the trailer where defendant had been staying reported seeing only a magazine, not the loose cartridges. The officers who received the cartridges from the trailer park manager did not testify as to where in the trailer park the cartridges had been found. Given the circumstances of this case and the use of the evidence by the prosecution, admission of the cartridges was unduly prejudicial to defendant.

This case is distinguishable from *State v. Felton*, 330 N.C. 619, 412 S.E.2d 344 (1992), *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998), and *State v. Thompson*, 332 N.C. 204, 420 S.E.2d 395 (1992), cited by the majority in holding that the cartridges were properly admitted.

In *Felton*, four bullets having similar characteristics to the one used to kill the victim were discovered inside a water heater behind

defendant's trailer. 330 N.C. at 625, 412 S.E.2d at 348. Thus, the specific location in which the bullets were found was known and clearly linked to the defendant. By contrast, in the present case, we know only that the cartridges came from some place within an entire trailer park. There was evidence that the trailer park was a high-crime area and that it was not unusual to hear gunshots fired there. Furthermore, the trailer park was a "hang-out" for many people who were potential suspects in these murders.

In *White*, shell casings fired from the same gun used to kill the victims in North Carolina were found in Arizona at a site not far from the motel where defendant was staying. 349 N.C. at 544, 508 S.E.2d at 260. Clearly, if defendant had no involvement in the murders, it was exceedingly unlikely that the actual murderer would travel to Arizona and fire the murder weapon in close proximity to the motel where defendant was staying. Given the remote possibility of a coincidence, the shell casings found in Arizona linked the defendant to the murders. By contrast, in the present case, many potential suspects in the murders spent time in the trailer park where the bullets were found. Furthermore, while in *White* it was quite an unusual circumstance to find shell casings in Arizona from a gun used to kill people in North Carolina, it is not particularly surprising that the cartridges in this case were found in the same trailer park where the murders themselves took place.

In *Thompson*, a gun with the same characteristics as the murder weapon was found in a ditch approximately a mile and a half from the murder scene. 332 N.C. at 221, 420 S.E.2d at 404-05. There was no contention that the location where the gun was found helped identify *defendant* as the murderer; thus, *Thompson* is inapposite to the present case.

Most importantly, the prosecution in this case acted as if it were known that the cartridges had been found in the trailer where defendant was staying. The prosecutor told the jury: "And in the trailer where the defendant lived, by his own admission, [was found] a live round extracted from the same gun that fired the other five [bullets fired during the Adams Street robbery and the Land murders]. . . ." The prosecutor went on to argue that this evidence proved that defendant, as opposed to other robbers at Adams Street, fired the gun that killed the Land cousins. In other words, the prosecution claimed that the cartridges were found *in defendant's trailer*, when in fact there was no evidence that they were. This connection was presented

to the jury as a crucial piece of evidence to identify defendant as the murderer.

Because the cartridges, known only to be found somewhere in Berwick Trailer Park, potentially implicated several people besides defendant, and because there was a high potential for the jury to be misled to believe that the cartridges had been found in defendant's trailer (as the prosecutor did ultimately argue), I believe it was reversible error not to exclude the cartridges under N.C.R. Evid. 401 and 403. There was little evidence in this case identifying defendant as the murderer. The cartridges were used as a key piece of evidence to convict the defendant, and there is a reasonable possibility that there would have been a different result if they had been excluded. *See* N.C. Gen. Stat. § 15A-1443(a)(1999)(setting forth standard for prejudicial error).

In addition, I believe the trial court erred in excluding on hearsay grounds testimony from Mitchell Quarterman regarding what information he had given Lucas Ismond. Quarterman's testimony clearly did not involve hearsay. The defense did not seek to introduce the substance of what Quarterman told Ismond (details about the murders and defendant's alleged involvement) in order to prove its truth; to the contrary, the defense would contend the details were in fact *not* true. *See* N.C.R. Evid. 801(c). The defense sought to introduce what details Quarterman told Ismond in order to show Ismond heard the details about which he testified from Quarterman and not from the defendant, as Ismond claimed. This is not a hearsay purpose.

I believe that exclusion of the testimony was unfairly prejudicial, in that the prosecution relied heavily on the testimony of Ismond to prove its case. If the evidence of the cartridges had been excluded from the trial, as I believe it should have been, Ismond's testimony becomes even more important. There was no direct evidence that defendant was the murderer other than Ismond's testimony that defendant had confessed to him. Defendant had a right to impeach Ismond's testimony to the extent that he legitimately could under the Rules of Evidence.

For the reasons cited above, I respectfully dissent and vote for a new trial.

VIRGINIA D. DESMOND, PLAINTIFF v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, DEFENDANT

No. COA00-260

(Filed 3 April 2001)

1. Appeal and Error— appealability—contributory negligence—judgment n.o.v.—substantial right

Although an appeal from the trial court's grant of judgment notwithstanding the verdict in favor of plaintiff on the issue of contributory negligence is an interlocutory order, defendant has a substantial right to an immediate appeal under N.C.G.S. § 1-277(a) and N.C.G.S. § 7A-27(d) because the issue of whether the trial court was correct in overturning the jury's verdict on contributory negligence remains central to the case and needs to be addressed.

2. Cities and Towns— maintenance of sidewalks—negligence action—denial of city's motion for directed verdict improper

The trial court erred in a negligence case involving a municipality's duty to keep its public sidewalks in proper repair under N.C.G.S. § 160A-296(a)(1) by denying defendant city's motion for a directed verdict at the close of plaintiff's evidence, because: (1) the testimony of plaintiff's expert that the depression in the sidewalk that caused plaintiff's fall existed for a number of years and had been at least one-half of an inch for one to two years before the accident is not sufficient to raise an inference of negligence since the law with regard to municipalities and maintenance of sidewalks is such that minor defects are not actionable; and (2) plaintiff presented no evidence that the city received actual notice or constructive notice of the sidewalk defect before plaintiff fell.

Judge HUDSON dissenting.

Appeal by defendant from orders entered 13 May 1999 and 16 September 1999 by Judge Forrest Donald Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 January 2001.

Law Offices of Chandler deBrun Fink & Hayes, by Walter L. Hart, IV, for plaintiff-appellee.

Crews & Klein, P.C., by James N. Freeman, Jr. and Andrew W. Lax, for defendant-appellant.

EAGLES, Chief Judge.

Defendant appeals the trial court's grant of judgment notwithstanding the verdict and a new trial to plaintiff, and also the trial court's denial of defendant's own motion for a directed verdict. Because we hold that the plaintiff failed to present sufficient evidence upon which a jury could find that the city of Charlotte was negligent, we reverse.

The evidence tended to show that on the evening of 15 April 1997, plaintiff met two friends for dinner at a restaurant in uptown Charlotte. After leaving the restaurant at approximately 7:45 p.m., the women "were walking along talking" on the way to the parking deck where plaintiff's car was located. The women walked three abreast with the plaintiff positioned on the side nearest the curb. As they approached the parking garage, plaintiff's toe went into a depression in the sidewalk causing her to fall.

After the fall, the women examined the sidewalk and were able to see a difference in elevation between the two sidewalk slabs where plaintiff fell. At trial, plaintiff's expert testified that the difference in elevation was 1.6 inches.

At the close of plaintiff's evidence, plaintiff and defendant both made motions for a directed verdict pursuant to N.C.R. Civ. P. 50(a), which were denied. Defendant offered no further evidence. The jury found that the city was negligent in maintaining the sidewalks, but also found that the plaintiff was contributorily negligent.

Thereafter, plaintiff filed a motion for judgment notwithstanding the verdict pursuant to N.C.R. Civ. P. 50(b) and a motion for a new trial pursuant to N.C.R. Civ. P. 59 which were granted upon rehearing. The trial court found that defendant had "failed to produce more than a scintilla of evidence that the plaintiff was contributorily negligent." The court granted a new trial on damages alone.

Defendant then moved for judgment notwithstanding the verdict and for a new trial on the issue of its negligence. The motions were denied, and it is from this order that defendants appeal.

[1] Although the litigants have not raised the issue in their briefs, we note initially that this appeal is interlocutory. The issue of damages has not yet been tried. *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950). However, we find the procedural history of this case similar to that of *Bowden v. Latta*, 337 N.C. 794, 448 S.E.2d 503 (1994), in which the Supreme Court found the defendants had a right to immediate appeal under G.S. § 1-277(a) and 7A-27(d). In *Bowden*, the jury found one co-defendant negligent and the plaintiff contributorily negligent. The trial court granted plaintiff's judgment notwithstanding the verdict on the issue of contributory negligence and granted a new trial on the issue of damages. The Supreme Court reversed the Court of Appeals' determination that the appeal was premature, holding:

> Regardless of whether an appellate court undertakes a substantive appeal now or after the parties have gone through a trial on damages, the issue of whether the trial judge was correct in overturning the jury verdict on contributory negligence remains central and will, in any event, need to be addressed. Deciding the matter now would streamline the process by delineating, as well as limiting, the remaining issues that could be litigated and appealed.

Id. at 797, 448 S.E.2d at 505. Accordingly, we now address defendant's appeal.

[2] We first address the trial court's denial of defendant's motion for a directed verdict at the close of plaintiff's evidence. G.S. § 160A-296(a)(1) sets forth the statutory duty of a municipality to keep its public sidewalks "in proper repair." "While the city is not an insurer of the safety of one who uses its streets and sidewalks, it is under a duty to use due care to keep its streets and sidewalks in a reasonably safe condition for the ordinary use thereof." *Mosseller v. Asheville*, 267 N.C. 104, 107, 147 S.E.2d 558, 561 (1966). A city will not be liable for injuries caused by "[t]rivial defects, which are not naturally dangerous." *Id.* at 109, 147 S.E.2d at 562. Municipalities do not insure that the condition of its streets and sidewalks are at all times absolutely safe. *McClellan v. City of Concord*, 16 N.C. App. 136, 191 S.E.2d 430 (1972). Municipalities are responsible

> only for negligent breach of duty, which is made out by showing that (1) a defect existed, (2) an injury was caused thereby, (3) the City officers knew, or should have known from ordinary supervi-

> sion, the existence of the defect, and (4) that the character of the defect was such that injury to travelers therefrom might reasonably be anticipated.

Id. at 138, 191 S.E.2d at 432 (citation omitted). "Notice of a dangerous condition in a street or sidewalk will be imputed to the town or city, if its officers should have discovered it in the exercise of due care." *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d. 557 (1960).

Here plaintiff's experts testified that the depression existed for a number of years and had been at least one-half of an inch for 1-2 years before the accident. This depression was contrary to the building code. However, we hold that this testimony is not sufficient to raise an inference of negligence. In *Joyce v. City of High Point*, 30 N.C. App. 346, 226 S.E.2d 856 (1976), the trial court properly entered summary judgment for the city when the irregularity in the sidewalk was 1-2 inches and the plaintiff did not see the irregularity before the fall. *Id.* at 350, 226 S.E.2d at 858. Our Supreme Court in *Bagwell v. Brevard*, 256 N.C. 465, 124 S.E.2d 129 (1962), held that plaintiff did not allege actionable negligence on the part of the town when the change in the sidewalk was approximately one inch. *Id.* at 466, 124 S.E. 2d at 130. In *Watkins v. Raleigh*, 214 N.C. 644, 200 S.E. 424 (1939), our Supreme Court held that a hole in the sidewalk which was 2½ feet wide and 2 or more inches in depth was trivial. *Id.* In *Falatovitch v. Clinton*, 259 N.C. 58, 129 S.E.2d 598 (1963), plaintiff fell in an opening of the sidewalk. *Id.* The defect had been there for at least three years. *Id.* at 59, 129 S.E.2d at 599. The defect was ten inches long, and several inches wide. *Id.* Our Supreme Court held that "[w]hile the evidence tends to show there was a hole or crack in the cement sidewalk, the evidence, in our opinion, was insufficient to establish actionable negligence. Defendant's failure to correct what must be considered a minor defect did not constitute a breach of its legal duty." *Id.* at 60, 129 S.E.2d at 599.

In addition, plaintiff presented no evidence that the city received actual notice or constructive notice of the sidewalk defect before the plaintiff fell. The sidewalk was constructed in 1988 and there are no records of complaints regarding this sidewalk since 1994, when the municipality began maintaining such records. The plaintiff did not present any evidence tending to establish constructive notice of the defect. In *Willis v. City of New Bern*, 137 N.C. App. 762, 529 S.E.2d 691 (2000) the municipality rebutted the plaintiff's attempt to infer notice by introducing the affidavit of one of the city employees. *Id.* at 765, 529 S.E.2d at 693. The employee testified there were no records

of any complaints or requests for improvement to the sidewalks in that area. *Id.* Here, a city employee testified that the records were void of any complaints of defects in this sidewalk. This Court in *Willis* further held

> [t]he happening of an injury does not raise the presumption of negligence. There must be evidence of notice either actual or constructive. The existence of a condition which causes injury is not negligence *per se*. The doctrine of *res ipsa loquitur* does not apply in actions against municipalities by reason of injuries to persons using its public streets.

Id.; *Smith*, 252 N.C. at 318, 113 S.E.2d at 559 (citations omitted).

In a similar case *Gower v. Raleigh*, 270 N.C. 149, 153 S.E.2d 857 (1967), our Supreme Court held that the plaintiff's evidence, taken as true, was not sufficient to permit a finding that the city had actual or constructive knowledge of the defect. *Id.* at 151, 153 S.E.2d at 859. The Court held that according to plaintiff's testimony, a reasonable inspection of its sidewalk and crosswalk would not have led to an inspector noticing the defect. *Id.* Mrs. Gower testified that she looked down before stepping off the curb and did not observe the defects. *Id.* She testified it was a clear day. *Id.* The Court held that the defect would not be more visible to a city inspector than to her. *Id.* The Court further held that if the plaintiff did "observe the crack before she stepped on it . . . and the existence of the crack was so clearly dangerous to users of the sidewalk that the city should have anticipated injury therefrom, the plaintiff, having observed the crack, should also have recognized the danger of stepping upon it. . . . If the city should have known the crack was a hazard to pedestrians, the plaintiff was negligent in stepping upon it, and thereby contributed to her own injury." *Id.* at 151-52, 153 S.E.2d at 859.

Although expert testimony regarding defects and their correlation with building codes typically gives rise to an inference of negligence sufficient to allow a jury to determine the issue, on this record it does not. The law with regard to municipalities and maintenance of sidewalks is such that minor defects are not actionable.

Because we hold that the defendant's motion for directed verdict should have been granted at the close of plaintiff's evidence, we do not address the remaining issues. Accordingly the court's denial of defendant's motion for directed verdict is

Reversed and remanded for entry of judgment for the defendant.

Judge SMITH concurs.

Judge HUDSON dissents.

Judge HUDSON, dissenting.

I believe plaintiff submitted sufficient evidence of defendant's negligence to allow the jury's verdict to stand. Thus, I respectfully dissent to the majority's decision that the trial court should have granted defendant's motion for a directed verdict on that issue.

The majority finds that the sidewalk defect of which plaintiff complains was trivial as a matter of law and points to *Watkins v. Raleigh*, 214 N.C. 644, 200 S.E. 424 (1939), *Joyce v. City of High Point*, 30 N.C. App. 346, 226 S.E.2d 856 (1976), *Bagwell v. Brevard*, 256 N.C. 465, 124 S.E.2d 129 (1962), and *Falatovitch v. Clinton*, 259 N.C. 58, 129 S.E.2d 598 (1963), in support of its position. I believe these cases are distinguishable. *Watkins* was decided on the basis of contributory negligence—the Supreme Court declined to explicitly address the issue of the whether the sidewalk defect was trivial as a matter of law. Most significantly, in none of the cases cited by the majority did the plaintiff present expert testimony regarding standards of care in the maintenance of sidewalks.

In the present case, plaintiff presented testimony from civil engineering expert Peter Verna and engineering and accident reconstruction expert Michael Dickinson that the condition of the sidewalk upon which plaintiff fell was defective. Verna indicated that the sidewalk had settled over time because the soil beneath it had not been properly compacted prior to pouring the concrete. Dickinson testified that the difference in elevation between the two sidewalk slabs was more than three times that allowed by several applicable state and national safety codes. Both men opined that its condition resulted in an increased probability that pedestrians would trip and fall.

Randolph Jones, defendant's employee in charge of the city's sidewalk repair program, admitted that the sidewalk upon which plaintiff fell did not meet "the requirements of standards of good repair." Also, the city investigator who inspected the site shortly after plaintiff's accident labeled the sidewalk as "hazardous."

Thus, the present case differs from *Watkins*, *Joyce*, *Bagwell*, and *Falatovitch* in that there was a wealth of evidence, including testimony by engineering experts and a representative of the city itself, from which a jury could and did find that defendant had breached its duty to maintain the sidewalk in a reasonably safe condition. Although the standard of care in a negligence case is a question of law, the degree of care required to measure up to the standard under the particular circumstances of the case is an issue for the jury. *Tindle v. Denny*, 3 N.C. App. 567, 570, 165 S.E.2d 351, 354 (1969).

Thus, I believe the question of whether defendant kept the sidewalk "in a reasonably safe condition for the ordinary use thereof," *Mosseller v. Asheville*, 267 N.C. 104, 107, 147 S.E.2d 558, 561 (1966), and whether the character of the defect was not trivial "such that injuries . . . might reasonably be foreseen," *id.* at 108, 147 S.E.2d at 561, was properly for the jury to decide. To hold that the defect was trivial as a matter of law based upon cases decided decades earlier and in which no expert testimony was presented overlooks the fact that safety standards evolve over time.

I also believe plaintiff presented sufficient evidence that defendant had constructive notice of the defect in order to take the issue to the jury. "It is the duty of the city to exercise a reasonable and continuing supervision over its streets in order that it may know their condition and it is held to have knowledge of a defect which such inspection would have disclosed to it." *Mosseller*, 267 N.C. at 108-09, 147 S.E.2d at 562.

Randolph Jones testified that at the time of plaintiff's accident, the city did not have a program for routine inspection of its sidewalks. An inspection was conducted only if requested by a citizen. A jury could have used this information to support the conclusion that defendant failed to exercise due care to discover defects in its sidewalks.

Furthermore, "when observable defects in a highway [or sidewalk] have existed for a time so long that they ought to have been observed, notice of them is implied, and is imputed to those whose duty it is to repair them." *Fitzgerald v. Concord*, 140 N.C. 110, 113, 52 S.E. 309, 310 (1905) (citation omitted). Here, engineering expert Peter Verna testified that the sidewalk slab in question began settling shortly after construction in 1988 and the settlement had continued gradually since that time. By 1991, the difference in elevation between the slabs would have been two-thirds of an inch. He opined

that when the difference becomes half an inch, the sidewalk needs to be fixed. Expert Michael Dickinson testified that the difference in elevation had been in excess of half an inch for between one year, two months and six years before the date of plaintiff's fall.

"On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required and it is usually a question for the jury on the facts and circumstances of each particular case . . . ." *Id.* at 114, 52 S.E. at 310. Here, there was expert testimony regarding the length of time the defect had been in existence in the sidewalk upon which plaintiff fell. *Cf. Smith v. Hickory*, 252 N.C. 316, 319, 113 S.E.2d 557, 560 (1960) (noting that plaintiff's guess as to how long sidewalk defect had existed was conjecture and that she had no expert testimony on the issue).

By contrast, in *Willis v. City of New Bern*, 137 N.C. App. 762, 529 S.E.2d 691 (2000), cited by the majority as a case in which the Court found a lack of constructive notice, there was no evidence as to how long the sidewalk defect had been in existence. Furthermore, in *Willis*, there is no indication evidence was presented regarding the city's inspection program or lack thereof.

Gower v. Raleigh, 270 N.C. 149, 153 S.E.2d 857 (1967), is also distinguishable. In *Gower*, plaintiff alleged the city was negligent in failing to repair a crack in the street and remove an oily substance from the sidewalk. The Court, in holding there was no constructive notice to the city, found there was "nothing to indicate how long the oily substance had been upon the sidewalk or curb." 270 N.C. at 151, 153 S.E.2d at 859. By contrast, in the present case, there was evidence as to how long the sidewalk defect had existed.

The *Gower* court further commented that if plaintiff herself had not noticed the crack in the street, which she described as being "real small," then the city's inspectors could not have been expected to see it either. *Id.* The Court appears to presume there will be inspections of the sidewalk by the city, but in the case before us defendant admitted it conducted none. Furthermore, in this case, witnesses testified the sidewalk defect was easily visible.

Gower did point out that if a defect is easily visible, normally a plaintiff will be found to be contributorily negligent by failing to avoid it. *Id.* at 151-52, 153 S.E.2d at 859. However, in this case, there was lay and expert testimony that the defect was not visible to a per-

son walking *in the direction plaintiff was walking*. There was evidence that the elevation difference, however, would be clearly visible to a person approaching from the opposite direction. Thus, this case presents an unusual mix of facts, where there was evidence that the defect was large enough to be noticed on inspection, yet plaintiff was unable to see it before falling through no fault of her own.

In conclusion, I believe there was sufficient evidence of a breach of duty on the part of defendant in failing to repair the defect in question, and sufficient evidence that defendant had constructive notice of the defect, in order to take the case to the jury. Furthermore, in that defendant failed to present "more than a scintilla of evidence" that plaintiff was contributorily negligent, the trial court also properly granted plaintiff's motions for judgment notwithstanding the verdict on that issue and for a new trial on the issue of damages. Thus, I vote to affirm the decision of the trial court in all respects.

LELAND DEMENT, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA00-169

(Filed 3 April 2001)

1. Insurance— automobile—supplementary payments clause—emergency first aid—application to third party

The trial court should have entered a judgment on the pleadings for defendant in a declaratory judgment action to define plaintiff's rights under an insurance policy where plaintiff was in an accident with a driver insured by defendant, plaintiff received on-site first aid from emergency medical technicians and further emergency medical care at a hospital, and plaintiff sought to recover under a supplementary payments clause in the driver's liability policy that referred to expenses for emergency first aid. Plaintiff is without standing as a third-party beneficiary and the supplementary payment clause is not triggered unless the insured becomes responsible for expenses for emergency first aid to others. Since nothing on the face of the pleadings shows that the insured incurred any expenses for plaintiff's first aid treatment, judgment on the pleadings was appropriate.

2. Pleadings— Rule 11 sanctions—case of first impression

The trial court did not err by denying a motion for Rule 11 sanctions in a declaratory judgment action to interpret an insurance policy where there was no evidence to support a conclusion that sanctions were appropriate under the legal insufficiency or improper purpose standard and the issue raised in the complaint was one of first impression.

3. Appeal and Error— assignments of error—statute not mentioned

Defendant did not preserve for appellate review the issue of whether the trial court should have awarded sanctions under N.C.G.S. § 6-21 where defendant made no reference to that statute in any assignment of error.

Appeal by defendant from order entered 10 November 1999 by Judge L. Todd Burke in Superior Court, Guilford County. Heard in the Court of Appeals 11 January 2001.

Donaldson & Black, P.A., by Rachel Scott Decker, for plaintiff-appellee.

Teague, Rotenstreich & Stanaland, L.L.P., by Kenneth B. Rotenstreich and Paul A. Daniels, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Leland DeMent ("plaintiff") brought this action for a declaratory judgment defining his rights under the "Supplementary Payments" clause of an insurance policy issued by Nationwide Mutual Insurance Company ("defendant") to Paula Keene, the driver of an automobile involved in an accident with plaintiff's vehicle. Defendant moved to dismiss the action and for judgment on the pleadings alleging, *inter alia*: (1) failure to state a claim upon which relief may be granted; (2) lack of a justiciable issue or genuine controversy; (3) failure to join the real party in interest; (4) lack of standing and/or privity of contract; and (5) absence of ripeness. Following a hearing, the trial court denied the motions, and defendant appeals.

The averments in plaintiff's complaint show that on 23 April 1998, while operating her vehicle along Rural Paved Road 2370 in Rowan County, North Carolina, Paula Keene failed to heed a stop sign and collided with plaintiff's vehicle. As a result of the collision, plaintiff sustained severe bodily injuries. Emergency medical technicians

responding to the accident administered on-site first aid to plaintiff. Plaintiff was then airlifted to North Carolina Baptist Hospital, where he received further urgent medical treatment. Plaintiff incurred significant medical expenses as a consequence of his emergency medical care.

Keene had a motor vehicle liability insurance policy with defendant, which policy was in full force and effect at the time of the accident. Under the "Supplementary Payments" clause of the "Liability Coverage" section of the policy, defendant agreed that "[i]n addition to [its] limit of liability, . . . [it would] pay on behalf of an **insured**: . . . Expenses for emergency first aid to others at an accident involving any auto covered by this policy." Pursuant to this provision, plaintiff requested that defendant pay his emergency medical expenses. Defendant refused, and plaintiff filed the present action seeking a judicial declaration of his rights under the policy provision.

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[1] On appeal, defendant argues that the trial court erred in denying its motion for judgment on the pleadings. Defendant contends that because plaintiff was a stranger to its insurance contract with Keene, plaintiff lacked standing to seek a declaratory judgment construing the policy provisions. We must agree.

Judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure is a method by which the trial court may dispose of a claim when it is evident from the face of the pleadings that the claim lacks merit. *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 134 N.C. App. 65, 67, 516 S.E.2d 911, 913 (1999), *aff'd in part as modified*, 351 N.C. 589, 528 S.E.2d 568 (2000). In ruling on a motion for judgment on the pleadings, the court must examine all facts and permissible inferences therefrom in the light most beneficial to the party opposing the motion. *Id.* at 67-68, 516 S.E.2d at 913. Additionally, all well-pleaded factual allegations of the non-moving party are accepted as true. *Id.* at 68, 516 S.E.2d at 913. Judgment on the pleadings is an expedient disposition where the court concludes that all genuine material issues of fact are resolved in the pleadings and that the moving party is entitled to judgment as a matter of law. *Cash v. State Farm Mut. Auto. Ins. Co.*, 137 N.C. App. 192, 528 S.E.2d 372, *affirmed*, 353 N.C. 257, 538 S.E.2d 569 (2000).

An action for declaratory judgment pursuant to section 1-253 of the General Statutes is designed to achieve a swift determination of "the rights, duties, and liabilities of parties in situations usually

involving an issue of law or the construction of a document where the facts involved are largely undisputed." *Hobson Construction Co. v. Great American Ins. Co.*, 71 N.C. App. 586, 588, 322 S.E.2d 632, 634 (1984). Before a declaratory judgment can be had, however, there must exist "a real controversy of a justiciable nature" between the parties. *Id.* at 589, 322 S.E.2d at 634 (citation omitted). As to what persons are entitled to declaratory relief, section 1-254 of the General Statutes sets forth the following criteria:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a . . . contract or franchise, may have determined any question of construction or validity arising under the instrument, . . . contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (1999). Thus, standing to seek a declaration as to the extent of coverage under an insurance policy requires that the party seeking relief have an enforceable contractual right under the insurance agreement. *Terrell v. Lawyers Mut. Liab. Ins. Co.*, 131 N.C. App. 655, 507 S.E.2d 923 (1998). Whether such a right exists depends on the intent of the contracting parties. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 407 S.E.2d 178 (1991).

Our courts have established several rules pertaining to the construction of insurance policies, the most rudimentary being that the language of the policy controls its interpretation. *Nationwide Mutual Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994), *affirmed*, 342 N.C. 482, 467 S.E.2d 34 (1996). "The various terms of an insurance policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect." *Cone Mills Corp. v. Allstate Ins. Co.*, 114 N.C. App. 684, 690, 443 S.E.2d 357, 361 (1994), *disc. review improvidently allowed*, 340 N.C. 353, 457 S.E.2d 300 (1995). Furthermore,

> "Where the language of a contract is plain and unambiguous, construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, in light of the undisputed evidence as to the custom, usage and meaning of its terms."

Id. (quoting *First Citizens Bank & Trust Co. v. McLamb*, 112 N.C. App. 645, 649-50, 439 S.E.2d 166, 169 (1993)). Since the objective of construing an insurance policy is to ascertain the intent of the parties, the courts should resist piecemeal constructions and should, instead, examine each provision in the context of the policy as a whole. *Blake v. Insurance Co.*, 38 N.C. App. 555, 557, 248 S.E.2d 388, 390 (1978).

The motor vehicle liability policy issued to Keene by defendant contains the following relevant provisions:

> ***Part B—Liability Coverage***
>
> ***Insuring Agreement***
>
> We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the insured. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit or settle any claim for bodily injury or property damage not covered under this policy.
>
> . . . .
>
> ***Supplementary Payments***
>
> In addition to our limit of liability, we will pay on behalf of an insured:
>
> . . . .
>
> 5. Expenses for emergency first aid to others at an accident involving any auto covered by this policy.

Plaintiff takes the position that pursuant to the emergency first aid provision, he may proceed directly against defendant for payment of the emergency medical expenses he incurred as a result of the collision involving defendant's insured. Plaintiff contends that as an emergency first aid recipient, he falls squarely within the class of persons whom the provision was intended to benefit. Therefore, plaintiff claims to have an enforceable contractual right as a third-party beneficiary of the Keene policy, which right confers standing in him to seek declaratory relief. No North Carolina decision address-

ing this specific issue has come to our attention. However, in other jurisdictions, courts have interpreted similar first aid provisions as inuring to the benefit of the insured, and thus, bestowing no rights on third parties.

In *Dalrymple v. Lumbermens Mut. Cas. Ins. Co.*, 380 N.Y.S.2d 900 (1976), the plaintiff sustained personal injuries in a collision involving an automobile insured by the defendant. Plaintiff required immediate medical treatment following the accident and incurred medical expenses related thereto. The policy issued to the defendant's insured contained a supplementary payments provision, under which the defendant agreed to "pay expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident." *Id.* at 902. Based on this provision, the plaintiff filed an action against the defendant to recover payment of her medical expenses. The plaintiff argued "that she [was] a member of that class of 'others' referred to in the policy provision," and thus, was a third-party beneficiary of the insurance agreement. *Id.* The Supreme Court of New York, however, rejected the plaintiff's argument, reasoning as follows:

> The clause, above referred to, which the plaintiff relies on, must be read in conjunction with all of the other paragraphs contained in that portion of the insurance policy entitled "Defense, Settlement, Supplementary Payments[."] Supplementary payments as used in an automobile liability policy are those payments which are to be made by an insurance company to reimburse an insured named in the policy for certain out-of-pocket expenses incurred by the insured. This is the purpose of a supplementary payments provision in an insurance policy. Had the defendant's insured, for example, after the accident, paid the expenses of the plaintiff herein for emergency treatment or for immediate medical and surgical relief, then, and in that event, the defendant's insured would have a right to seek reimbursement from the defendant under the supplementary payments provision.

Id. at 903. The court further concluded that the parties did not intend the first aid provision to create any actionable right in a third party, but intended that the provision operate exclusively to the benefit of the insured. *Id.* Accordingly, the court held that the plaintiff lacked standing to proceed directly against the insurance company under the terms of the policy. *Id.*

In *Vega v. State Farm Auto. Ins. Co.*, 401 So.2d 368 (La. Ct. App. 1981), the plaintiff filed an action against the defendant and his insurance company for personal injuries arising out of a head-on collision. The plaintiff argued that he was entitled to recover the amounts he expended for his wife's medical care under the supplementary payments provision of the defendant's liability insurance policy. The provision stated that the insurer would "pay, in addition to the applicable limits of liability: . . . (c) Expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of an accident involving an automobile insured hereunder and not due to war." *Id.* at 374. The plaintiff took the position that the first aid clause was "a stipulation pour autri or a stipulation in favor of a third person." *Id.* The Louisiana Court of Appeals disagreed, stating that "th[e] clause, otherwise known as the 'good samaritan' clause, [was] designed to reimburse an insured for expenses incurred on behalf of another party who does not qualify as an insured under the policy contract." *Id.* Hence, the court concluded that the plaintiff had no right of recovery under the supplementary payments provision. *Id.*

In the case currently before us, the supplementary payments clause contained in the Keene policy set forth defendant's agreement to "pay ***on behalf of an insured*** . . . [e]xpenses for emergency first aid to others." (Emphasis added.) Although this language varies slightly from that used in the *Dalrymple* and *Vega* policies, we are of the opinion that those decisions lend some guidance as to the purpose and effect of the provision at issue here.

First, we note that in North Carolina, a person may bring an action to enforce a contract to which he is not a party, if he demonstrates that the contracting parties intended primarily and directly to benefit him or the class of persons to which he belongs. *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 33, 351 S.E.2d 786, 790 (1987). The intent of the parties is ascertained "by construction of the 'terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish.' " *Id.* at 34, 351 S.E.2d at 790 (quoting *Lane v. Surety Co.*, 48 N.C. App. 634, 639, 269 S.E.2d 711, 714-15 (1980), *disc. review denied*, 302 N.C. 219, 276 S.E.2d 916 (1981)). Furthermore, " '[w]hen a third person seeks enforcement of a contract made between other parties, the contract must be construed strictly against the party seeking enforcement.' " *Id.* at 34, 351 S.E.2d at 791 (quoting *Lane*, 48 N.C. App. at 638, 276 S.E.2d at 714).

Critical to our understanding of whether it was the parties' intent to confer a direct benefit on first aid recipients is the declaration that payment of such expenses would be made "on behalf of an insured." Giving ordinary meaning to the phrase, we regard action taken "on behalf of" a person as that done "in the interest of," "[f]or the benefit of," or "[a]s the agent of" that person. *See The American Heritage Dictionary* 77 (3rd ed. 1994). Therefore, we conclude that defendant's obligation of an insurer to pay first aid medical expenses "on behalf of any insured" flows primarily and directly to the insured. Because the benefit running to plaintiff by reason of the provision is merely incidental, he is without standing as a third-party beneficiary to seek enforcement of the covenant or a declaratory judgment as to its terms. *See Terrell*, 131 N.C. App. at 660, 507 S.E.2d at 926.

We believe that like the "good samaritan" clauses interpreted by the courts in *Dalrymple* and *Vega*, the supplementary payment clause is not triggered unless and until the insured becomes responsible, whether legally or gratuitously, for "[e]xpenses for emergency first aid to others." Only then can payment of the expenses be made "on behalf of the insured." Since nothing on the face of the pleadings shows that Keene incurred any expenses for plaintiff's first aid treatment, judgment on the pleadings in favor of defendant was appropriate. Accordingly, we reverse the denial of defendant's motion and remand this matter to the trial court for entry of judgment on the pleadings.

[2] Defendant next argues that the court erroneously denied its motion for sanctions under Rule 11 of the North Carolina Rules of Civil Procedure, on the ground that plaintiff's complaint was legally insufficient and was brought for an improper purpose. We disagree.

In pertinent part, Rule 11(a) of our Rules of Civil Procedure provides as follows:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a plead-

> ing, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction[.]

N.C. Gen. Stat. § 1A-1, Rule 11(a) (1999). The trial court's decision to deny a motion for mandatory sanctions under Rule 11 is reviewable *de novo*. *Scholar Business Assocs., Inc. v. Davis*, 138 N.C. App. 298, 531 S.E.2d 236 (2000). On review, the court must determine: "(1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence." *Twaddell v. Anderson*, 136 N.C. App. 56, 70, 523 S.E.2d 710, 720 (1999) (quoting *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989)), *disc. review denied*, 351 N.C. 480, 543 S.E.2d 510 (2000). If the trial court makes no factual findings or legal conclusions concerning a Rule 11 motion for sanctions, remand is necessary, unless " 'there is no evidence in the record, considered in the light most favorable to the movant, which could support a legal conclusion that sanctions are proper.' " *Scholar Business*, 138 N.C. App. at 304, 531 S.E.2d at 240 (quoting *McClerin v. R-M Industries, Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995)).

Having reviewed the record in its entirety, we find no evidence to support a conclusion that sanctions under Rule 11 are appropriate on either the "legal insufficiency" or "improper purpose" standard. Moreover, we stated in our analysis that the issue raised by plaintiff's complaint was one of first impression in this State. Therefore, we conclude that the trial court committed no error in denying defendant's motion for sanctions.

[3] As to defendant's argument that the court should have awarded sanctions pursuant to section 6-21.5 of the General Statutes, we note that defendant made no reference to this statute in any of the assignments of error appearing in the record on appeal. Accordingly, defendant has not preserved this argument for our review. *See* N.C.R. App. P. 10(c)(1) (requiring assignments of error in the record on appeal to "state plainly, concisely and without argumentation the legal basis upon which error is assigned"). Further, in view of our determination that the trial court should have awarded judgment on the pleadings in favor of defendant, we need not consider the balance of defendant's arguments on appeal.

In conformity with the reasoning expressed herein, the judgment of the trial court is reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion.

Reversed in part, affirmed in part, and remanded.

Judges MARTIN and THOMAS concur.

IN THE MATTER OF: MASHANNA NICOLE BLACKBURN, MINOR

No. COA00-414

(Filed 3 April 2001)

1. **Termination of Parental Rights— motion to dismiss—sufficiency of evidence**

The trial court did not err in a termination of parental rights case by denying respondent mother's motion to dismiss at the close of petitioner's evidence under N.C.G.S. § 1A-1, Rule 41(b), because there was substantial evidence of neglect including domestic violence between respondent and her live-in boyfriend, inappropriately leaving the child in the care of others, respondent's illegal drug use and distribution in the presence of the child, an overall history of lawlessness, respondent's repeated incarcerations, and a prior adjudication of neglect.

2. **Termination of Parental Rights— neglect—clear, cogent, and convincing evidence**

The trial court did not err by concluding as a matter of law that grounds existed under N.C.G.S. § 7A-289.32(2) (now N.C.G.S. § 7B-1111(a)) for the termination of respondent mother's parental rights based on neglect, because clear, cogent, and convincing evidence reveals that: (1) the child was not receiving proper care from her parent and at the time of the termination proceeding respondent was still unable to care for her child since she was in prison until January 2003; (2) respondent has been repeatedly incarcerated since 1989; and (3) respondent continually attempted to leave her child in the care of others.

3. Termination of Parental Rights— best interests of the child—no abuse of discretion

The trial court did not abuse its discretion in a termination of parental rights case by concluding the alleged repetition of alleged neglect will continue, there is no reasonable hope that respondent mother can correct conditions to appropriately care and provide for the child, and it is in the best interests of the child that her parental rights be terminated, because: (1) respondent has not shown an improvement in her lifestyle; (2) there is no evidence respondent is likely to make appropriate decisions as to her daughter's welfare; and (3) there is nothing upon which the trial court could reasonably base a decision to find it would not be in the child's best interests to terminate parental rights.

Appeal by respondent from judgment entered 15 December 1999 by Judge Edgar B. Gregory in Yadkin County District Court. Heard in the Court of Appeals 11 January 2001.

N. Lawrence Hudspeth, III for respondent-appellant.

Richard N. Randleman for petitioner-appellee.

Dennis G. Martin, guardian ad litem for minor.

THOMAS, Judge.

Respondent, Tammy Carter, mother of Mashanna Blackburn, appeals from an order entered by the trial court terminating her parental rights. For reasons discussed herein, we affirm the trial court.

The facts are as follows: Mashanna was born to respondent on 3 March 1995. On 19 May 1995, petitioner, the Yadkin County Department of Social Services, received a report alleging that Mashanna was neglected. During an interview with petitioner, respondent admitted taking Mashanna to a crack house, dealing illegal drugs, associating with known drug users in the child's presence and even leaving her alone with drug users. She further said she had engaged in prostitution to support her drug habit and that her live-in boyfriend was a drug user who had dealt in illegal drugs. There also was domestic violence between respondent and her boyfriend. As a result, she took part in a child protection plan devised and overseen by petitioner from May to September 1995. Throughout that period, however, respondent maintained custody of Mashanna. The

whereabouts of Mashanna's father, Orrando Blackburn, were unknown.

In March of 1996, respondent was jailed for writing worthless checks and failure to appear in court. A juvenile petition was filed and an order to assume nonsecure custody of Mashanna was entered on 31 March 1996. On 8 April 1996, Mashanna was adjudicated neglected and dependent, custody was placed with petitioner, and the trial court ordered that reasonable efforts be made for reunification after respondent was released from jail. Although respondent was released on 14 May 1996, the child was not returned to her custody from foster care until September 1996.

Respondent was again incarcerated on 14 March 1998 due to a probation violation and later received an active prison sentence of not less than fifty-two nor more than sixty-two months. Also on the fourteenth of March, an order for nonsecure custody of Mashanna was entered. At the time, Mashanna was found to have scabies and continued to suffer from language, socialization, and adaptive behavior delays. The trial court held a continued custody hearing on 16 March 1998, and declared Mashanna abandoned. Appropriate family placement was not available, causing the child to remain in foster care. In subsequent review hearings on 23 March 1998 and 14 September 1998, the trial court determined it was in Mashanna's best interests for custody to remain with petitioner, but that the goal or plan was still reunification with respondent.

In a third review hearing, however, on 8 March 1999, the trial court not only found it was in Mashanna's best interests for custody to remain with petitioner but also that petitioner was relieved of further responsibility to use reasonable efforts for reunification. The court found that petitioner "may pursue" termination of parental rights.

Petitioner filed a petition for termination of parental rights on 31 March 1999. On 15 December 1999, the trial court entered an order terminating respondent's parental rights. From this order, respondent appeals and asserts six assignments of error.

We note that when the petition was filed, Chapter 7A of the N.C. General Statutes governed termination of parental rights and is the controlling authority in the instant case. By the time the case was heard, however, Chapter 7B had been enacted. Among other modifications, references to "child" have been changed to "juvenile" in Chapter 7B.

There is a two-step process in a termination of parental rights proceeding. *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984). In the adjudicatory stage, the trial court must find that at least one ground for the termination of parental rights listed in N.C. Gen. Stat. § 7A-289.32 (now codified as section 7B-1111) exists. N.C. Gen. Stat. § 7A-289.30 (1998) (now codified as N.C. Gen. Stat. § 7B-1109). In this stage, the court's decision must be supported by clear, cogent and convincing evidence with the burden of proof on the petitioner. *In re Swisher*, 74 N.C. App. 239, 240, 328 S.E.2d 33, 35 (1985). We note that Chapters 7A and 7B interchangeably use the "clear, cogent and convincing" and the "clear and convincing" standards. It has long been held that these two standards are synonymous. *Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252. Once one or more of the grounds for termination are established, the trial court must proceed to the dispositional stage where the best interests of the child are considered. There, the court shall issue an order terminating the parental rights unless it further determines that the best interests of the child require otherwise. N.C. Gen. Stat. § 7A-289.31(a) (1998) (now codified as section 7B-1110(a)). *See also In re Carr*, 116 N.C. App. 403, 448 S.E.2d 299 (1994).

We first turn to the adjudication.

[1] Respondent argues the trial court committed reversible error in denying her motion to dismiss at the close of petitioner's evidence pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, alleging that petitioner failed to show a right to relief. We disagree.

A motion to dismiss pursuant to Rule 41(b) will be granted "if the [petitioner] has shown no right to relief or if the [petitioner] has made out a colorable claim but the court nevertheless determines as the trier of fact that the [respondent] is entitled to judgment on the merits." *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999) (quoting *Ayden Tractors v. Gaskins*, 61 N.C. App. 654, 660, 301 S.E.2d 523, 527, *disc. review denied*, 309 N.C. 319, 307 S.E.2d 162 (1983)). The trial court is able to weigh all evidence before it and make a determination. Here, there was substantial evidence of neglect that included domestic violence between respondent and her live-in boyfriend, inappropriately leaving the child in the care of others, respondent's illegal drug use and distribution in the presence of the child, an overall history of lawlessness, respondent's repeated incarcerations and a prior adjudication of neglect. A prior adjudica-

tion of neglect cannot be the sole basis of a termination proceeding, although it may be relevant evidence. *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984). However, in the instant case, the prior adjudication is not the sole basis. The findings overwhelmingly establish a basis for surviving the motion to dismiss. Respondent has not shown that she is entitled to judgment on the merits at the close of petitioner's evidence. Thus, we find the trial court did not err and respondent's first assignment of error is rejected.

[2] By respondent's second assignment of error, she argues the trial court committed error in concluding as a matter of law, after all of the evidence, that grounds existed for the termination of respondent's parental rights in that Mashanna is a neglected child. We disagree.

N.C. Gen. Stat. § 7A-289.32(2) (now codified as section 7B-1111(a)) delineates nine possible grounds for termination of parental rights. The statute provides

> [t]he court may terminate the parental rights upon a finding of one or more of the following . . . (2) The parent has abused or neglected the child. The child shall be deemed to be . . . neglected if the court finds the child to be . . . a neglected child within the meaning of G.S. 7A-517(21) [now codified as G.S. 7B-101(15)].
>
> A neglected child is
>
> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7A-517(21) (1998) (now codified as section 7B-101(15)). In determining neglect, the trial judge must find evidence of neglect at the time of the termination proceeding. *Ballard*, 311 N.C. at 716, 319 S.E.2d at 232. In the instant case, the child was not receiving proper care from her parent and, at the time of the termination proceeding, respondent was still unable to care for her child. She conceded that the earliest she would be able to care for Mashanna would be after January of 2003, her scheduled release date.

The trial court's findings of fact will be overturned only if respondent can show a lack of clear, cogent and convincing competent evidence to support the findings. *In re Allen*, 58 N.C. App. 322, 293 S.E.2d 607 (1982). Respondent argues there was insufficient evidence to show neglect because incarceration alone is not sufficient to demonstrate wilful abandonment. *In re Maynor*, 38 N.C. App. 724, 248 S.E.2d 875 (1978). However, respondent's current incarceration alone is not the basis for this finding of neglect. Respondent has repeatedly been incarcerated since 1989. In addition to facts already mentioned, petitioner was summoned to retrieve the child from the home of respondent's friend, Rodney Jarrett, in 1996. Jarrett's mother, who owned the home, alleged that Jarrett was a crack cocaine addict and that neither one of them would continue to care for Mashanna. In 1998, respondent left the child with Betty Palmer, who notified petitioner that she could not continue to care for Mashanna due to personal problems as well as a lack of money and food. Respondent's own mother, Barbara Hutchens, already rearing an older child of respondent's, refused to care for Mashanna.

In considering the circumstances in the aggregate, we find the trial judge did not err in concluding as a matter of law that grounds existed for the termination of parental rights, based on respondent's neglect of Mashanna. Thus, respondent's second assignment of error is rejected.

[3] We shall combine, for our purposes, respondent's third, fourth, fifth and sixth assignments of error. She argues the trial court erred in its conclusions that: 1) the alleged repetition of the alleged neglect will continue; 2) there is no reasonable hope that respondent can correct conditions to appropriately care and provide for the child; and 3) it is in the best interests of the child that her parental rights be terminated. We disagree.

One of the underlying principles guiding the trial court in the dispositional stage is the recognition of the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological parents or legal guardians. N.C. Gen. Stat. § 7A-289.22(2) (now codified as section 7B-1100(2)). In all cases where the interests of the child and those of the child's parents or guardians are in conflict, however, action which is in the best interests of the child should be taken. N.C. Gen. Stat. § 7A-289.22(3) (now codified as section 7B-1100(3)).

After the trial court has determined grounds exist for termination of parental rights at adjudication, the court is required to issue an order of termination in the dispositional stage, unless it finds the best interests of the child would be to preserve the parent's rights. *In re Parker*, 90 N.C. App. 423, 368 S.E.2d 879 (1988). This would ordinarily create a presumption for the issuance of the termination order once a termination ground has been established. However, a presumption is either rebuttable or conclusive. *Black's Law Dictionary* 1185 (6th ed. 1990). It is not conclusive because the trial judge has discretion. Nor is it rebuttable because it neither affects the burden of production or proof. *Id.* As our Supreme Court noted in *In re Montgomery*, the legislature has properly recognized that in certain situations, even where the grounds for termination could be legally established, the best interests of the child indicate that the family unit should not be dissolved. 311 N.C. 101, 316 S.E.2d 246 (1984). In sum, where there is reasonable hope that the family unit within a reasonable period of time can reunite and provide for the emotional and physical welfare of the child, the trial court is given discretion not to terminate rights. *Id.*

While there is no requirement at this dispositional stage for the court to make findings of fact upon the issuance of an order to terminate parental rights, such findings and conclusions must be made upon any determination that the best interests of the child require that rights *not* be terminated. N.C. Gen. Stat. § 7A-289.31(b) and (c) (now codified as sections 7B-1110(b) and (c)).

Evidence heard or introduced throughout the adjudicatory stage, as well as any additional evidence, may be considered by the court during the dispositional stage. In the instant case, the trial court heard petitioner's evidence of repeated violations of service agreements, illegal drug use, other criminal behavior, domestic violence, incarcerations and not only a lack of care for Mashanna, but actually putting her in danger on many occasions. The pattern of neglect was long and unbroken which resulted in little permanency in the life of Mashanna.

Respondent proffered evidence claiming she had overcome her problems and achieved rehabilitation while in prison. She enrolled in a cosmetology course there, frequently wrote letters to her daughter, and also wrote to petitioner and the court asking them not to terminate her parental rights. She requested visits with Mashanna, but those requests were denied.

Despite her efforts at reformation, however, respondent has been written up at least eleven times for disciplinary problems during the latest incarceration, including disobeying orders, misusing medicine, theft of property, possessing non-threatening contraband and provoking an assault.

We note that the child and her best interests are at issue here, not respondent's hopes for the future. *See In re Smith*, 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982). Respondent has not shown an improvement in her lifestyle. While she claims she no longer is engaging in criminal behavior, she is, after all, in a highly structured and secure facility. Additionally, there is no evidence that she is likely to make appropriate decisions as to her daughter's welfare. There was nothing upon which the trial court could reasonably base a decision to find it would *not* be in Mashanna's best interests to terminate parental rights.

We find the trial court did not abuse its discretion and therefore reject respondent's third, fourth, fifth and sixth assignments of error.

Based upon the foregoing, the order of the trial court terminating respondent's parental rights is affirmed.

AFFIRMED.

Judges MARTIN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. BRUCE JEROME HOLMES

No. COA00-117

(Filed 3 April 2001)

1. Drugs— trafficking by possession or transportation of 28 or more grams—sufficiency of evidence—average weight of sample bags

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence charges of trafficking by possessing or transporting 28 or more grams of heroin where an SBI forensic chemist testified that he examined each of the 671 bags containing an off-white or tan substance seized from defendant, randomly selected and weighed 50 bags, and calculated the total

weight of 31 grams by determining the average weight and multiplying by 671.

2. Drugs— trafficking by possession or transportation of 28 or more grams—average weight of sample bags—instruction on lesser included offense denied

The trial court did not err in a prosecution for trafficking by possession or transportation of 28 or more grams of heroin by denying defendant's request for an instruction on the lesser-included offense of trafficking by possession or transportation of 14 or more grams but less than 28 where an SBI forensic chemist testified that he examined each of the 671 bags containing an off-white or tan substance seized from defendant, randomly selected and weighed 50 bags, and calculated the total weight of 31 grams by determining the average weight and multiplying by 671.

3. Search and Seizure— probable cause—informants' tips

The trial court did not err in a narcotics prosecution by denying defendant's motion to suppress evidence seized in a search based upon information from informants where the court found that the tips included a physical description of the perpetrators and their vehicle as well as the time and place the sale of the heroin was to occur; the informants had been reliable, providing information leading to multiple arrests and convictions; the informants had first-hand knowledge of the illegal drug activities involved in this case; and the reliability of the tips was established by police observations leading up to the arrest.

Appeal by defendant from judgment entered 6 August 1999 by Judge Larry G. Ford in Guilford County Superior Court. Heard in the Court of Appeals 12 January 2001.

Attorney General Michael F. Easley, by Associate Attorney General Jeffrey C. Sugg, for the State.

W. David Lloyd for defendant-appellant.

WALKER, Judge.

On 6 August 1999, defendant was convicted of one count of possession with intent to sell or deliver heroin, one count of trafficking in heroin by possession of 28 grams or more, and one count of trafficking in heroin by transportation of 28 grams or more. The State's evidence tended to show the following: On or about 5 January 1999,

Officer Richard Koonce (Koonce) of the Greensboro Police Department and Officer Herbert Sampson (Sampson) of the High Point Police Department each received information from two different informants, Travis London (London) and Antoine Leake (Leake). The informants reported the following: (1) two men known as "Black" and "Blue" would be delivering for sale to London and Leake a large quantity of heroin that evening at 6:00 p.m. at an International House of Pancakes (IHOP) restaurant in Greensboro, North Carolina; (2) "Black," otherwise known as Anthony Barnett (Barnett), is a black male, 30 years of age, approximately 6 feet tall and weighing 195 pounds; (3) "Blue," otherwise known as Bruce Holmes (defendant), is a black male, thirty years of age, approximately 6 feet tall and weighing 175 pounds; (4) Barnett and defendant would be traveling in a tan minivan (van) with Virginia license plates; (5) in the past several weeks, London and Leake had purchased heroin from Barnett and defendant several times at the IHOP.

After receiving this information, Koonce and Sampson involved several other police officers in an arrest plan which included setting up video surveillance at the IHOP that evening. It was agreed that London and Leake would assist the officers by pretending to buy the heroin from Barnett and defendant and then attempt to flee the scene once the police intervened. Leake was equipped with a body wire so Koonce could monitor the transaction. Once London and Leake saw the heroin, they were to give a prearranged signal to police by stating "[t]he shit looks good." London and Leake were to additionally use the word "paper" when the discussion of payment for the heroin took place, which among drug dealers is slang for "money." Once these signals were given, police planned to move in on the transaction.

Later that day, London and Leake received a telephone call from defendant and Barnett to confirm the meeting time and location for the sale of the heroin. Around 6:00 p.m., the police observed as defendant and Barnett arrived in the previously described van which was later determined to be registered in defendant's name. Defendant and Barnett stepped out of the van, entered the IHOP for a few moments while appearing to search for someone and returned to the van. London and Leake then arrived, left their parked Isuzu Trooper (Trooper) and entered the van for a few moments. Next, Leake and Barnett exited the van and reentered the Trooper. London then left the van and started to approach the Trooper. About this time, Koonce thought he had heard the prearranged signal, but was not certain due to noise interference in the wire transmission between him and

Leake. After hearing some discussion among the parties about money, Koonce believed a transaction was occurring between them and alerted the other officers to intervene. London, Leake and Barnett started to flee but were detained by the police. Defendant remained in the van and was also detained by the police.

Koonce informed defendant and Barnett he was going to search the minivan. The search revealed a black plastic bag in the console area between the two front seats. When Koonce opened the bag, he found 671 smaller bags containing what was later identified as heroin by Thomas McSwain (McSwain), a forensic drug chemist with the State Bureau of Investigation (SBI). McSwain testified as an expert witness in the field of forensic drug chemistry and the identification of controlled substances. The trial court consolidated for trial defendant's charges with those of co-defendant Barnett.

[1] We first address defendant's contention that the trial court erred in denying his motion to dismiss because there was insufficient evidence that 28 or more grams of heroin were seized from him. Defendant contends the State presented only circumstantial evidence through the testimony of McSwain to establish the quantity of heroin seized since he did not weigh each of the 671 bags. McSwain testified he examined each of the 671 bags which contained an off-white or tan substance. He randomly selected 50 bags which was a larger number than the usual sample size. He then weighed the 50 bags to assure himself the average weight was within an acceptable range. He determined the average weight of the 50 bags to be .0462 grams per bag, with only a "slight variance" in the weight of the individual bags. He then calculated the total weight of the heroin to be 31 grams by multiplying .0462 by 671. McSwain admitted he did not conduct a further statistical analysis as a foundation for his opinion of the total weight of heroin.

To survive a motion to dismiss, there must be "substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. The reviewing court must consider all the evidence taken in the light most favorable to the State to determine whether there is substantial evidence of that crime charged and that defendant committed the crime. Substantial evidence consists of 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct." *State v. Harding*, 110 N.C. App. 155, 162, 429 S.E.2d 416, 421 (1993) (citations omitted).

Here, we need only address whether there is substantial evidence defendant committed each element of the charge of trafficking in heroin, which occurs when one "sells, manufactures, delivers, transports, or possesses" a quantity of "28 grams or more." N.C. Gen. Stat. § 90-95(h)(4) (1999).

This case is similar to *State v. Myers*, 61 N.C. App. 554, 301 S.E.2d 401 (1983), *cert. denied*, 311 N.C. 767, 321 S.E.2d 153 (1984) and *State v. Hayes*, 291 N.C. 293, 230 S.E.2d 146 (1976), where in each case a defendant challenged the content and weight of a controlled substance on the basis that only random samples of the controlled substances were tested and weighed. In *Hayes*, an expert in the field of chemical and microscopic analysis and controlled substances testified he visually examined the remaining two of three envelopes which defendant gave to the police. *Hayes*, 291 N.C. at 301, 230 S.E.2d at 151. The expert tested the contents of only one of the three envelopes which proved to contain marijuana. *Id.* He then determined the contents of the three envelopes contained marijuana by visual inspection. *Id.* The expert likewise randomly selected for testing only four of sixteen envelopes seized from defendant's home which also proved to contain marijuana. *Id.* He visually inspected the remaining twelve of the sixteen envelopes and determined each contained marijuana. *Id.* He then weighed all nineteen envelopes containing marijuana and determined the total weight to be 56.4 grams. *Id.* In holding there was sufficient evidence to go to the jury on the question of whether all of the envelopes contained marijuana, our Supreme Court noted the expert witness had examined and identified marijuana in numerous prior cases. *Id.* at 302, 230 S.E.2d at 151-52. He had visually examined the contents of all the envelopes, which contents appeared to all contain marijuana. *Id.*

Likewise in *Myers*, defendant was convicted of felonious trafficking by selling or delivering 10,000 or more units (tablets) of a controlled substance, methaqualone. *Myers*, 61 N.C. App. at 555, 301 S.E.2d at 402. The State computed the total number of methaqualone tablets based upon the weight of the two bags, rather than actually counting all of the tablets. *Id.* On the basis of this calculation, a determination was made that 30,241 tablets of methaqualone had been seized as evidence. *Id.* Of this total, only 20 tablets were randomly tested and after chemical analysis, were found to contain methaqualone. *Id.* The expert testified he examined all of the tablets to make sure they had the same physical characteristics. *Id.* at 556, 301 S.E.2d at 402. Defendant contended because this evidence pre-

sented a question as to the actual quantity of tablets containing methaqualone, his request for a jury instruction on a lesser-included offense of trafficking less than 10,000 tablets of the controlled substance should have been granted. *Id.* at 555, 301 S.E.2d at 402. This Court disagreed, holding "[a]ll of the evidence tended to show that defendant committed the offense of trafficking in 10,000 or more dosage units of methaqualone and there was no evidence of a lesser-included offense." *Id.* at 556, 301 S.E.2d at 403.

In the instant case, all of the evidence presented by the State tended to show the 671 bags seized from defendant contained heroin. Upon visual examination, McSwain observed the 671 bags, which were taken from the same black plastic bag, were packaged alike and, in his opinion, the 50 bags he sampled had only a "slight variance" in weight. Further, McSwain had 29 years of training and experience in forensic drug chemistry and in the identification of controlled substances with the SBI. He had testified as an expert in this field over five hundred times. *See Harding*, 110 N.C. App. at 163, 429 S.E.2d at 422 (holding "an expert chemist may give his opinion as to the whole when only part of the whole has been tested" where the State's expert's testimony was admissible as to the composition of 165 packets allegedly containing heroin, even though a comprehensive chemical analysis was randomly performed on only a small portion of the packets which the expert determined to contain the same material as all of the packets). Because the State presented sufficient evidence that 28 or more grams of heroin was seized from defendant, this assignment of error is overruled.

[2] Next, defendant argues the trial court erred in denying his request for a jury instruction on the lesser-included offense of trafficking in heroin by transporting or possessing 14 grams or more, but less than 28 grams of heroin. Defendant contends that based on McSwain's testimony, the jury could find he possessed less than 28 grams of heroin.

It is well settled "a jury instruction of a lesser included offense is required 'if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and acquit him of the greater.' " *State v. Brooks*, 136 N.C. App. 124, 131, 523 S.E.2d 704, 709 (1999), *cert. denied*, 351 N.C. 475, 543 S.E.2d 496 (Supreme Court No. 48P00 filed April 6, 2000), *quoting State v. Gary*, 348 N.C. 510, 524, 501 S.E.2d 57, 67 (1998). "Conversely, when all the evidence tends to show that defendant committed the crime charged in the bill of indictment and there is no evidence of the lesser-included offense,

the court should refuse to charge on the lesser-included offense." *State v. Summitt*, 301 N.C. 591, 596, 273 S.E.2d 425, 247, *cert. denied*, 451 U.S. 970, 68 L. Ed. 2d 349 (1981).

Based on our upholding the trial court's denial of defendant's motion to dismiss, we likewise conclude there was sufficient evidence to support the charge of trafficking in heroin by transporting or possessing 28 grams or more and there was insufficient evidence to support an instruction on the lesser-included offense.

[3] In his third assignment of error, defendant contends the trial court erred in denying his motion to suppress all evidence seized and statements made by him since there was no probable cause to support the search, as it was based upon information from unreliable informants.

When reviewing a denial of a motion to suppress, this Court's review is "limited to determining whether the trial court's findings of fact are supported by competent evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law are legally correct." *State v. Trapp*, 110 N.C. App. 584, 587, 430 S.E.2d 484, 486 (1993).

Defendant cites *Alabama v. White*, 496 U.S. 325, 110 L. Ed. 2d 301 (1990), in support of his contention that informants London and Leake are unreliable. *Id.*, 496 U.S. 325, 110 L. Ed. 2d 301 (holding that an anonymous tip on its own seldom demonstrates the informant's basis of knowledge or veracity, so as to justify an investigatory stop). However, that case dealt with an anonymous informant and is not dispositive. Here, the trial court found the informants London and Leake were known by name to Koonce and Sampson and had previously provided reliable information which had been used in the past to make arrests for drug violations. There is no evidence in the transcript to indicate that these informants had ever provided unreliable information to either of the detectives handling the case.

In *State v. Isleib*, 319 N.C. 634, 356 S.E.2d 573 (1987), a deputy sheriff had received information from an informant on three prior occasions and on each of these occasions such information had yielded arrests and convictions in drug cases. *Id.* at 635, 356 S.E.2d 574-75. Our Supreme Court held the deputy sheriff had sufficient information in that case to constitute probable cause to conduct a warrantless search of a vehicle after receiving the informant's tip. *Id.* at 638, 356 S.E.2d at 576.

Based upon an informant's information, this Court recently articulated in *State v. Earhart*, 134 N.C. App. 130, 516 S.E.2d 883 (1999), the standard for searching a vehicle without a warrant, otherwise known as the automobile exception:

> A search of a vehicle on a public roadway or public vehicular area is properly conducted without a warrant as long as probable cause exists for the search. Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that 'an offense has been or is being committed. In utilizing an informant's tip, probable cause is determined using a 'totality-of-the circumstances' analysis which 'permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip.'

Earhart, 134 N.C. App. at 133, 516 S.E.2d at 886 (citations omitted). This analysis includes but is not limited to "the informant's 'basis of knowledge' for his tip and the 'veracity' or 'reliability' of the tip[,]" which may be established by independent police corroboration. *Id.* at 134, 516 S.E.2d at 886.

In ruling on defendant's motion to suppress, the trial court found that London and Leake's tips included a physical description of the perpetrators and their vehicle, as well as the time and place the sale of heroin was to occur. The trial court further found they had been previously reliable sources of information to Koonce and Sampson, leading to multiple arrests and convictions. In addition, London and Leake had first-hand knowledge of the illegal drug activities of defendant and Barnett, as they had purchased heroin from them at the IHOP location several times in the weeks leading up to this incident. Moreover, the reliability of the tip was established by independent police corroboration, as revealed by what the police heard and observed leading up to the arrest of defendant and Barnett. These facts and circumstances sufficiently established an indicia of reliability of these informants to provide the police officers with probable cause to support the search and seizure of the bag containing heroin in defendant's van. The trial court thus properly denied defendant's motion to suppress.

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

No error.

Judges HUNTER and CAMPBELL concur.

CARL JEFFREY LANE, PLAINTIFF v. CITY OF KINSTON AND STEPHEN L. THOMPSON, DEFENDANTS

No. COA00-265

(Filed 3 April 2001)

Cities and Towns— public duty doctrine—protection of individuals with substance abuse problems—no special relationship exception—no special duty exception

The trial court did not err in a negligence case by dismissing plaintiff's complaint against defendant city and defendant police officer based on failure to state a claim upon which relief may be granted even though plaintiff maintains that N.C.G.S. §§ 122C-2 and 122C-301 operate outside the public duty doctrine and impose an affirmative duty on the city and its agents to assist individuals with substance abuse problems, because: (1) a special relationship was not created by the officer's alleged failure to act where the officer knew or should have known plaintiff would be exposed to an unusually high risk if care was not taken; (2) a special duty did not arise from the officer's alleged promise to call a taxi cab for the inebriated plaintiff since it was merely gratuitous and not sufficient to constitute an actual promise of safety; (3) N.C.G.S. § 122C-301 is not an exception to the public duty doctrine when it does not place an affirmative duty on a police officer to transport an intoxicated individual or to call for hired transportation; and (4) N.C.G.S. §§ 122C-301 and 122C-2 are not exceptions to the public duty doctrine since neither expressly authorizes a private right of action for the breach of its terms.

Appeal by plaintiff from order entered 10 November 1999 by Judge Donald Jacobs in Lenoir County Superior Court. Heard in the Court of Appeals 22 February 2001.

Jeffrey S. Miller, for plaintiff-appellant.

Sumrell, Sugg, Carmichael, Hicks & Hart, P.A., by Scott C. Hart, for defendants-appellees.

TYSON, Judge.

Plaintiff, Carl Jeffrey Lane ("Lane"), appeals the trial court's order dismissing his complaint against defendants City of Kinston ("City") and Stephen L. Thompson ("Thompson") for failure to state a claim upon which relief may be granted. We affirm the trial court's dismissal of Lane's action for the reasons stated below.

On 13 September 1999, Lane filed a complaint seeking damages for defendants' negligence. Lane filed an amended complaint on 28 September 1999. The amended complaint alleged, in relevant part, that lane was walking southward on Queen Street in Kinston, North Carolina, in the early morning of 27 July 1997. Lane was walking toward the home of his brother, Mark Lane, from a house a few miles away. The complaint alleged that Lane was "intoxicated." Lane stopped to rest temporarily on a bench in front of the Lenoir County Library.

The complaint alleged that Thompson, a City police officer, drove up to Lane in a marked City police car at approximately 12:49 a.m., as Lane sat on the bench. The complaint stated that Thompson observed Lane's "inebriation." The complaint alleged that Lane "asked defendant Thompson to give him a ride to his brother's residence, located approximately three to four miles away, which Thompson refused to do." The complaint further alleged that Lane requested that Thompson call a taxi-cab to come and transport Lane home. Thompson did not call a cab, and drove away instead. In the alternative, Lane's complaint alleged that Thompson agreed to call a taxi-cab at Lane's request, but that Thompson did not wait to ensure Lane's safety.

Lane's complaint further alleged that, after Thompson left, Lane again began to walk in a southward direction on Queen Street toward Mark Lane's home. It stated that, during the walk, Lane "was accosted by several individuals who robbed him, beat him, and threw him over the side of a bridge causing a fall of approximately twenty-five feet." Lane alleged that, as a result of defendants' negligence in failing to assist him, he incurred permanent injuries, and medical expenses in excess of $122,000.00.

The complaint alleged that Thompson, an agent of the City, was negligent in (1) failing to assist an intoxicated individual under G.S. § 122C-301; (2) failing to assist Lane when Lane's condition of peril was or should have been obvious; (3) refusing to call a taxi-cab to

transport Lane; and (4) refusing to aid a person in obvious peril who requested assistance, and thus had a "special relationship" with Thompson.

On 19 October 1999, defendants filed a motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6), N.C. R. Civ. P. The trial court entered an order dismissing Lane's complaint on 10 November 1999. Lane appeals.

The sole issue on appeal is whether the trial court erred in dismissing Lane's complaint for failure to state a claim upon which relief may be granted. Lane argues that the complaint states a claim for relief based on Chapter 122C of the North Carolina General Statutes. Lane maintains that G.S. § 122C-2 and 122C-301 operate outside the general public duty doctrine and "impose an affirmative duty" on the City and its agents "to assist individuals with substance abuse problems."

In reviewing the grant of a 12(b)(6) motion to dismiss, we assess the legal sufficiency of the complaint, taking all factual allegations as true. *Peacock v. Shinn*, 139 N.C. App. 487, 492, 533 S.E.2d 842, 846, *disc. review denied*, 353 N.C. 267, — S.E.2d — (2000) (citation omitted). "A complaint cannot withstand a motion to dismiss where an insurmountable bar to recovery appears on its face." *Id.* (citation omitted). " 'Such an insurmountable bar may consist of an absence of law to support a claim, an absence of facts sufficient to make a good claim, or the disclosure of some fact that necessarily defeats the claim.' " *Id.* (quoting *Al-Hourani v. Ashley*, 126 N.C. App. 519, 521, 485 S.E.2d 887, 889 (1997)).

A. Public Duty Doctrine

The public duty doctrine arises when allegations of a complaint involve the exercise of the defendants' police powers as a municipality. *Little v. Atkinson*, 136 N.C. App. 430, 432, 524 S.E.2d 378, *disc. review denied*, 351 N.C. 474, — S.E.2d — (2000) (citation omitted). Our Supreme Court adopted the public duty doctrine in *Braswell v. Braswell*, 330 N.C. 363, 371, 410 S.E.2d 897, 902 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992). The Court defined the doctrine as follows:

> 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.

Id. at 370-71, 410 S.E.2d at 901 (citing *Coleman v. Cooper*, 89 N.C. App. 188, 193, 366 S.E.2d 2, 6, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988)) (emphasis supplied).

In adopting the doctrine, the Supreme Court noted two general exceptions to the rule: "(1) where there is a special relationship between the injured party and the police" and "(2) 'when a municipality, through its police officers, 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 (quoting *Coleman*, 89 N.C. App. at 194, 366 S.E.2d at 6).

The first exception, the "special relationship" exception, "must be specifically alleged, and is not created merely by a showing that the state undertook to perform certain duties." *Frazier v. Murray*, 135 N.C. App. 43, 50, 519 S.E.2d 525, 530 (1999), *appeal dismissed*, 351 N.C. 354, — S.E.2d — (2000) (citation omitted). "A 'special relationship' depends on 'representations or conduct by the police which cause the victim(s) to detrimentally rely on the police such that the risk of harm as the result of police negligence is something more than that to which the victim was already exposed.' " *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 338, 511 S.E.2d 41, 44, *cert. denied*, 350 N.C. 851, 539 S.E.2d 13 (1999) (quoting *Hull v. Oldham*, 104 N.C. App. 29, 38, 407 S.E.2d 611, 616, *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991)).

Lane's complaint alleges that a special relationship was created between Lane and Thompson because Thompson "refused to aid a person in obvious peril who requested the aid of a police officer." This allegation does not sufficiently allege an exception to the public duty doctrine based on a "special relationship." This Court held that this State does not recognize an exception to the public duty doctrine for failure to act where an officer " 'knew or should have known the plaintiff . . . would be exposed to an unusually high risk if care was not taken. . . .' " *Vanasek* at 339, 511 S.E.2d at 45.

The second exception to the public duty doctrine, the "special duty" exception, " 'is a very narrow one; it should be applied only

when the promise, reliance, and causation are manifestly present.' " *Little*, 136 N.C. App. at 433, 524 S.E.2d at 380 (quoting *Braswell*, 330 N.C. at 372, 410 S.E.2d at 902). In order for a plaintiff to state a prima facie case under this exception, " 'the complaint must allege an 'overt promise' of protection by defendant, detrimental reliance on the promise, and a causal relation between the injury and the reliance.' " *Id.* (citing *Lovelace v. City of Shelby*, 133 N.C. App. 408, 412-13, 515 S.E.2d 722, 725 (1999)); *see also*, *Braswell* at 372, 410 S.E.2d at 902.

In *Braswell*, the plaintiff argued that he could recover for the defendants' negligence under the "special duty" exception to the public duty doctrine. *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. The evidence tended to show that the plaintiff's mother was killed by the plaintiff's father, Billy. *Id.* at 372, 410 S.E.2d at 902. The victim had expressed to the defendant-officer that she felt as though she may be in danger of being harmed by Billy. *Id.* The defendant-officer told the victim "that Billy would not harm [her] and that his men would be keeping an eye on her." *Id.* at 371-72, 410 S.E.2d at 902. The officer further promised that "[she] would get to and from work safely." The victim was shot by Billy while driving to her attorney's office. *Id.* at 372, 410 S.E.2d at 902.

The defendants argued that the officer's statements, if made, were "general words of comfort and assurance, commonly offered by law enforcement officers in situations involving domestic problems, and that such promises were merely gratuitous and hence not sufficient to constitute an actual promise of safety." *Id.* at 371-72, 410 S.E.2d at 902. Our Supreme Court agreed, noting that, although the officer had offered assurances that the victim would be safe, "there is absolutely no evidence tending to indicate that he expressly or impliedly promised her protection at any time other than when she was driving to and from work." *Id.* at 372, 410 S.E.2d at 902. The Court further stated that, because the victim was driving to her attorney's office when killed, "even if there were a promise to provide protection while traveling to and from work, [the victim's] alleged reliance on [the officer's] promise cannot in any way be considered to have caused her death." *Id.*

Here, Lane's complaint alleges, in the alternative, that Thompson promised to call a taxi-cab for Lane, but then "having recognized that Lane was inebriated and in a position of peril abandoned him and failed and refused to aid [Lane] in any way whatsoever." This allegation is insufficient to state a claim under the "special duty" exception.

Thompson's alleged promise to call a taxi-cab was "merely gratuitous and hence not sufficient to constitute an actual promise of safety." *Braswell* at 372, 410 S.E.2d at 902.

The complaint does not allege that Thompson promised to stay with Lane until a taxi-cab arrived; that Thompson promised that a taxi-cab would, in fact, arrive; or that Thompson promised to ensure Lane's safety on his way home. The complaint, taken as true, fails to show that Thompson ever promised to ensure Lane's safety on 27 July 1997. In short, Lane's complaint fails to "allege an 'overt promise' of protection by defendant, detrimental reliance on the promise, and a causal relation between the injury and the reliance.' " *Little*, 136 N.C. App. at 433, 524 S.E.2d at 380. Lane's complaint fails to state a claim for relief under either exception to the public duty doctrine.

B. Statutory Exceptions

Lane maintains that G.S. § 122C-301 imposes an affirmative duty on defendants beyond the public duty doctrine. Lane argues that the statute affirmatively required that Thompson assist Lane, upon observing Lane's intoxicated condition. G.S. § 122C-301 provides, in relevant part:

> (a) An officer may assist an individual found intoxicated in a public place by taking any of the following actions: (1) The officer may direct or transport the intoxicated individual home; (2) The officer may direct or transport the intoxicated individual to the residence of another individual willing to accept him . . .

N.C. Gen. Stat. § 122C-301(a) (1999). Lane also relies on G.S. § 122C-2 in support of his argument that defendants were under an affirmative obligation to assist Lane beyond the general application of the public duty doctrine:

> The policy of the State is to assist individuals with mental illness, developmental disabilities, and substance abuse problems in ways consistent with the dignity, rights, and responsibilities of all North Carolina citizens. Within available resources it is the obligation of State and local government to provide services to eliminate, reduce, or prevent the disabling effects of mental illness, developmental disabilities, and substance abuse. . . .

N.C. Gen. Stat. § 122C-2 (1999).

Lane's reliance on these statutes is misplaced. Although instructive, the statutes do not place an affirmative obligation on a police

officer to transport an intoxicated individual, or to call for hired transportation. G.S. § 122C-301 clearly states that an "officer may assist an individual found intoxicated in a public place by taking any of the following actions." Black's Law Dictionary defines "may" as "permitted to," and states "[t]his is the primary legal sense—usually termed the 'permissive' or 'discretionary' sense." Black's Law Dictionary 993 (7th ed. 1999). This language does not impose an affirmative duty. The language of G.S. § 122C-2 simply explains the policy of this State with respect to substance abusers.

Moreover, in the context of the public duty doctrine, our Supreme Court has held that, unless a statute prescribes a private right of action for its breach, the statute will not be interpreted as an exception to the general public duty doctrine:

> [W]e do not believe the legislature, in establishing the Occupational Safety and Health Division of the Department of Labor in 1973, intended to impose a duty upon this agency to each individual worker in North Carolina. Nowhere in chapter 95 of our General Statutes does the legislature authorize a private, individual right of action against the State to assure compliance with OSHANC standards. Rather, the most the legislature intended was that the Division prescribe safety standards and secure some reasonable compliance through spot-check inspections made "as often as practicable." N.C. Gen. Stat. § 95-4(5) (1996).

Stone v. North Carolina Dep't of Labor, 347 N.C. 473, 482, 495 S.E.2d 711, 716, *reh'g denied*, — N.C. —, 502 S.E.2d 836, *cert. denied*, 119 S. Ct. 540, 142 L. Ed.2d 449 (1998) (emphasis supplied). "Our caselaw generally holds that a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute." *Vanesek*, 132 N.C. App. at 339, 511 S.E.2d at 44.

Neither G.S. § 122C-301 nor G.S. § 122C-2 expressly authorizes a private right of action for the breach of its terms. Therefore, consistent with the court's decision in *Stone*, we do not interpret either statute as being outside the general application of the public duty doctrine.

The allegations of Lane's complaint fail to show that defendants' actions fall outside the public duty doctrine. Taking all factual allegations in the complaint as true, we hold that the face of Lane's com-

plaint reveals a bar to Lane's recovery. The trial court properly dismissed Lane's complaint pursuant to Rule 12(b)(6). *See Peacock*, 139 N.C. App. at 492, 533 S.E.2d at 846.

Affirmed.

Judges MARTIN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. PRENTIS CONNIE REAVES

No. COA00-193

(Filed 3 April 2001)

1. Appeal and Error— preservation of issues—failure to object—failure to allege plain error

Although defendant assigns error to the questioning and detention by a North Carolina Highway Patrol trooper to support his convictions for operating a motor vehicle without a valid operator's license and injury to personal property, defendant failed to properly preserve this issue for appellate review because he failed to object at trial as required by N.C. R. App. P. 10(b) and he failed to argue plain error.

2. Sentencing— structured—criminal contempt not a prior conviction

The trial court erred in a case arising out of operating a motor vehicle without a valid operator's license and injury to personal property by its computation of defendant's sentence as Level III instead of Level II under N.C.G.S. § 15A-1340.21 of the North Carolina's Structured Sentencing Act based upon defendant's prior conviction for criminal contempt, because: (1) criminal contempt does not constitute a prior conviction under the Act when it is assumed that the 1994 adjudication was punishable by a thirty-day maximum term under N.C.G.S. § 5A-12(a); (2) the North Carolina Constitution mandates that there be no conviction of a "crime" except upon a jury verdict or upon a plea of guilty or no contest in lieu of the right to a jury trial, N.C. Const., art. I, § 24; and (3) the General Assembly did not include criminal contempt adjudications as a crime when it amended the statute on 1 December 1997.

Appeal by defendant from judgments entered 28 September 1999 by Judge B. Craig Ellis in Columbus County Superior Court. Heard in the Court of Appeals 24 January 2001.

Attorney General Michael F. Easley, by Assistant Attorney General P. Bly Hall, for the State.

Don W. Viets, Jr. for defendant-appellant.

JOHN, Judge.

Defendant appeals judgments entered upon convictions of the offenses of operating a motor vehicle without a valid operator's license and injury to personal property. We vacate the judgments entered and remand for re-sentencing.

In light of our disposition, a recitation of the underlying facts is unnecessary. In addition, defendant in his appellate brief has "admit[ted] that the evidence presented was legally sufficient to support a conviction," thus abandoning his first assignment of error.

[1] Defendant's second assertion of error is directed at his questioning and detention by a North Carolina Highway Patrol trooper. Defendant claims such acts were "unlawful and unconstitutional and all evidence should have been suppressed and both charges dismissed." However, as the State correctly points out, defendant's second argument has not been properly preserved for appellate review.

N.C.R. App. P. 10(b) provides as follows:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . . .

Further, when a party has failed to take such action during the course of proceedings in the trial court,

> he has the burden of establishing his right to appellate review by showing that the exception was preserved by rule or law or that the error alleged constitutes plain error.

State v. Gardner, 315 N.C. 444, 447, 340 S.E.2d 701, 705 (1986).

In the case *sub judice*, thorough examination of the record reveals defendant proffered no motion to suppress evidence of his

questioning and detention as required by N.C.G.S. §§ 15A-974, 977, 979 (1999), nor did he object at trial to the introduction of said evidence. Moreover, in presenting his argument to this Court, defendant has not specifically and distinctly claimed admission of the evidence constituted plain error. *See* N.C.R. App. P. 10(c)(4) (issue not preserved "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." In short, defendant "did not object at trial or allege plain error", *State v. Scott*, 343 N.C. 313, 332, 471 S.E.2d 605, 616 (1996), and thus "has failed to properly preserve this issue for appeal." *Id.*

[2] Lastly, defendant disagrees with the trial court's computation of his sentence under North Carolina's Structured Sentencing Act (the Act). *See* N.C.G.S. §§ 15A-1340.10 *et seq.* (1999). Upon conviction of the offenses noted above, defendant was sentenced at Level III under N.C.G.S. § 15A-1340.21 (1996), that portion of the Act specifically governing determination of the sentencing level of individuals convicted of misdemeanors. In its sentencing calculation, the trial court included as a prior conviction defendant's 1994 adjudication of criminal contempt. Defendant maintains criminal contempt does not constitute a "prior conviction" under the Act and that his prior record level therefore should have been computed as Level II. Defendant's argument has merit.

At the time of the offenses for which defendant was tried, the Act provided:

> (a) Generally.—The prior conviction level of a misdemeanor offender is determined by calculating the number of the offender's prior convictions that the court finds to have been proven in accordance with this section.
>
> (b) Prior Conviction Levels for Misdemeanor Sentencing.—The prior conviction levels for misdemeanor sentencing are:
>
> (1) Level I—0 prior convictions.
>
> (2) Level II—At least 1, but not more than 4 prior convictions.
>
> (3) Level III—At least 5 prior convictions.

G.S. § 15A-1340.21. The Act further stated that

> [a] person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime.

N.C.G.S. § 15A-1340.11(7) (1999). Finally,

> [f]or the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest

N.C.G.S. § 15A-1331(b) (1999).

As a criminal sentencing statute, the Act must be strictly construed. *See State v. Jarman*, 140 N.C. App. 198, 205, 535 S.E.2d 875, 880 (2000) (" '[c]riminal statutes must be strictly construed' " (citation omitted)), and *Joint Venture v. City of Winston-Salem*, 54 N.C. App. 202, 205, 282 S.E.2d 509, 511 (1981) ("[s]tatutes imposing penalties are . . . strictly construed in favor of the one against whom the penalty is imposed"), *disc. review denied*, 304 N.C. 728, 288 S.E.2d 803 (1982). "Adjudged" within the meaning of G.S. § 15A-1331(b) refers to the return by the jury of a verdict of guilty. *See State v. Fuller*, 48 N.C. App. 418, 420, 268 S.E.2d 879, 881, *disc. review denied*, 301 N.C. 403, 273 S.E.2d 448 (1980). Reading G.S. §§ 15A-1340.ll(7) and 15A-1331(b) *in pari materia*, *see Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984) (statutes which are *in pari materia*, *i.e.*, which relate or are applicable to the same matter or subject, although enacted at different times, must be construed together in order to ascertain legislative intent), therefore, a "prior conviction" under G.S. § 15A-1340.21 refers only to a verdict of guilty of, or a plea of guilty or no contest to, a "crime."

Our State Constitution provides 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. Black's Law Dictionary defines a crime as "a positive or negative act in violation of penal law" or "an offense against the State or United States." Black's Law Dictionary 370 (6th ed. 1990).

Criminal contempt, on the other hand,

> "is a term applied where the judgment is in punishment of a[] [completed] act . . . tending to interfere with the administration of justice [.]"

Mauney v. Mauney, 268 N.C. 254, 256, 150 S.E.2d 391, 393 (1966) (citation omitted). Accordingly,

> [c]riminal [contempt] proceedings are those brought to preserve the power and to vindicate the dignity of the court and to punish for disobedience of its processes or orders.

Gaylon v. Stutts, 241 N.C. 120, 123, 84 S.E.2d 822, 825 (1954).

Although contempt proceedings thus are *"sui generis,"* they remain punitive or "criminal *in . . . nature*" such that a party is charged with "doing something forbidden" and punished if "found guilty" of the act, *Mauney*, 268 N.C. at 256, 150 S.E.2d at 393 (emphasis added),; *see North Carolina v. Carr*, 264 F. Supp. 75, 79 (W.D.N.C. 1967) (contempt proceedings "brought to vindicate the dignity and authority of the court" are considered "criminal in their nature and are generally governed by the rules applicable to criminal cases"), *appeal dismissed*, 386 F.2d 129 (4th Cir. 1967). As our Supreme Court has observed,

> "it is said that the *process* by which the party charged [with criminal contempt] is reached and tried . . . is essentially criminal or quasi-criminal."

Blue Jeans Corp. v. Clothing Workers, 275 N.C. 503, 508, 169 S.E.2d 867, 870 (1969) (emphasis added) (citations omitted)).

Indeed, the State relies heavily upon the procedural trappings of a criminal contempt adjudication as well as dicta in *O'Briant v. O'Briant*, 313 N.C. 432, 435, 329 S.E.2d 370, 373 (1985) ("criminal contempts are crimes, and accordingly, the accused is entitled to the benefits of all constitutional safeguards") to support the contention that a criminal contempt adjudication constitutes a "prior conviction" under the Act. Nonetheless, we conclude the General Assembly did not intend an adjudication of criminal contempt to constitute a "prior conviction" for sentencing purposes under G.S. § 15A-1340.21.

First, enumeration of the "exclusive" grounds for adjudication of criminal contempt is found at N.C.G.S. § 5A-ll (1999). On the other hand, the General Assembly has confined provisions of our "penal law," Blacks Law Dictionary 370, primarily to Chapter 14 of the General Statutes, *see* N.C.G.S. § 14-1 *et. seq.* (1999).

More significantly, in *Blue Jeans Corp.* our Supreme Court held an adjudication of criminal contempt under former N.C.G.S. § 5-4 (repealed 1977) to comprise a "petty offense" to which

> the right of trial by jury in criminal cases secured by Article III, Section 2 of the Federal Constitution, and by the Sixth Amendment thereto, does not extend . . . .

Blue Jeans Corp., 275 N.C. at 511, 169 S.E.2d at 871.

The authorized maximum punishment for criminal contempt at the time of the decision in *Blue Jeans Corp.* was a fine of $250.00 or imprisonment for thirty days. *Id.* Under N.C.G.S. § 5A-12(a) (1999), the maximum punishment for criminal contempt currently is "censure, imprisonment up to 30 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three," although the section also sets the maximum punishment for failure to comply with a non-testimonial identification order, *see* N.C.G.S. § 15A-271, *et seq.* (1999), and for violation of N.C.G.S. § 5A-11(8) (1999) at ninety days and six months respectively, G.S. § 5A-12(a).

We cannot determine from the instant record the basis for defendant's 1994 criminal contempt adjudication. We must, therefore, resolve that issue in favor of defendant, *see State v. Gardner*, 315 N.C. 444, 450, 340 S.E.2d 701, 707 (because it would be "pure speculation" for this Court to suggest which theory jury relied upon, ambiguous verdict construed in favor of defendant); and *State v. Gilley*, 135 N.C. App. 519, 528, 522 S.E.2d 111, 117 (1999) (ambiguity in court order and "terseness of . . . [court] judgment must be construed in favor of defendant"), and assume for purposes of our decision herein that the 1994 contempt adjudication was punishable by a thirty day maximum term. Having deemed the issue not to be before us, we thus specifically do not address whether an adjudication of criminal contempt based upon failure to comply with a non-testimonial identification order or a violation of G.S. § 5A-11 might constitute a "prior conviction" under the Act.

As noted above, the North Carolina Constitution mandates 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. In our State, moreover,

> the only exception to the rule that "nothing can be a conviction but the verdict of a jury" is the constitutional authority granted the General Assembly to provide for the *initial* trial of misdemeanors in inferior courts without a jury, with trial *de novo* by a jury upon appeal. N.C. Const., art I. § 24 (1971).

State v. Hudson, 280 N.C. 67, 79, 185 S.E.2d 189, 192 (1971) (citation omitted).

In short, our Supreme Court has upheld denial in superior court of a jury trial in criminal contempt proceedings which might result in a maximum punishment of no more than thirty days imprisonment. *See Blue Jeans Corp.*, 275 N.C. at 511, 169 S.E.2d at 872. Because the North Carolina Constitution mandates that there can be no conviction of a "crime" except upon a jury verdict, *see* N.C. Const., art. I, § 24, or upon a plea of guilty or no contest in lieu of the right to a jury trial, *see* G.S. § 15A-1331(b), defendant's 1994 adjudication of criminal contempt, assumed for purposes of the instant opinion to have subjected him to a maximum punishment of no more than thirty days imprisonment, cannot be considered a "prior conviction" under a "strict" construction, *see State v. Jarman*, 140 N.C. App. at 205, 535 S.E.2d at 880, *and Joint Venture*, 54 N.C. App. at 205, 282 S.E.2d at 511, of G.S. § 15A-1340.11(7).

Finally, we note the General Assembly amended G.S. § 15A-1340.21(b) on 1 December 1997 by inserting the following concluding sentence:

> In determining the prior conviction level, a prior offense may be included if it is either a felony or a misdemeanor at the time the offense for which the offender is being sentenced is committed.

Defendant contends the General Assembly sought to clarify that an offense must have been either a felony or misdemeanor to qualify as a "prior conviction." The State responds that

> it appears the [legislative] intent was to clarify that both felonies and misdemeanors are counted and each is counted as one conviction.

Whatever the intent of the amendment, *see Spruill v. Lake Phelps Vol. Fire Dep't*, Inc., 351 N.C. 318, 323, 523 S.E.2d 672, 676 (2000) ("[i]n construing a statute with reference to an amendment, it is presumed that the Legislature intended either (1) to change the substance of the original act or (2) to clarify the meaning of it"), the statute expressly fails to include, either in the original or amended version, any provision that a previous adjudication of criminal contempt may be counted as a "prior conviction" under the Act, *see In re Taxi Co.*, 237 N.C. 373, 376, 75 S.E.2d 156, 159 (1953) (where statute sets forth instances of its coverage, other coverage is necessarily

excluded under the maxim *expressio unius est exclusio alterius*, *i.e.*, "the expression of one thing is the exclusion of another"). Had the General Assembly intended that criminal contempt adjudications as well as misdemeanors be considered "crimes," *see* Black's Law Dictionary, 370 (" '[c]rime' and 'misdemeanor', properly speaking, are synonymous terms") so as to qualify as "prior conviction" under G.S. § 15A-1340.11(7), "it would have been a simple matter [for it] to [have] include[d] th[at] explicit phrase," *In re Appeal of Bass Income Fund*, 115 N.C. App. 703, 706, 446 S.E.2d 594, 596 (1994), within the statutory amendment. *See McAninch v. Buncombe County Schools*, 347 N.C., 126, 133, 489 S.E.2d 375, 380 (1997) (after having "specifically declared" method of lost income calculation applicable to "the usual situation[]," General Assembly would have been "equally specific" had it intended a different method to apply in "the exceptional cases").

In sum, defendant's 1994 criminal contempt adjudication did not constitute a "prior conviction" for purposes of the Act, and the trial court erred by including such adjudication within its computation of defendant's sentencing level. Accordingly, the trial court's judgments are vacated and this matter remanded for re-sentencing proceedings not inconsistent with the opinion herein.

No error in the trial; remanded for re-sentencing.

Judges WYNN and McGEE concur.

THOMAS E. THOMPSON, ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER THOMPSON, DECEASED, PLAINTIFF v. SUSAN ELIZABETH BRADLEY AND WILLIE THOMAS BRADLEY, JR., DEFENDANTS

No. COA00-80

(Filed 3 April 2001)

1. Appeal and Error— assignment of error—issues included

The Court of Appeals considered both issues of negligence and contributory negligence, even though plaintiff's assignment of error referred only to contributory negligence, because the issues were intertwined and the trial court did not state its reasons for the grant of summary judgment.

2. Motor Vehicles— automobile accident—causation—issue of fact

The trial court erred by granting summary judgment for defendant in an action arising from an automobile accident where the deposition of Susan Bradley, the driver, placed responsibility for the accident on the passenger, plaintiff's decedent, while defendants' expert stated that the accident was caused by Bradley's steering overcorrection. Differing conclusions might reasonably be drawn from the evidence, depending upon which party's evidence is accepted as true; moreover, the case raises issues of credibility in that the only defense evidence was the deposition from Bradley, who had an interest in the outcome, and plaintiff's expert, who arguably had an interest in the outcome also.

Appeal by plaintiff, Thomas Thompson from order entered 27 October 1999 by Judge W. Russell Duke, Jr. in Halifax County Superior Court. Heard in the Court of Appeals 14 February 2001.

Ward and Smith, P.A., by V. Stuart Couch and A. Charles Ellis, for plaintiff-appellant.

Poyner & Spruill, L.L.P., by J. Nicholas Ellis and Gregory S. Camp, for defendant-appellee.

BIGGS, Judge.

This appeal arises out of a wrongful death action by Thomas Thompson, administrator for the estate of Christopher Thompson, alleging that the negligence of defendant Susan Bradley caused Christopher Thompson's death. The trial court granted defendant's motion for summary judgment, finding as a matter of law that no genuine issue of material fact existed. From this order, plaintiff appeals.

On 7 June 1997, plaintiff's decedent, Christopher Thompson (Thompson), suffered fatal injuries in a single car accident in which he was the only passenger, and defendant, Susan Elizabeth Bradley (Bradley), was the driver. A deposition of Bradley, the only surviving witness to the accident, provided the following testimony which was introduced as evidence at the summary judgment hearing: Bradley and Thompson were non-romantic friends. Both were from Roanoke Rapids. Bradley was 21 years old and had recently earned a nursing degree, while Thompson was an eighteen year old high school stu-

dent. On 6 June 1997, the two agreed to spend time together after Thompson finished work. They met that evening in a parking lot near Bradley's house. Bradley drove her car, a Chevrolet Lumina with bench seats, and Thompson left his car in the parking lot. Bradley and Thompson drove around the Roanoke Rapids area for several hours, searching for other young people with whom they might socialize. They drove to a local mall, the main street of town, a park near Rocky Mount, a fast food restaurant, and the Wal-Mart store in Rocky Mount, where Bradley bought a music CD. After 11:00 P.M., the two returned to Roanoke Rapids, and took another drive through town and past the shopping mall.

According to Bradley, Thompson then expressed an interest in viewing the road on which Bradley's grandmother lived. The two set out in the direction of the road which was some miles away. Their route included several twists and turns, and at some point the two crossed the North Carolina state line and entered Virginia. Before returning to Roanoke Rapids, they stopped in the parking lot of a small country store. By this time Thompson was getting sleepy and had reclined his seat.

The accident occurred shortly after they left the parking lot, as Bradley was driving back towards Roanoke Rapids. They were on a paved two-lane road without any markings. Bradley rounded a curve, then slowed to less than 55 MPH on the straightaway and took her foot off the accelerator, causing the car to slow down. Bradley testified that Thompson then placed his foot on top of hers and pressed down, causing the car to speed up. Bradley immediately lost control of the car, which fishtailed and swerved before rolling into a ditch. Bradley, who was wearing her seat belt, had no serious injuries. However, Thompson, not wearing a seat belt, was thrown from the car and died.

Other pertinent facts to which Bradley testified are that the weather was clear; Bradley's car had no apparent mechanical or electrical problems; and neither Thompson nor Bradley had consumed alcohol.

Other than Bradley's deposition testimony, the only other factual evidence in the record was the affidavit of Michael Sutton (Sutton), an accident reconstruction expert retained by the plaintiff. Sutton's affidavit stated that he had interviewed law enforcement officers who had been at the scene, and had reviewed photographs, weather reports, and Bradley's deposition. According to Sutton, even if

Thompson had put his foot on Bradley's, this would not have caused the collision to occur in the manner that it had in this case. He found "no physical evidence to indicate [that Thompson] caused or contributed to the accident." His conclusion was that the accident was "due to steering overcorrection which led to the subsequent roll over of the vehicle."

Plaintiff argues on appeal that the evidence before the trial court presented genuine issues of material fact, and thus that summary judgment was erroneously granted. For the reasons that follow, we agree.

[1] We first address a procedural issue raised by defendant. The plaintiff's sole assignment of error was that the trial court erred in granting summary judgment for the defendant "on the ground that there was a genuine issue of material fact that Plaintiff's decedent was not contributorily negligent, and defendants were therefore not entitled to judgment as a matter of law." Defendants argue that the specificity of this assignment of error does not permit consideration of the related question of defendant's own negligence.

Defendant correctly states the general rule that the scope of appellate review is limited to issues presented in the assignments of error on appeal, *see Koufman v. Koufman*, 330 N.C. 93, 408 S.E.2d 729 (1991). However, we do not agree with defendant's contention that the plaintiff's assignment of error precludes this Court from exploring whether genuine issues of fact exist as to the issue of Bradley's negligence. Since the trial court does not state its reasons for the grant of summary judgment, and the issues of negligence and contributory negligence are so intertwined, this Court will examine both issues. In addition, having allowed plaintiff's motion to amend the record, filed 10 May 2000, to include a general assignment of error as to the trial court's ruling, such review is appropriate.

[2] Summary judgment is proper when

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

N.C.G.S. § 1A-1, Rule 56(c) (1999); *DiOrio v. Penny*, 331 N.C. 726, 417 S.E.2d 457 (1992). The party moving for summary judgment "assumes the burden of positively and clearly showing there is no genuine issue as to any material fact." *Lewis v. Blackman*, 116 N.C. App. 414, 417,

448 S.E.2d 133, 135 (1994). The record will be reviewed in the light most favorable to the non-movant, and all inferences will be drawn against the movant. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). In ruling on a motion for summary judgment, the trial court does not resolve issues of fact. Summary judgment is improper if any material fact is subject to dispute. *Ragland v. Moore*, 299 N.C. 360, 261 S.E.2d 666 (1980). Moreover, to prevail the defendant must show either that (1) an essential element of the plaintiff's claim is nonexistent; (2) the plaintiff is unable to produce evidence that supports an essential element of his claim; or, (3) the plaintiff cannot overcome affirmative defenses raised against him. *Dobson v. Harris*, 352 N.C. 77, 530 S.E.2d 829 (2000).

The complaint in this case alleged that Bradley's negligence as a driver caused the collision that claimed Thompson's life. "Negligence is the failure to exercise proper care in the performance of a legal duty owed by a defendant to a plaintiff under the circumstances." *Cassell v. Collins*, 344 N.C. 160, 163, 472 S.E.2d 770, 772 (1996) (citation omitted). The relevant duty in this case is that of an automobile driver; the driver owes a duty towards his or her passengers to exercise reasonable and ordinary care for their safety. *Colson v. Shaw*, 301 N.C. 677, 273 S.E.2d 243 (1981); *Jacobsen v. McMillan*, 124 N.C. App. 128, 476 S.E.2d 368 (1996). This duty of care was breached if, as alleged in the complaint, Bradley operated her car in a careless and reckless manner, drove at an unsafe speed, failed to decrease speed to avoid a collision, and generally failed to keep the car under proper control.

Bradley's deposition testimony was that she lost control of her car because Thompson had put his foot on top of hers. This evidence raised the affirmative defense of contributory negligence. Contributory negligence is the breach of duty of a plaintiff to exercise due care for his or her own safety, such that the plaintiff's failure to exercise due care is a proximate cause of his or her injury. *Champs Convenience Stores v. United Chemical Co.*, 329 N.C. 446, 406 S.E.2d 856 (1991); *Holderfield v. Trucking Co.*, 232 N.C. 623, 61 S.E.2d 904 (1950).

Under North Carolina law, contributory negligence generally will act as a complete bar to a plaintiff's recovery. *Cobo v. Raba*, 347 N.C. 541, 495 S.E.2d 362, (1998); *Blue v. Canela*, 139 N.C. App. 191, 532 S.E.2d 830, *disc. review denied*, 352 N.C. 672, 545 S.E.2d 418 (2000). An exception arises when the defendant has engaged in willful or wanton conduct, such as is alleged by plaintiff in his or her com-

plaint. Proof of such conduct permits recovery by a plaintiff despite his or her contributory negligence. *Parchment v. Garner*, 135 N.C. App. 312, 520 S.E.2d 100 (1999), *disc. review denied*, 351 N.C. 359 542 S.E.2d 216 (2000).

Thus, if it were proven that Thompson had put his foot on Bradley's, causing the accident, Thompson would recover nothing unless it could be shown that Bradley's driving constituted willful and wanton conduct.

An issue of material fact is "genuine" when differing conclusions might reasonably be drawn from the evidence before the trial judge. *Locklear v. Langdon*, 129 N.C. App. 513, 500 S.E.2d 748 (1998); *Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App. 163, 336 S.E.2d 699 (1985). The issue presented in this case is whether the evidence before the judge reasonably would permit differing conclusions to be drawn regarding either the defendant's negligence or the plaintiff's contributory negligence.

Summary judgment generally is disfavored in cases of negligence or contributory negligence. Indeed, as expressed by the North Carolina Supreme Court, "it is only in exceptional negligence cases that summary judgment is appropriate, since the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court." *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980) (citation omitted). In *Ragland*, there was evidence that the plaintiff had failed to yield the right of way. However, the Court held that summary judgment should not have been granted on the basis of contributory negligence; rather, the jury should have determined whether the plaintiff's actions were a proximate cause of the accident. *See also Lane v. Dorney*, 252 N.C. 90, 113 S.E.2d 33 (1960) (questions of negligence should not be taken from the jury if the evidence is susceptible to more than one interpretation); *Canela*, 139 N.C. App. at 195, 532 S.E.2d at 832-33 (2000) (jury ordinarily decides questions of contributory negligence and negligence); *Nobles v. Talley*, 139 N.C. App. 166, 532 S.E.2d 549 (2000) (summary judgment seldom appropriate in negligence cases).

We believe the evidence before the trial court at the summary judgment hearing presents a genuine issue of fact on the questions of negligence and contributory negligence. Bradley's deposition testimony places responsibility for the accident on Thompson, while the affidavit submitted by Thompson's expert stated that the accident was caused by Bradley's steering overcorrection. He further found no

physical evidence that indicated that Thompson had caused or contributed to the accident. Differing conclusions might reasonably be drawn from this evidence depending on which party's evidence is accepted as true. Moreover, viewing this conflicting evidence in the light most favorable to plaintiff-appellant, we conclude, the evidence presents material issues of fact appropriate for jury determination.

The present case also raises issues of credibility, another factor that renders summary judgment improper. This Court previously has held that issues of credibility should be determined by the jury. For example, in *Lea v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970), the evidence on a motion for summary judgment primarily consisted of the affidavits of the defendants. This Court found that summary judgment should not have been granted, noting that if a witness is interested in the outcome of a suit, the witness's credibility should be submitted to the jury, to avoid the trial judge conducting a "trial by affidavit." *Accord*, *Lewis v. Blackman*, 116 N.C. App. 414, 448 S.E.2d 133 (1994). Similarly, in *Locklear*, 129 N.C. App. at 517, 500 S.E.2d at 751, this Court reversed the trial judge's grant of summary judgment, stating that

> defendant relied exclusively on his own sworn statements to support his motion for summary judgment. To award defendant with summary judgment, the trial court must have assigned credibility to defendant's sworn statements as a matter of law. We hold that in doing so, the trial court erred.

Id. at 517, 500 S.E.2d at 751.

In the present case, Bradley's deposition was the only defense evidence. As a party, she has an interest in the outcome of the suit, putting her credibility at issue. Likewise, the jury should be allowed to consider the credibility of the accident reconstructionist. Having been retained by plaintiff, he arguably has an interest in the outcome, which may be considered by the jury. *See Whisenhunt v. Zammit*, 86 N.C. App. 425, 358 S.E.2d 114 (1987) (bias of expert witness proper subject for jury); *Willoughby v. Wilkins*, 65 N.C. App. 626, 310 S.E.2d 90 (1983) (expert witness could properly be examined concerning prior malpractice claims brought against him to show possible bias). Where, as in this case, there exist issues as to the weight to be given the evidence produced at the summary judgment hearing, as well as issues of credibility, the grant of summary judgment is error. For the reasons stated herein, we reverse and remand for a trial on the merits.

Reverse and Remand.

Judges WALKER and SMITH concur.

WALTER CLARK ERWIN, PLAINTIFF v. LENA LOWDERMILK TWEED, DEFENDANT

No. COA00-250

(Filed 3 April 2001)

1. Insurance— UIM coverage—family farm trust vehicles—individually owned

The trial court correctly granted summary judgment for plaintiff in a declaratory judgment action to determine UIM coverage for vehicles owned by a family farm trust where defendant contended that plaintiff was not entitled to coverage because the farm trust had a legally independent existence. The General Assembly has recognized the importance of maintaining the family farm, whatever legal entity it assumes, and has enacted legislation treating family farms differently in insurance regulations and for property tax purposes. Vehicles owned by the family farm trust on this record are to be treated as "individually owned" for insurance purposes; the present occupier of the farm, who is a 20% owner and trustee, is the named insured; and any family member residing in the same household is a class I insured under the policy.

2. Insurance— UIM coverage—stacking—private passenger or fleet vehicle—weight of vehicle—issue of fact

The trial court erred in a declaratory judgment action to determine UIM coverage by finding that a business auto policy could be stacked with a personal auto policy and granting summary judgment for plaintiff. An insured party may only stack interpolicy underinsured motorist coverages for non-fleet private passenger vehicles; the weight of the vehicle determines whether it is a private passenger vehicle or a fleet vehicle and there was no information here conclusively determining the weight. N.C.G.S. § 58-40-10(b).

3. Insurance— UIM claim—notice to insurer

Defendant-insurer's agents had prompt notice of plaintiff's UIM claim where plaintiff stated that he was in and out of defendant's local office almost daily to chat and discuss various matters relating to his insurance with his personal agent and that he was "virtually certain" that various members of the office inquired about his son's health and accident recovery progress.

Appeal by defendant from order and declaratory judgment entered 11 December 1999 by Judge James U. Downs in Burke County Superior Court. Heard in the Court of Appeals 22 January 2001.

Bryce Thomas & Associates, by Bryce O. Thomas, Jr., for the plaintiff-appellee.

Willardson & Lipscomb, L.L.P., by William F. Lipscomb, for unnamed defendant-appellant.

EAGLES, Chief Judge.

Unnamed defendant (hereinafter "Farm Bureau") appeals from the order and declaratory judgment finding that the plaintiff was entitled to underinsured motorist coverage under two insurance policies. The polices covered vehicles owned by Bellevue Farm Trust ("hereinafter BFT"). Plaintiff lives on Bellevue Farm with his parents and is a beneficiary of BFT.

The evidence presented at the hearing tends to show the following. On 19 December 1993 plaintiff, the 15 year old child of W.C. Erwin, Jr., was struck and injured on his bicycle by the vehicle driven by defendant Tweed. Defendant Tweed's vehicle was covered by a policy issued by State Auto Insurance Company which provided bodily injury coverage in the amount of $50,000.00 per person. State Auto tendered its limits—$12,666.00 to plaintiff's parents for medical bills, and the balance of $37,334.00 to plaintiff. On 16 October 1996 plaintiff notified unnamed defendant in writing of a UIM claim. Plaintiff argues he is entitled to UIM coverage under three policies issued by Farm Bureau. Farm Bureau Policy No. AP 3725121 is issued to plaintiff's parents. Farm Bureau Policy Nos. BAP 2040951 and AP 3915189 are issued to BFT. All three provide UIM coverage. Farm Bureau does not dispute coverage under Policy No. AP 3725121, however it denies coverage under policy Nos. BAP 2040951 and AP 3915189 on the basis

that plaintiff is not a family member of BFT and was not in a covered auto at the time of the accident.

[1] The UIM coverage provisions of the Farm Bureau policy allow insureds to recover for personal injuries, defining "insured" as:

1. You or any family member.

2. Any other person occupying:

   a. your covered auto; or

   b. any other auto operated by you.

3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person listed in 1. or 2. above.

Farm Bureau argues that since the insured in these two policies is BFT, and plaintiff was not in a covered auto, plaintiff's injuries are not covered. Farm Bureau relies on *Busby v. Simmons*, 103 N.C. App. 592, 406 S.E.2d 628 (1991) and *Stockton v. N.C. Farm Bureau*, 139 N.C. App. 196, 532 S.E.2d 566, *disc. rev. denied*, 352 N.C. 683, 545 S.E.2d 727 (2000), in support of this position. In *Busby*, the policy covered a sub-chapter S corporation's vehicles. The corporation was owned 2/3 by the plaintiff and 1/3 by plaintiff's father. The *Busby* plaintiff was not in a covered auto at the time of the accident. This Court held that "named insured" did not include "officers, directors or stockholders of a corporation when the named insured is a corporation." *Busby*, 103 N.C. App. at 596, 406 S.E.2d at 630. In *Stockton*, the named insured was "Oak Farm." *Stockton*, 139 N.C. App. at 197, 532 S.E.2d at 567. "Oak Farm" is the name of an unincorporated piece of land. *Id.* at 200, 532 S.E.2d at 568. A family lives on it and farms it, but Oak Farm is not a separate legal entity and has no independent legal existence. *Id.* This Court held that Oak Farm was indistinguishable from the owners of Oak Farm and concluded that UIM coverage was available for family members of Oak Farm's owners even though they were not injured in a covered vehicle. *Id.* Farm Bureau argues that if the named insured, unlike *Stockton*, has a legally independent existence and is not an individual, then there can be no coverage for insureds not actually occupying a covered automobile. Farm Bureau reasons that since there is a trust document for BFT and trusts are recognized as legal entities, then insureds of BFT not in a covered automobile, such as plaintiff, are not entitled to UIM coverage under those policies. As applied in the context of family farms, we disagree.

I. Legislative Treatment of Family Farms

A. Taxation

The United States Congress has recognized the special problems facing a family farmer and efforts to preserve the family farm for future generations. Chapter 11 of the Internal Revenue Code (Estate Tax) allows for present use valuation of lands used in a farming enterprise. 26 U.S.C.A. § 2032A. "The statute is designed to encourage the continued use of real property for farming . . . ." *Smoot v. Commissioner of Internal Revenue*, 1987 WL 49387 (C.D.Ill. 1987). Because the fair market value of property represents the "highest and best use" to which the property could be used, rather than the current use, families are often forced to sell farms in order to pay estate taxes. *Smoot v. U.S.*, 892 F.2d 597, 600 (1989). Congress permits complying farms to be valued according to their present use which is often much lower than their fair market value. *Id.* "Congress 'intended to preserve the family farm . . ., [a] very important American institution[s], both economically and culturally.' " *Id.*, 1976 Ways and Means Report at 5, 1976 U.S. Code Cong. & Admin.News at 3359. Our General Assembly also recognizes the importance of maintaining the family farm, whatever legal entity it assumes. In *In re Appeal of ELE Inc.*, 97 N.C. App. 253, 388 S.E.2d 241 (1990), this Court upheld the intention of the General Assembly to preferentially treat certain agricultural lands for purposes of property taxation. *Id.* at 257, 388 S.E.2d at 244.

> As originally written, the present use valuation was available only for land owned by individuals, which was defined in the statute as being a natural person or persons and not a corporation. In 1975, the legislature expanded the definition of "individually owned" property to include property owned by a corporation having as its principal business one of the specified activities and whose shareholders are natural persons actively engaged in such activities or the relatives of such persons. Thus "family corporations" involved in farming were permitted to qualify for present use valuation. The legislation authorizing these family corporations to qualify for preferential treatment was enacted at a time when farm families were advised to incorporate for estate planning purposes.

Id. (citation omitted). The current statute authorizing present use valuation has further expanded the definition of an "individually owned" farm to include family trusts.

(4) Individually owned.—Owned by one of the following:

. . . .

(c) A trust that was created by a natural person who transferred the land to the trust and each of whose beneficiaries who is currently entitled to receive income or principal meets one of the following conditions:

1. Is the creator of the trust or the creator's relative.

2. Is a second trust whose beneficiaries who are currently entitled to receive income or principal are all either the creator of the first trust or the creator's relatives.

G.S. § 105-277.2(4)(c) (1996). These preferential valuations of lands farmed by families exist as a mechanism to assist family farmers in maintaining their farms for future generations. Depending on the value of the family farm, for estate tax purposes it is often beneficial for the farm to be incorporated or for the owner to place it in trust for his relatives. This allows the owner of the property to use the present use valuation of the property as of the date of the transaction. G.S. § 105-277.3. In addition, this serves to reduce the estate tax. 26 U.S.C.A. § 2032A.

Placing the property in trust or incorporating the farm rarely has an impact on the income tax liability of the farmer-owners. However, these mechanisms do help families to pass their lands to the next generation without subjecting the farms to urbanization and skyrocketing property values. The General Assembly has determined that incorporation of a family farm or placing a family farm in trust will not prevent the land from being valued based solely on its ability to produce income. G.S. § 105-277.2(4)(c) (1996).

B. Insurance

In addition, the General Assembly has enacted legislation which treats family farm entities differently from other businesses in insurance regulations.

(1) "Private passenger motor vehicle" means:

a. A motor vehicle of the private passenger or station wagon type that is owned or hired under a long-term contract by the policy named insured and that is neither used as a public or livery conveyance for passengers nor rented to others without a driver; or

> b. A motor vehicle that is a pickup truck or van that is owned by an individual or by husband and wife or individuals who are residents of the same household if it:
>
> 1. Has a gross vehicle weight as specified by the manufacturer of less than 10,000 pounds; and
>
> 2. Is not used for the delivery or transportation of goods or materials unless such use is (i) incidental to the insured's business of installing, maintaining, or repairing furnishings or equipment, or (ii) for farming or ranching.
>
> Such vehicles owned by a family farm copartnership or a family farm corporation shall be considered owned by an individual for the purposes of this section;

G.S. § 58-40-10. This section specifically states that vehicles used for farming, whether owned by a natural person or a family farm business entity are considered "individually owned" for the purposes of insurance. *Id.* Again, the General Assembly has recognized that many family farmers choose business entities other than sole proprietorships as methods of preserving the farm for future generations. The General Assembly has specified that a vehicle owned by a family farm copartnership or a family farm corporation is not transformed into a fleet vehicle for insurance purposes. *Id.* We hold that for liability insurance purposes there is no substantial difference between a family farm copartnership or a family farm corporation and a family farm trust.

Accordingly, on this record, we hold that vehicles owned by BFT, a family farm trust, shall be treated as "individually owned" for insurance purposes. W.C. Erwin, Jr. the present occupier of Bellevue Farm, 20% owner of Bellevue Farm and trustee of BFT, is properly considered the named insured. Any family member residing in the same household as W.C. Erwin, Jr. is a class I insured under policy Nos. BAP 2040951 and AP 3915189.

II. Interpolicy Stacking

[2] Farm Bureau next assigns as error the trial court's finding that the business auto policy could be stacked with the personal auto policies. The business auto policy covers an 1973 International dump truck. An insured party is only permitted to stack interpolicy underinsured motorist coverages for non-fleet private passenger type vehi-

cles. *N.C. Farm Bureau Mut. Ins. Co. v. Stamper*, 122 N.C. App. 254, 258, 468 S.E.2d 584, 586 (1996); G.S. § 20-279.21(b)(4) (1999). Farm Bureau argues that the International dump truck fails to meet any of the statutory definitions of a "private passenger motor vehicle" under G.S. § 58-40-10(b).

> (1) "Private passenger motor vehicle" means:
>
> b. A motor vehicle that is a pickup truck or van that is owned by an individual or by husband and wife or individuals who are residents of the same household if it:
>
> 1. Has a gross vehicle weight as specified by the manufacturer of less than 10,000 pounds; and
>
> 2. Is not used for the delivery or transportation of goods or materials unless such use is (i) incidental to the insured's business of installing, maintaining, or repairing furnishings or equipment, or (ii) for farming or ranching.
>
> Such vehicles owned by a family farm copartnership or a family farm corporation shall be considered owned by an individual for the purposes of this section;

Id. Farm Bureau and plaintiff dispute the characteristics and weight of this truck. There is no information of record which determines conclusively the manufacturer's weight of this truck. Since the manufacturer's weight of this truck determines whether it is considered a private passenger vehicle or a fleet vehicle, we hold that there is a genuine issue of material fact as to the whether the policy covering this International dump truck can be stacked with the other policies. G.S. § 1A-1, N.C.R. Civ. P. 56(c) (1999). Summary judgment on this issue is inappropriate and is reversed.

III. Notice

[3] Next we address Farm Bureau's argument that even if there is coverage under the policies, plaintiff breached the policy conditions by failing to promptly notify Farm Bureau of his potential claim. The provisions of liability insurance policies which impose as conditions to liability the duty of an insured to give notice of accidents are, except where otherwise provided by statute, binding on the parties. *Henderson v. Insurance Co.*, 254 N.C. 329, 118 S.E.2d 885 (1961). Both policies contain language mandatory that insureds promptly notify Farm Bureau in the event of an "accident" or "loss."

Farm Bureau argues that it was not notified of the 19 December 1993 claim until 16 October 1996 when it received a letter from plaintiff's attorney. However, W.C. Erwin, Jr. stated he was in and out of the Farm Bureau local office almost daily to "chat" and discuss "various matters relating to [his] insurance" with his personal agent at the time, Wesley Shuffler. W.C. Erwin, Jr. is "virtually certain" that various members of the office, including Wesley Shuffler, inquired about his son's health and accident recovery progress following the accident on 19 December 1993. The insurance business is carried on by agents largely through subordinates. *Olvera v. Charles Z. Flack Agency*, 106 N.C. App. 193, 198, 415 S.E.2d 760, 763 (1992). "[A] general agent may, as a matter of implied consent, appoint subagents and subordinates whose statements, acts, knowledge, or **receipt of notice** within the ordinary course of business will bind the company." *Id.* (emphasis added). We hold that on this record Farm Bureau's agents had prompt notice of this potential claim.

Because we hold that there are genuine issues of fact as to whether the International dump truck is a "private passenger motor vehicle," we reverse entry of summary judgment on the issue of interpolicy stacking and remand to the trial court for further proceedings. Because we hold that vehicle liability insurance policies issued to a family farm trust insure the residents of the family farm, we affirm the entry of summary judgment by the trial court that plaintiff is a class I insured of BAP 2040951 and AP 3915189 and thereby entitled to UIM coverage.

Accordingly the judgment of the trial court is

Affirmed in part, reversed in part and remanded.

Judges HUDSON and SMITH concur.

MARY H. THOMPSON, PLAINTIFF v. THE TOWN OF DALLAS, NORTH CAROLINA AND OFFICER J.D. HOWELL, IN HIS OFFICIAL CAPACITY AND INDIVIDUALLY, DEFENDANTS

No. COA00-499

(Filed 3 April 2001)

1. **Appeal and Error— appealability—governmental and public official's immunity—substantial right**

Although an appeal from the denial of a motion for summary judgment is generally an interlocutory order, defendants have a right to an immediate appeal because orders denying dispositive motions based on the defenses of governmental and public official's immunity affect a substantial right.

2. **Immunity— governmental—public official—waiver—purchase of liability insurance**

The trial court did not err by denying defendants' motion for summary judgment with respect to plaintiff's negligence claim against defendant town and defendant officer in his official and individual capacities, because: (1) the defense of governmental immunity has been waived to the extent defendant town purchased liability insurance; and (2) public official's immunity does not extend to protect defendant officer from suit in his official capacity to the extent defendant town waived its immunity through the purchase of liability insurance.

3. **Police Officers— suit in individual capacity—punitive damages**

The trial court did not err by denying defendants' motion for summary judgment with respect to plaintiff's punitive damages claim against defendant officer in his individual capacity, because the facts alleged are sufficiently egregious, if proved, to support a finding that defendant's conduct was willful and either intentionally or recklessly indifferent to foreseeable consequences.

Appeal by defendants from order entered 8 March 2000 by Judge Richard D. Boner in Gaston County Superior Court. Heard in the Court of Appeals 1 February 2001.

Tim L. Harris & Associates, by J. Neal Rodgers, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and Stacey M. Stone, and Caudle & Spears, by Lloyd C. Caudle, for defendant-appellants.

MARTIN, Judge.

Plaintiff filed this action alleging claims against defendants Town of Dallas and Officer J.D. Howell, individually and in his official capacity, arising from events allegedly occurring while defendant Howell was employed as a police officer for the Town of Dallas. In her complaint, plaintiff alleged that her grandson suffered a head injury due to an accident at plaintiff's home. Plaintiff and the child's parents placed the child in plaintiff's automobile and proceeded to transport him to the emergency room at Gaston Memorial Hospital. As plaintiff drove through Dallas with her emergency flashers operating, she was observed by Officer Howell, who turned on his blue light and siren. In response, plaintiff stopped her car, walked backed to Howell's patrol car, and requested his assistance. When Howell did not offer assistance or investigate the child's condition, plaintiff returned to her vehicle, apparently without the officer's permission, and proceeded to the hospital, with Howell in pursuit. Upon plaintiff's arrival at the hospital, Howell placed plaintiff under arrest. Though she submitted without resistance, plaintiff alleges that Howell threatened her with chemical mace, handcuffed her behind her back, and treated her in a "rough and callous manner." Plaintiff's son informed the officer that plaintiff had suffered a previous heart attack and suffered from heart problems. Nevertheless, Howell transported plaintiff to the magistrate's office where he filed charges for speeding and failing to stop for a blue light. Plaintiff alleges that as a result of the officer's actions, she suffered additional heart problems requiring hospitalization. She alleges that the criminal charges filed against her by Officer Howell were subsequently dismissed by the Gaston County district attorney's office. Plaintiff alleged six claims for relief: negligence, violations of the North Carolina Constitution, "breach of statutory and fiduciary duties (malfeasance of office)," abuse of process and malicious prosecution, use of excessive force during arrest in violation of G.S. § 15A-401(d), and a claim for punitive damages against Officer Howell individually for his "malicious, willful and wanton conduct." She also alleged that Defendant Town of Dallas had waived governmental immunity through the purchase of liability insurance.

Defendants answered, admitting the existence of liability insurance, denying the material factual allegations of the complaint, and asserting several affirmative defenses, including, *inter alia*, governmental immunity and public official's immunity. Defendants' subsequent motion for judgment on the pleadings was granted as to plaintiff's third claim for relief alleging "breach of statutory and fiduciary duties (malfeasance of office)," but was denied as to plaintiff's remaining claims. Defendants then moved for summary judgment as to plaintiff's remaining claims. The trial court granted summary judgment in favor of defendants and dismissed plaintiff's second (violation of N.C. Constitution, Article I, § 19), fourth (abuse of process/malicious prosecution), and fifth (excessive force during arrest) claims for relief, but denied summary judgment as to plaintiff's first (negligence) and sixth (punitive damages against Officer Howell individually) claims for relief. Defendants appeal from the order denying their motion for summary judgment as to those claims.

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[1] The order from which defendants have appealed is an interlocutory order. In general, "a party has no right to immediate appellate review of an interlocutory order." *Tise v. Yates Const. Co., Inc.*, 122 N.C. App. 582, 584, 471 S.E.2d 102, 105 (1996), *affirmed as modified and remanded*, 345 N.C. 345, 480 S.E.2d 677 (1997) (citing *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). When the order affects a substantial right, however, a party has a right to an immediate appeal. N.C. Gen. Stat. § 1-277(a); 7A-27(d)(1). Orders denying dispositive motions based on the defenses of governmental and public official's immunity affect a substantial right and are immediately appealable. *Corum v. University of North Carolina*, 97 N.C. App. 527, 389 S.E.2d 596 (1990), *affirmed in part, reversed in part, and remanded*, 330 N.C. 761, 413 S.E.2d 276, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664 (1992). Immediate appeal of such interlocutory orders is allowed because " 'the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.' " *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996) (citations omitted). Defendants' appeal, therefore, is properly before this Court.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a mat-

ter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). The moving party has the burden of establishing that no genuine issue of material fact exists, and can meet the burden

> by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Roumillat v. Simplistic Enterprises, Inc., 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 376 S.E.2d 425 (1989)). The record before us does not include any discovery materials nor is there any indication that any materials other than the pleadings were before the trial court.

[2] By their first assignment of error, defendants contend the trial court erred in denying their motion for summary judgment with respect to plaintiff's first claim for relief alleging negligence. Their arguments present issues of whether plaintiff's negligence claims are barred by the doctrines of governmental immunity or public official's immunity.

Generally, "the doctrine of governmental, or sovereign, immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity." *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993) (citations omitted). A public officer sued in his official capacity "operates against the public entity itself, as the public entity is ultimately financially responsible for the compensable conduct of its officers." *Epps*, 122 N.C. App. at 203, 468 S.E.2d at 850. Thus, a public officer sued in his official capacity is simply another way of suing the public entity of which the officer is an agent. Governmental or sovereign immunity "prevents the State or its agencies from being sued without its consent." *Corum*, 97 N.C. App. at 533, 389 S.E.2d at 599.

Governmental immunity "is inapplicable, however, where the state has consented to suit or has waived its immunity through the purchase of liability insurance." *Messick*, 110 N.C. App. at 714, 431 S.E.2d at 493. Pursuant to G.S. § 160A-485(a):

> Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. . . . Immunity shall be waived only to the extent that the city is indemnified by

> the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance.

In her complaint, plaintiff alleged:

> 3. Defendant Dallas has waived any governmental immunity it could have raised to plaintiff's complaint in that defendant Dallas has purchased liability insurance to cover such negligent conduct as alleged herein by plaintiff.
>
> 4. Plaintiff has reason to believe that said liability insurance exists and that it was in force at the time of the plaintiff's injuries.

In their answer, defendants admitted "that coverage exists and is not excluded" and, in their reply brief to this Court, they concede that the defense of governmental immunity has been waived in this case, to the extent defendant Town of Dallas has purchased liability insurance.

Defendants argue, however, that the doctrine of public official's immunity serves as a complete bar to plaintiff's claim for negligence. The law of public official's immunity is well established in North Carolina: "As long as a public officer lawfully 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, he is protected from liability." *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citations omitted). The doctrine of public official's immunity serves to protect officials from *individual liability* for mere negligence, but not for malicious or corrupt conduct, in the performance of their official duties. *Slade v. Vernon*, 110 N.C. App. 422, 429 S.E.2d 744 (1993). Thus, while Officer Howell is protected from individual liability for mere negligence in the performance of his duties by the doctrine of public official's immunity, such immunity does not extend to protect him from suit in his official capacity for such negligence to the extent his employer, defendant Town, has waived immunity by the purchase of liability insurance. Accordingly, we hold that to the extent defendant Town of Dallas has waived its immunity through the purchase of liability insurance, defendant Town, and defendant Howell, as sued in his official capacity, are not immune from suit for Howell's alleged negligent acts, and summary judgment was properly denied for such claims.

[3] Defendants next contend the trial court erred by denying their motion for summary judgment as to plaintiff's sixth claim for relief for punitive damages against defendant Howell. Plaintiff sought punitive damages against Howell in his individual capacity only.

As noted above, a public officer is immune from personal liability for mere negligence in the performance of his duties, but is not immune if his actions are determined to be malicious or corrupt or beyond the scope of duties. It is also well established that a defendant may be liable for punitive damages where his conduct "reaches a level higher than mere negligence and amounts to willful, wanton, malicious, or reckless indifference to foreseeable consequences." *Hare v. Butler*, 99 N.C. App. 693, 701, 394 S.E.2d 231, 237, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kassa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984).

In her claim for relief seeking punitive damages, plaintiff alleged:

> 16. Defendant Howell . . . proceeded to threaten plaintiff with chemical mace and handcuff her behind her back. While Defendant Howell was treating the Plaintiff in a rough and callous manner, Plaintiff's son, Eric, informed Defendant Howell that plaintiff suffered from severe heart problems, had experienced a previous heart attack, and could experience another heart attack if defendant Howell did not stop his abusive behavior.
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> . . .
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> 18. Defendant's Howell's actions resulted in severe and painful injuries to the plaintiff. Within hours of the abusive and wrongful arrest, Plaintiff suffered a coronary atherosclerosis of the native coronary vessel and unstable angina, requiring immediate hospitalization.
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> . . .
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> 47. Defendant Howell's actions toward the plaintiff constituted malicious, willful and wanton conduct, and a gross and reckless disregard for the rights, health and safety of plaintiff, rendering defendant Howell liable for punitive damages.

Considered with the other allegations of the complaint, and in the light most favorable to plaintiff, as we must on a motion for summary judgment, the facts alleged above are sufficiently egregious, if proved, to support a finding that defendant Howell's conduct was willful, and either intentionally or recklessly indifferent to foreseeable consequences. As the moving party, defendant Howell had "the burden of showing that no material issues of fact exist, such as by demonstrating through discovery that the opposing party cannot produce evidence to support an essential element of his claim or defense." *Dixie Chemical Corp. v. Edwards*, 68 N.C. App. 714, 715, 315 S.E.2d 747, 749 (1984). Although defendants' answer denies plaintiff's allegations, the pleadings simply forecast a genuine dispute upon the issue of defendant Howell's conduct. Defendant Howell offered no evidentiary materials, through discovery or otherwise, at the summary judgment stage to show that plaintiff could not produce evidence to support her allegations. Thus, he has failed to carry his burden of showing that no genuine issue of material fact exists and the denial of defendants' summary judgment motion regarding plaintiff's sixth claim for relief must be affirmed.

Affirmed.

Judges TIMMONS-GOODSON and THOMAS concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD WASHINGTON

No. COA00-198

(Filed 3 April 2001)

1. Robbery— dangerous weapon—misdemeanor larceny—instruction on lesser included offense not required

The trial court did not err by giving instructions for the offense of robbery with a dangerous weapon under N.C.G.S. § 14-87(a) without instructing on the lesser included offense of misdemeanor larceny, because: (1) the evidence clearly established that defendant possessed and used a dangerous weapon; and (2) whether defendant carried the gun into the store with him, or as he alleges, acquired the gun in a struggle is irrelevant.

2. Assault— deadly weapon with intent to kill inflicting serious injury—instruction on lesser included offense not required—no plain error

The trial court did not err by giving instructions for the offense of assault with a deadly weapon with intent to kill inflicting serious injury under N.C.G.S. § 14-32(a) without instructing on the lesser included offenses of assault with a deadly weapon, assault inflicting serious injury, and assault with a deadly weapon inflicting serious injury, because: (1) the evidence at trial supported every element of the offense of assault with a deadly weapon with intent to kill inflicting serious injury; and (2) there was no plain error in the trial court's instruction.

3. Homicide; Robbery; Assault— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of first-degree murder, robbery with a dangerous weapon, and assault with a dangerous weapon with intent to kill inflicting serious injury, because there was substantial evidence as to each of the elements of the offenses charged.

4. Homicide— first-degree murder—short-form indictment—constitutionality

Although the short-form murder indictment used to charge defendant with first-degree murder did not allege all of the elements of first-degree murder, the trial court did not err in concluding the indictment was constitutional.

Appeal by defendant from judgments entered 2 December 1998 by Judge D. Jack Hooks in Cumberland County Superior Court. Heard in the Court of Appeals 25 January 2001.

Attorney General Michael F. Easley by Special Deputy Attorney General Thomas F. Moffitt for the State.

Margaret Creasy Ciardella for the defendant-appellant.

THOMAS, Judge.

Defendant was found guilty in a jury trial of first degree murder, robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. He was sentenced to life imprisonment without parole plus a consecutive term of not less than

116 months nor more than 149 months. On appeal, defendant argues four assignments of error.

The State's evidence tended to show on 20 March 1996 Danny Bayless (Bayless) was working at Lucas Rod and Reel in Fayetteville when he heard loud voices coming from Willis Grocery Store (store). The two businesses were in the same building and shared a common entrance door to the outside. Bayless then heard Randy Carter (Carter), a clerk at the store, cry out "Save me, save me." As Bayless entered the store to investigate, he observed Carter on the floor being struck in the head with a pistol by defendant. As defendant turned the pistol, which actually belonged to Carter, toward Bayless, Bayless fired his own pistol and shot defendant in the chest. Defendant fired three shots at Bayless, striking him with each, and turned and fired "at least" two shots at Carter, killing him. Defendant then removed cash from the store's register and fled.

After being captured and taken to the emergency room, knowing a police officer was present, defendant said to his wife, "I went inside and told him I needed the money. The man had a gun and we started struggling for the gun and it went off."

Hospital records showed defendant underwent a colostomy as a result of his wounds. They also showed he tested positive for cocaine.

Defendant presented no evidence at trial.

The jury returned a verdict of guilty on each of the three charges. The trial court arrested judgment on robbery with a dangerous weapon since it merged with the first degree murder conviction based on the felony murder rule. *See State v. Goldston*, 343 N.C. 501, 474 S.E.2d 412 (1996).

By defendant's first and second assignments of error, he argues the trial judge erred in giving instructions for 1) robbery with a dangerous weapon without instructing for the offense of misdemeanor larceny; and 2) assault with a deadly weapon with intent to kill inflicting serious injury without instructing for (a) assault with a deadly weapon, (b) assault inflicting serious injury and (c) assault with a deadly weapon inflicting serious injury.

A trial judge is required to instruct the jury on the law arising from evidence presented at trial. The necessity of instructing the jury as to lesser included offenses arises only where there is evidence

from which the jury could find that a lesser included offense had been committed. *State v. White*, 322 N.C. 506, 512, 369 S.E.2d 813, 816 (1988). Further, the trial judge is not required to submit lesser included offenses for a jury's consideration when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence related to any element of the crime charged. *State v. Snead*, 295 N.C. 615, 247 S.E.2d 893 (1978).

[1] As to defendant's contention regarding the trial court's failure to instruct on misdemeanor larceny, N.C. Gen. Stat. § 14-87(a) defines robbery with a dangerous weapon as the taking of personal property of another, in his presence or from his person, without his consent by endangering or threatening his life with a firearm or other dangerous weapon, with the taker knowing he is not entitled to the property and intending to permanently deprive the owner of the property. *White* at 515, 369 S.E.2d at 817.

The lesser offense of larceny is defined as the taking and carrying away of the property of another without the owner's consent and with the intent to permanently deprive the owner of his property. *White* at 518, 369 S.E.2d at 819.

Our Supreme Court in *White* held that misdemeanor larceny is a lesser included offense of robbery with a dangerous weapon, an instruction for misdemeanor larceny should have been given under facts where defendant's version of the events supported it, and the failure to give such an instruction entitled the defendant to a new trial. In *White*, however, there was a conflict in the evidence as to whether the defendant actually possessed a weapon. There is no such conflict here. In the instant case, the evidence clearly established that defendant possessed and used a dangerous weapon. The facts *sub judice* are more similar to *State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550 (1997). The Court in *Cummings* said "Here, the evidence is uncontradicted that the robbery was committed with the use of a dangerous weapon. Whether defendant carried the gun into the store with him, or as he alleges, 'acquired the gun in a struggle' is irrelevant." *Id* at 326, 488 S.E.2d at 570.

The evidence presented at trial positively established the elements of armed robbery. Therefore, this first assignment of error is overruled.

[2] As to defendant's contention that the trial court erred by not instructing on assault with a deadly weapon and assault inflicting serious injury, we also disagree.

N.C. Gen. Stat. § 14-32(a) lists the elements of assault with a deadly weapon with intent to kill inflicting serious injury as: (1) an assault; (2) with a deadly weapon; (3) with intent to kill; and (4) inflicting serious injury not resulting in death. Here, defendant pointed a .357 magnum pistol at Bayless and shot him. A pistol is a deadly weapon *per se*. *State v. Powell*, 238 N.C. 527, 78 S.E.2d 248 (1953). Thus, there was an assault with a deadly weapon. Additionally, one of the bones in an arm was broken in several places with the bullet exiting near the elbow. Another bullet passed through his right side and shoulder with a third remaining lodged near his shoulder. Bayless clearly suffered serious injury.

The finding of intent to kill was also well supported. "Defendant's intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances." *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988) (*citing State v. Thacker*, 281 N.C. 447, 189 S.E.2d 145 (1972)). Defendant shot Bayless three times at close range with a large caliber pistol and within seconds fired fatal shots into Carter. All the evidence shows defendant intended to use lethal force. The evidence at trial supported every element of the offense of assault with a deadly weapon with intent to kill inflicting serious injury.

Defendant also contends the trial court should have instructed on the offense of assault with a deadly weapon inflicting serious injury, even though there was no request by defendant for such an instruction at trial. "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 by any party, out of the presence of the jury." N.C.R. App. P. 10(b)(2) (2001).

The plain error rule can be an exception, however, and defendant argues such an exception is justified here. We disagree.

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where the error is grave error

> which amounts to a denial of a fundamental right of the accused,' or the error has 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citing *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982)).

> The plain error rule does not negate Rule 10(b)(2) and as is explained in *Odom*, rarely will an improper instruction which not objected to (or in this case not requested) justify reversal. Instead of the prejudicial error contained in N.C.G.S. § 15A-1443, we must determine whether the jury instruction was erroneous, and if so, whether it had a probable impact on the jury's verdict.

State v. Rathbone, 78 N.C. App. 58, 65, 336 S.E.2d 702, 706 (1985), *disc. review denied*, 316 N.C. 200, 341 S.E.2d 582 (1986). We find no plain error in the court's instructions. Accordingly, all parts of defendant's second assignment of error are overruled.

[3] By Defendant's third assignment of error, he argues the trial court erred in denying defendant's motion to dismiss based on insufficient evidence. We disagree.

In considering a motion to dismiss based upon insufficiency of the evidence "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). If the court finds there is substantial evidence as to each element of the offense charged, or any lesser included offenses, the trial court must deny the motion to dismiss as to those charges supported by substantial evidence and submit them to the jury for its consideration; the weight and credibility of such evidence is a question for the jury. *State v. Vause*, 328 N.C. 231, 236-37, 400 S.E.2d 57, 61 (1991).

We find there was substantial evidence as to each of the elements of the offenses charged. Thus, this assignment of error is rejected.

[4] In his fourth assignment of error defendant argues the trial court lacked jurisdiction as to the first degree murder charge in that the short form indictment authorized by N.C. Gen. Stat. § 15-144 failed to allege all of the elements of first degree murder.

Defendant was appropriately charged in a short form bill of indictment in accordance with N.C. Gen. Stat. § 15-144. The defendant's indictment states in part:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT THAT on or about the 20th day of March, 1996, in the County named above the defendant named above did unlawfully, willfully and feloniously did of malice aforethought kill and murder Robert Carter. This act was in violation of North Carolina General Statutes Section 14-17."

Our Supreme Court "has consistently held indictments based on this statute are in compliance with both the North Carolina and United States Constitutions." *State v. Wallace*, 351 N.C. 481, 504-05, 528 S.E.2d 326, 341 (2000). See, e.g., *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000); and *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985). "In light of our overwhelming case law approving the use of short form indictments and the lack of a federal mandate to change that determination, we decline to do so." *State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 343 (2000) Accordingly, this assignment of error is overruled as well.

NO ERROR.

Judges MARTIN and TIMMONS-GOODSON concur.

DONALD J. GOLDS, PLAINTIFF-APPELLEE v. CENTRAL EXPRESS, INC., A MISSOURI CORPORATION, CENTRAL EXPRESS, AN UNINCORPORATED ASSOCIATION, PARTNERSHIP, OR PROPRIETORSHIP, AND DENNIS L. JENNY, DEFENDANTS-APPELLANTS

No. COA00-536

(Filed 3 April 2001)

1. Appeal and Error— appealability—denial of motion to dismiss for lack of jurisdiction

The denial of a motion to dismiss for lack of jurisdiction is immediately appealable.

2. Jurisdiction— personal—prima facie proof

The trial court erred by denying a motion to dismiss for lack of personal jurisdiction over the nonresident defendant where the complaint did not state the section of the long-arm statute under which jurisdiction was obtained or allege facts as to activity being conducted in North Carolina by defendant at the time of service of process, and a review of the record and complaint showed that plaintiff failed to meet his burden of proving prima facie a statutory basis for personal jurisdiction. N.C.G.S. § 1-75.4.

3. Pleadings— Rule 11 sanctions

The trial court did not err by denying a motion for Rule 11 sanctions for a complaint filed in North Carolina arising from an automobile accident in Louisiana.

Appeal by defendants from judgment entered 2 March 2000 by Judge Claude S. Sitton and filed 3 March 2000 in Burke County Superior Court. Heard in the Court of Appeals 5 February 2001.

Kuehnert Bellas & Bellas, PLLC, by Eric R. Bellas, for plaintiff-appellee.

Patton, Starnes, Thompson, Aycock, Teele & Ballew, P.A., by Larry A. Ballew, for defendants-appellants.

WALKER, Judge.

Plaintiff, a North Carolina resident, filed an action against Central Express, Inc. (defendant Central Express) and Dennis L. Jenny (defendant Jenny) on 6 January 2000, alleging negligence on the part of defendant Jenny resulting from an automobile accident. In his complaint, plaintiff sought damages for personal injury and property loss.

The accident occurred on 7 January 1998 around 7:08 p.m. in the parking lot of a fuel station in Hammond, Louisiana. At the time of the accident, plaintiff was sitting in the passenger side of his vehicle, which was parked in a marked parking space. Defendant Central Express' vehicle, which was being driven by its employee, defendant Jenny, collided with the passenger side of plaintiff's vehicle.

In his complaint, plaintiff alleged defendant Jenny was acting within the course and scope of his employment at the time of the accident. Plaintiff served defendant Jenny by certified mail but did not obtain service on defendant Central Express.

On 14 February 2000, defendants filed a motion to dismiss the action, alleging lack of jurisdiction under Rule 12(b)(2). N.C. R. Civ. P. 12(b)(2) (1999). In their motion, defendants asserted that defendant Central Express is a Missouri corporation, defendant Jenny is a citizen and resident of Highland, Illinois, and the accident giving rise to this action occurred in or near Hammond, Louisiana. Defendants further moved for sanctions and costs pursuant to Rule 11 of the North Carlina Rules of Civil Procedure "for the defense of this action which has no basis in law or fact." N.C.R. Civ. P. 11 (1999). By order filed 3 March 2000, the trial court denied defendants' motion to dismiss and for sanctions.

[1] In their assignment of error, defendants contend the trial court erred in denying their motion to dismiss for lack of jurisdiction pursuant to Rule 12(b)(2) because defendants have insufficient contacts with this State and because defendant Central Express was not served with process. N.C.R. Civ. P. 12(b)(2).

At the outset, we note "[t]he denial of a motion to dismiss for lack of jurisdiction is immediately appealable" and not interlocutory. *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 614, 532 S.E.2d 215, 217, *cert. denied*, 353 N.C. 261, 546 S.E.2d 90 (2000), *citing* N.C. Gen. Stat. § 1-277(b) (1999); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982). Whether the courts of this State may exercise personal jurisdiction over a nonresident defendant involves a two-prong analysis: "(1) Does a statutory basis for personal jurisdiction exist, and (2) If so, does the exercise of this jurisdiction violate constitutional due process?" *J.M. Thompson Co. v. Doral Mfg. Co.*, 72 N.C. App. 419, 424, 324 S.E.2d 909, 913, *cert. denied*, 313 N.C. 602, 330 S.E.2d 611 (1985). The assertion of personal jurisdiction over a defendant comports with due process if defendant is found to have sufficient minimum contacts

with the forum state to confer jurisdiction. *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 276 S.E.2d 521, *cert. denied*, 303 N.C. 314, 281 S.E.2d 651 (1981).

[2] The statutory basis for asserting personal jurisdiction pursuant to N.C. Gen. Stat. § 1-75.4 is referred to as the "long-arm statute." N.C. Gen. Stat. § 1-75.4 (1999); *Godwin v. Walls*, 118 N.C. App. 341, 346, 455 S.E.2d 473, 478, *cert. granted*, 341 N. C. 419, 461 S.E.2d 757 (1995) (motion to withdraw petition for discretionary review granted 19 October 1995). Our long-arm statute provides several methods by which personal jurisdiction may be exercised over a defendant and includes in pertinent part:

> (1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> . . .
>
> d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

N.C. Gen. Stat. § 1-75.4(1)(d). "This statute is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process." *DeArmon v. B. Mears Corp.*, 67 N.C. App. 640, 643, 314 S.E.2d 124, 126 (1984), *rev'd on other grounds*, 312 N.C. 749, 325 S.E.2d 223 (1985). However, "[t]he burden is on [the] plaintiff to establish itself within some ground for the exercise of personal jurisdiction over defendant." *Public Relations, Inc.* v. *Enterprises, Inc.*, 36 N.C. App. 673, 677, 245 S.E.2d 782, 784 (1978), *citing Bryson v. Northlake Hilton*, 407 F. Supp. 73 (M.D.N.C. 1976); *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973). "The failure to plead the particulars of jurisdiction is not fatal to the claim so long as the facts alleged permit the inference of jurisdiction under the statute." *Williams v. Institute for Computational Studies*, 85 N.C. App. 421, 428, 355 S.E.2d 177, 182 (1987). If a defendant challenges the court's jurisdiction, "a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits. If the court takes the latter option, the plaintiff has the initial burden of establishing *prima facie* that jurisdiction is proper." *Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217 (citations omitted).

Plaintiff, in the instant case, alleges in his complaint "[u]pon information and belief, both named defendants are subject to the personal jurisdiction of the Courts of this State pursuant to N.C.G.S. § 1-75.4[.]" Although the complaint cites our long-arm statute as providing personal jurisdiction over defendants, the complaint does not state the section of this statute under which jurisdiction is obtained nor does it allege any facts as to activity being conducted in this State at the time of service of process. On appeal, plaintiff argues that personal jurisdiction is based upon N.C. Gen. Stat. § 1-75.4(1)(d) because defendant Central Express was engaged in substantial activity in that defendants "regularly conduct business within this [S]tate by delivering freight from, to or through this State."

In *Godwin*, this Court held plaintiff failed to prove a *prima facie* statutory basis for jurisdiction under N.C. Gen. Stat. § 1-75.4(1). *Godwin*, 118 N.C. App. 341, 455 S.E.2d 473. In that case, neither the complaint nor amended complaint contained any allegations regarding the nature of defendants' contacts with this State and the record was devoid of evidence to support the trial court's presumed finding of substantial activity within this State. *Id.* at 351-52, 455 S.E.2d at 481. Recently, this Court in *Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000) held that a motion to dismiss for lack of personal jurisdiction under N.C. Gen. Stat. § 1-75.4(4)(a) was properly denied where allegations in plaintiff's complaint satisfied requirements of the long-arm statute by sufficiently claiming that defendant carried on solicitations within the meaning of the statute.

A review of the record and plaintiff's complaint shows he failed to meet his burden of proving *prima facie* a statutory basis for personal jurisdiction. Accordingly, the trial court erred by denying defendant's motion to dismiss for a lack of personal jurisdiction.

[3] In light of our disposition of this case under our "long arm statute," we need only address defendants' additional assignment of error that the trial court erred in denying their motion for sanctions pursuant to Rule 11 of our Rules of Civil Procedure and in failing to enter findings and conclusions in its order. N.C.R. Civ. P. 11.

Defendant claims Rule 11 sanctions are warranted because plaintiff "through his counsel, filed a complaint which lacks legal sufficiency, factual sufficiency and was filed only to 'forum-shop' in North Carolina after the applicable one year statute of limitations had expired in Louisiana."

The trial court's decision whether or not to impose Rule 11 sanctions is reviewable *de novo*. *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365, *cert. denied*, 337 N.C. 691, 448 S.E.2d 521 (1994), *citing Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989), *cert. denied*, 329 N.C. 505, 407 S.E.2d 552 (1991). In general, an order imposing or denying sanctions must be supported by findings of fact and conclusions of law. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714. The trial court's failure to make findings and conclusions results in error, which generally requires the case to be remanded for the resolution of any disputed factual issues. *Taylor v. Taylor Products, Inc.*, 105 N.C. App. 620, 630, 414 S.E.2d 568, 576 (1992). "However, remand is not necessary when there is no evidence in the record, considered in the light most favorable to the movant, which could support a legal conclusion that sanctions are proper." *Id.*

Rule 11, which sets forth the circumstances under which sanctions may be imposed, states in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C.R. Civ. P. 11. In other words, Rule 11 provides that a pleading must contain the following to avoid the imposition of sanctions: (1) legal sufficiency; (2) factual sufficiency; and (3) a proper purpose. *Williams v. Hinton*, 127 N.C. App. 421, 423, 490 S.E.2d 239, 241 (1997). A pleading lacking in any of these three areas is sufficient to support sanctions under Rule 11. *Id.*

To determine whether a pleading is legally sufficient, the trial court should look "first to the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of 'whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law.' " *Bryson v. Sullivan*, 330 N.C. 644, 661, 412 S.E.2d 327, 336 (1992), *quoting dePasquale v. O'Rahilly*, 102 N.C. App. 240, 246, 401 S.E.2d 827, 830 (1991). This is measured by "an objective standard of reasonable inquiry." *Id.* (citation omitted).

To determine whether a complaint is factually sufficient, the court must determine: "(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *McClerin v. R-M Industries, Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995).

A complaint has been influenced with an improper purpose when its purpose is " 'any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.' " *Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996) (citation omitted). For example, "a party 'will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents or cause them unnecessary cost or delay.' " *Id.* "An objective standard is used to determine the existence of an improper purpose, with the burden on the movant to prove such improper purpose." *Id.*

After careful review, we cannot conclude the complaint was legally and factually deficient or filed with an improper purpose such that sanctions should be imposed.

In sum, the trial court's order denying defendants' motion to dismiss for a lack of personal jurisdiction pursuant to Rule 12(b)(2) is reversed. N.C.R. Civ. P. 12(b)(2). The trial court's order denying defendants' motion for sanctions pursuant to Rule 11 is affirmed. N.C.R. Civ. P. 11.

Reversed in part and affirmed in part.

Judges HUNTER and CAMPBELL concur.

STATE OF NORTH CAROLINA v. MARY HOLLYFIELD BISSETTE, DEFENDANT

No. COA00-19

(Filed 3 April 2001)

1. Constitutional Law— due process—felony conviction following appeal of misdemeanor conviction

Defendant's felony larceny conviction in superior court was a violation of her due process rights and was vacated where she was tried and convicted of misdemeanor larceny in district court

based on the alleged theft of a copy machine from her employer, she exercised her right to a trial de novo in superior court, and she was then indicted, prosecuted and convicted of felony larceny based on the same alleged occurrence.

2. Constitutional Law— double jeopardy—prosecutor's intention to dismiss misdemeanor—felony jury impaneled

Jeopardy attached when the jury was impaneled and a prosecutor's pretrial announcement of his election not to pursue a misdemeanor charge was binding and tantamount to an acquittal where defendant was arrested for felonious larceny from her employer, the charge was reduced to misdemeanor larceny, defendant was tried and convicted, she appealed to superior court for a trial de novo, defendant was then indicted for felonious larceny from her employer, the two charges appeared on the docket, the prosecutor explained that they came from a single occurrence and that he intended to dismiss the misdemeanor charge, defendant was tried and convicted of the felony larceny charge, and the felony conviction was vacated on appeal.

Appeal by defendant from judgment entered 23 June 1999 by Judge James E. Lanning in Guilford County Superior Court. Heard in the Court of Appeals 20 February 2001.

Michael F. Easley, Attorney General, by V. Lori Fuller, Assistant Attorney General, and Richard Bradford, Associate Attorney General, for the State.

Clifford, Clendenin, O'Hale & Jones, L.L.P., by Walter L. Jones, for defendant-appellant.

HUDSON, Judge.

On 12 April 1995, a warrant for defendant's arrest was served alleging defendant had violated N.C.G.S. § 14-74 (1999). This statute is entitled "Larceny by servants and other employees" (commonly referred to as "larceny by an employee"), and a violation of this statute constitutes a felony. *See* G.S. § 14-74. After defendant's arrest, the charge against defendant was reduced to "misdemeanor larceny," defendant entered a plea of not guilty, and on 8 February 1996 defendant was tried and convicted in district court on the misdemeanor larceny charge. Defendant exercised her right to appeal for a trial *de novo* in superior court pursuant to N.C.G.S. § 7A-290 (1999). On 13

March 1996, defendant waived arraignment in superior court and entered a plea of not guilty to the misdemeanor larceny charge. Defendant was then indicted on the felony charge of "larceny by an employee" pursuant to G.S. § 14-74 on 21 October 1996. On 15 November 1996, defendant waived arraignment in superior court and entered a plea of not guilty to the felony larceny charge.

On 21 June 1999, the case came before the superior court. The record indicates that two separate charges, with two separate case numbers, appeared on the docket for trial at that time: the misdemeanor larceny charge on appeal from the district court, and the felony "larceny by an employee" charge for which defendant had been indicted. The Guilford County Assistant District Attorney explained to the court that the two charges emanated from a single underlying occurrence, and that he had intended to have the misdemeanor larceny charge dismissed at the time defendant was indicted on the felony larceny charge. He further stated that he would file another dismissal at the conclusion of the trial in superior court to ensure that the misdemeanor larceny charge was, in fact, dismissed. Defendant was then tried before a jury and found guilty on the felony larceny charge.

[1] On appeal from that judgment, defendant raises two assignments of error. Because the judgment against defendant must be vacated on the grounds set forth in her first assignment of error, we do not reach defendant's second assignment of error. In her first assignment of error, defendant contends that her constitutional rights were violated when she was indicted and prosecuted for felony larceny pursuant to G.S. § 14-74 in superior court after she had previously been convicted in district court of misdemeanor larceny based on the same offense. We agree.

In *Blackledge v. Perry*, 417 U.S. 21, 40 L. Ed. 2d 628 (1974), the defendant had been convicted before a North Carolina district court on a misdemeanor charge of assault with a deadly weapon, and following this conviction the defendant had exercised his right to a trial *de novo* in the superior court. The State had then obtained an indictment on a felony charge of assault with a deadly weapon with intent to kill and inflict serious bodily injury, based on the same conduct which gave rise to the misdemeanor charge of assault with a deadly weapon. In determining whether the defendant's constitutional rights had been violated, the Court examined the potential for abuse in allowing a defendant to be prosecuted for a felony offense on appeal

from a conviction of a misdemeanor offense arising from the same incident. The Court stated:

> A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a de novo trial.

Id. at 27-28, 40 L. Ed. 2d at 634. The Court held that one convicted of a misdemeanor in North Carolina is entitled to pursue his right to trial *de novo* in superior court without the apprehension that the State will retaliate by substituting a felony charge for the original misdemeanor and thus subject him to a potentially greater period of incarceration. *Id.* at 28, 40 L. Ed. 2d at 634-35. The Court concluded that the State's actions amounted to a violation of the defendant's due process rights. *Id.* at 28-29, 40 L. Ed. 2d at 635. The Court also emphasized that this result did not depend upon a showing of actual retaliatory motive on the part of the prosecutor, since it was the mere potential for vindictiveness entering into the two-tiered appellate process which constituted a violation of the defendant's rights. *Id.* at 28, 40 L. Ed. 2d at 635.

This Court has had occasion to apply the holding in *Blackledge* to similar circumstances. In *State v. Phillips*, 38 N.C. App. 377, 247 S.E.2d 794 (1978), the defendant was tried and convicted in district court under two warrants for two misdemeanor offenses, both arising out of the same incident. The defendant appealed both convictions to superior court for trial *de novo*. Prior to the trial in superior court, the district attorney secured a grand jury indictment charging defendant with a felony offense arising from the same conduct for which defendant was convicted of the two misdemeanor charges. Defendant was tried and convicted on the felony charge in superior court. On appeal to this Court, the defendant challenged the felony indictment and his conviction thereunder, alleging a violation of his due process rights. Based on the rationale in *Blackledge*, we held that it was not constitutionally permissible for the State to respond to the

defendant's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*. *Id.* at 378-79, 247 S.E.2d at 795.

In the instant case, defendant was tried and convicted of misdemeanor larceny in district court based on the alleged theft from her employer of a copy machine. Defendant exercised her right to appeal for a trial *de novo* in superior court. Defendant was then indicted, prosecuted, and convicted of felony larceny pursuant to G.S. § 14-74 based on the same alleged occurrence underlying the misdemeanor conviction. We believe *Blackledge* clearly controls the instant case and, therefore, hold that defendant's felony larceny conviction in superior court was a violation of her due process rights and must be vacated.

The State attempts to distinguish the instant case from *Blackledge*, arguing that *Blackledge* involved a prosecutor introducing felony charges against the defendant for the first time following the defendant's appeal from misdemeanor convictions, whereas the case at bar involves an original warrant charging defendant with a felony. However, this Court has previously considered and rejected this argument. In *State v. Mayes*, 31 N.C. App. 694, 230 S.E.2d 563 (1976), a warrant issued for the arrest of the defendant charging him with violating N.C.G.S. § 14-33(b)(3) (1999). Although the warrant included the word "feloniously" in its description of the offense, G.S. § 14-33(b)(3) is a misdemeanor offense, and the judgment and commitment from the district court made evident that the defendant had been found guilty of a misdemeanor offense. The defendant exercised his right to appeal for a trial *de novo* in the superior court. The indictment in superior court charged the defendant with a felony offense based on the same underlying incident, and the defendant moved to quash this felony indictment. His motion was denied, and he was tried and convicted of the felony offense. On appeal, we found that *Blackledge* controlled the result, and we vacated the felony conviction. *Id.* at 696, 697, 230 S.E.2d at 565. In responding to the State's argument that the case should be distinguished from *Blackledge*, we stated:

> We are not convinced by the State's argument that this case can be distinguished from *Blackledge* because the defendant was originally charged with a felony. It is immaterial whether defendant was originally charged with a felony, since he was tried and convicted in district court of a misdemeanor. In fact, the original

> warrant charged a violation of G.S. 14-33(b)(3), a misdemeanor. The statute was referred to specifically, and the elements of that misdemeanor offense were listed on the warrant. The use of the word "feloniously" in the warrant was surplusage.

Id. at 697, 230 S.E.2d at 565. As in *Mayes*, it is immaterial whether or not defendant in the instant case was originally charged with felony larceny, since he was tried and convicted in district court of misdemeanor larceny.

[2] Having determined that the conviction in superior court for felony larceny must be vacated on due process grounds, we turn to a related issue not expressly raised by defendant. The assistant district attorney stated on the record during the trial in superior court that he would have the misdemeanor charge against defendant dismissed following the trial. However, it is not clear from the record whether the misdemeanor charge against defendant has, in fact, been dismissed. Because the charge may not have been dismissed, we believe it is important to address the issue of whether defendant may be prosecuted in superior court on the misdemeanor larceny charge subsequent to this opinion vacating the felony larceny conviction.

At the commencement of the trial in superior court, the assistant district attorney addressed the court and stated:

> This would be the case in 96 CRS 22655. The defendant, Mary Hollyfield Bissette, is charged with larceny by employee. To that charge, she has entered a plea of not guilty. And we are calling the case for trial. Your Honor, I believe the docket . . . would reflect Ms. Bissette also being charged with a larceny offense, misdemeanor larceny, in 95 CRS 40177. Your Honor, that is the same occurrence. What happened was, that it was reduced to a misdemeanor for trial in District Court, and then when the defendant was found not guilty [sic], she appealed it, and then the State went ahead and indicted on the original charge of larceny by employee. So that 95 CRS 40177 should be dismissed. I had filed a dismissal back when we indicted, but somehow it did not get dismissed. And I'll prepare another dismissal on that charge at the conclusion of the trial.

A prosecutor's pre-trial announcement of his election to seek conviction only for some of the offenses charged in the indictment "becomes binding on the State and tantamount to acquittal of charges contained in the indictment . . . when jeopardy has attached as the

result of a jury being impaneled and sworn to try the defendant." *State v. Hickey*, 317 N.C. 457, 466, 346 S.E.2d 646, 652-53 (1986). In the instant case, the representations by the assistant district attorney were made on the record prior to the impaneling of the jury, and jeopardy did attach as the result of the jury being impaneled and sworn to try defendant. Thus, these representations constituted a binding election not to pursue the misdemeanor larceny charge, and such election was tantamount to an acquittal of this charge.

Judgment vacated.

Judges GREENE and McCULLOUGH concur.

SOUTHPARK MALL LIMITED PARTNERSHIP, PLAINTIFF v. CLT FOOD MANAGEMENT, INC., AND FLAMER'S OF SOUTHPARK, INC., DEFENDANTS

No. COA00-246

(Filed 3 April 2001)

Landlord and Tenant— summary ejectment—commercial lease

The trial court did not err by its entry of summary ejectment in favor of plaintiff based on defendants' failure to pay rent within five days after notice as contained in section 24.1 of the commercial lease, because: (1) the plain and ordinary meaning of the lease language unambiguously required defendants to cure the default within five calendar days of plaintiff's 2 July 1999 notice letter; (2) defendants failed to cite any precedent from this state holding that the term "days" in a lease agreement is ambiguous as a matter of law or that the word should be construed beyond its ordinary usage to mean "business days;" (3) defendants failed to show any evidence that the parties to the lease intended the word "days" to mean "business days;" and (4) even if the lease was construed to mean "business days," the payment was still untimely.

Appeal by defendants from judgment entered 17 December 1999 by Judge Fritz Y. Mercer in Mecklenburg County District Court. Heard in the Court of Appeals 22 February 2001.

Robinson, Bradshaw & Hinson, P.A., by Douglas M. Jarrell, for plaintiff-appellee.

Parker, Poe, Adams & Bernstein, L.L.P., by John W. Francisco; John T. Daniel, for defendants-appellants.

TYSON, Judge.

Defendants, CLT Food Management, Inc. ("CLT") and Flamer's of Southpark, Inc. ("Flamer's") (collectively "defendants"), appeal the trial court's entry of judgment awarding plaintiff, Southpark Mall Limited Partnership ("Southpark"), possession of the premises at issue. We affirm the trial court's order for the reasons stated below.

Southpark owns Southpark Mall, a shopping complex in Charlotte, North Carolina. On 28 January 1992, Southpark's predecessor-in-interest executed a written lease agreement ("the lease") with Flamer's. The lease provided Flamer's with space in Southpark Mall's food court for operation of a fast-food restaurant. Flamer's subleased the premises to CLT with landlord's consent in September 1993. Flamer's remained liable under the lease in the event of default by CLT.

The lease required CLT to make monthly rental payments to Southpark on the first day of each month. Section 24.1 of the lease addressed CLT's ability to cure a default, and Southpark's remedy for CLT's failure to cure:

> If at any time Tenant shall fail to remedy any default in the payment of any amount due and payable under this lease for five (5) days after notice . . . then in any such event Landlord may, at Landlord's option and without limiting Landlord in the exercise of any other right or remedy Landlord may have on account of such default, and without any further demand or notice . . . terminate this lease by giving Tenant written notice of its election to do so, as of a specified date not less than thirty (30) days after the date of giving such notice.

(emphasis supplied). The lease further provided that any notice required by the lease "shall be deemed to have been given, made or communicated, as the case may be, on the date the same was deposited in the United States mail . . . ."

CLT defaulted under the lease by failing to pay the rent due 1 July 1999. On 2 July 1999, Southpark sent a letter by certified mail to CLT

giving notice of the default. The letter stated that if Southpark did not receive CLT's rent payment "within five (5) days after the date of this notice," it could terminate the lease "without giving tenant any further notice or opportunity to cure such default." CLT received the notice on 6 July 1999.

CLT did not cure its default on 7 July 1999, within five days of Southpark's 2 July 1999 notice letter. CLT did pay July rent to Southpark on 9 July 1999, seven days after notice of the default. On 12 July 1999, Southpark notified CLT and Flamer's that the lease terminated effective 31 August 1999, due to CLT's failure to timely cure its 1 July 1999 default. CLT refused to vacate the premises at Southpark Mall, and became a holdover tenant.

On 8 September 1999, Southpark filed a Complaint in Summary Ejectment against CLT and Flamer's, seeking immediate possession of the leased premises. The matter was heard at a non-jury trial on 6 December 1999. On 17 December 1999, the trial court entered judgment in favor of Southpark. The trial court found that Section 24.1 of the lease unambiguously required that CLT remedy any default "within five days after notice." The trial court found that CLT failed to timely pay its monthly rent on 1 July 1999, and that Southpark notified CLT of the default on 2 July 1999. The trial court concluded that CLT defaulted under the lease, and that it failed to cure its default by 7 July 1999, as required by the lease. The trial court entered an order of ejectment awarding Southpark immediate possession of the premises. CLT and Flamer's appeal.

CLT and Flamer's assign error to the trial court's entry of summary ejectment in favor of Southpark. Defendants concede that CLT defaulted under the lease by failing to pay rent on 1 July 1999. They also concede that Southpark gave notice of the default effective 2 July 1999, as provided by the lease. *See Main Street Shops, Inc. v. Esquire Collections, Ltd.*, 115 N.C. App. 510, 515, 445 S.E.2d 420, 422-23 (1994) (where lease itself provides that notice is effective upon deposit in the mail, "[b]y the very terms of the lease, therefore, notification is accomplished once an appropriate writing is addressed and deposited in the mail as specified; neither receipt nor proof of receipt are required.").

Defendants argue that the phrase "five (5) days after notice" contained in section 24.1 of the lease is ambiguous, and therefore must be construed in favor of CLT and Flamer's. Defendants assert that the

phrase should be construed as "business days," and that CLT's 9 July 1999 payment timely cured the default within five business days. We disagree, and affirm the trial court's entry of judgment and order of ejectment.

Where the language of a contract is clear, the contract must be interpreted as written. *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 120, 516 S.E.2d 879, 882, *disc. review denied*, 350 N.C. 832, 539 S.E.2d 288 (1999), *cert. denied*, 120 S. Ct. 1161, 145 L. Ed.2d 1072 (2000) (citation omitted). As with contracts, the rule of interpretation for leases is that a word in a lease "should be given its natural and ordinary meaning." *Charlotte Housing Authority v. Fleming*, 123 N.C. App. 511, 514, 473 S.E.2d 373, 375 (1996) (citation omitted).

In *Charlotte Housing Authority*, we noted that where a non-technical word is not defined in a lease, we must interpret the word consistent with its plain dictionary meaning:

> The word 'guest' is not defined in Ms. Fleming's lease; accordingly, it should be given its natural and ordinary meaning. *See, Martin v. Ray Lackey Enterprises*, 100 N.C. App. 349, 354, 396 S.E.2d 327, 331 (1990) (holding that the rules governing interpretation of a lease are the same as those governing interpretation of a contract); *E.L. Scott Roofing Co. v. State of N.C.*, 82 N.C. App. 216, 223, 346 S.E.2d 515, 520 (1986) (holding that when a term is not defined in a contract, the presumption is that the term is to be given its ordinary meaning and significance).

Id. We noted that Webster's Third New International Dictionary defines " 'guest' " as " 'a person to whom hospitality is extended, . . . one invited to participate in some activity at the expense of another.' " *Id.* (citation omitted). Thus, where the party at issue was not on the leased premises by way of invitation, he was not a "guest" as contemplated by the lease. *Id.* at 515, 473 S.E.2d at 376; *see also, IRT Property Co. v. Papagayo, Inc.*, 338 N.C. 293, 296, 449 S.E.2d 459, 461 (1993), (non-technical words in a lease must be interpreted consistent with ordinary meaning).

Black's Law Dictionary defines "day" as "[a]ny 24-hour period; the time it takes the earth to revolve once on its axis." Black's Law Dictionary 402 (7th ed. 1999). The American Heritage College Dictionary defines "day" as "[t]he period of light between one dawn and nightfall; the interval from sunrise to sunset." The American Heritage College Dictionary 354 (3d ed. 1997). The plain meaning of

"day" does not encompass anything more than the regular passage of twenty-four hours. Its ordinary meaning does not convey any information as to when the average business is open for operation.

Defendants failed to cite any precedent from this State holding that the term "days" in a lease agreement is ambiguous as a matter of law, or that the word should be construed beyond its ordinary usage to mean "business days." Defendants have also failed to show any evidence that the parties to the lease intended the word "days" to mean "business days." Hassan Aris, CLT's Business Manager, was defendants' sole witness at trial. Aris testified that he "understood that [he] had to deliver [the rent] check by July 7," and that delivery on that date "was required under the lease."

"When the language of a contract is plain and unambiguous, its construction is a matter of law for the court." *Marsh Realty Co. v. 2420 Roswell Ave.*, 90 N.C. App. 573, 576, 369 S.E.2d 113, 115 (1988) (citing *DeTorre v. Shell Oil Co.*, 84 N.C. App. 501, 353 S.E.2d 269 (1987)). We hold, consistent with the plain and ordinary meaning of the lease language, that section 24.1 of the lease unambiguously required defendants to cure CLT's default within five calendar days of Southpark's 2 July 1999 notice letter.

Assuming, *arguendo*, that the lease were construed to mean "business days," CLT's 9 July 1999 payment was untimely. Southpark Mall was open for business from Friday, 2 July 1999, through Wednesday, 7 July 1999, five "business" days following Southpark's notice of default.

Southpark's letter, mailed 2 July 1999, did not specifically state that CLT's July rent must be received by 7 July 1999. Defendants argue that Southpark's letter did not give CLT proper notice of when a cure was due. This argument is unpersuasive. Southpark's letter unambiguously stated that if Southpark did not receive CLT's payment "within (5) days after the date of this notice," Southpark could terminate the lease "without giving tenant any further notice or opportunity to cure such default." If CLT was confused by Southpark's notice letter, CLT could have consulted the lease provisions to determine the period for curing a default.

Defendants attempt to justify CLT's failure to cure the default prior to 9 July 1999 by stating that, "[w]hen a representative of CLT received the Notice Letter on Tuesday, July 6, 1999, he believed that he had five 'business days' from the date of the Notice Letter (or until

July 9, 1999) to cure the default." CLT further argues as excuse that it could not prepare Southpark's rent check until 9 July 1999 "because its bookkeeper was out of the office until that date." Southpark is not responsible for CLT's failure to inform its representatives about the terms of its own lease, nor for CLT's failure to maintain bookkeeping services to timely pay its rentals.

The trial court's entry of judgment and order of ejectment in favor of Southpark is hereby affirmed.

Affirmed.

Judges MARTIN and TIMMONS-GOODSON concur.

JULIA McNALLY v. ALLSTATE INSURANCE COMPANY

No. COA00-339

(Filed 3 April 2001)

Insurance— UIM coverage—signed rejection form ineffective

The trial court did not err in a declaratory judgment action by determining that a signed rejection form of UIM coverage was ineffective at the time of plaintiff insured's accident, because: (1) UIM coverage was not actually available at the time plaintiff signed the rejection form since plaintiff was not purchasing a policy written at limits that exceeded the minimum limits of $25,000/$50,000, N.C.G.S. § 20-279.21(b)(4); and (2) under a contracts theory, plaintiff's right to reject or waive UIM coverage was not in existence at the time of the "rejection."

Appeal by defendant from judgment entered 21 January 2000 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 January 2001.

DeVore, Acton and Stafford, P.A. by Fred W. DeVore, III for plaintiff-appellee.

Dean & Gibson by Michael G. Gibson for defendant-appellant.

THOMAS, Judge.

Allstate Insurance Company (defendant) appeals from entry of a declaratory judgment which determined a signed rejection form of underinsured motorist (UIM) coverage to be ineffective.

On 21 January 1993, Julia McNally (plaintiff) and her husband, Francis, applied for an automobile insurance policy from defendant. The policy was written with liability insurance coverage of $25,000 per person/$50,000 per accident, which at that time was the statutory minimum. Plaintiff's husband, on both his and his wife's behalf, signed a document which stated in part "I choose to reject Combined Uninsurance/Underinsurance Motorists Coverage and Select Uninsured Motorist Coverage at limits of: Bodily Injury 25/50,000, Property Damage 15,000." It is undisputed that his signature, as an insured under this particular policy, would be valid to bind plaintiff. The policy took effect in April and was renewed with the same coverage limits in October 1993, April 1994 and October 1994. In April of 1995, however, plaintiff and her husband chose to increase the liability coverage to $100,000/$300,000. No new UIM rejection form was signed.

Plaintiff still had the $100,000/$300,000 policy in 1998 when she was seriously injured in a motor vehicle accident. The operator and owner of the vehicle at fault maintained only the minimum required bodily injury coverage of $25,000/$50,000. The "reasonable value" of plaintiff's injuries, by stipulation of the parties in the instant case, clearly exceeded the amount of the other driver's coverage. Plaintiff thus filed a claim for UIM coverage under her own policy. Defendant denied coverage, however, based on the original rejection form signed in 1993.

Plaintiff petitioned for a declaratory judgment to determine whether she had UIM coverage. The trial court ruled there was coverage and from this judgment, defendant appeals.

By the only assignment of error, defendant argues the trial court erred in concluding that plaintiff's purported rejection of UIM coverage was not effective at the time of plaintiff's accident. We disagree.

This is a case of first impression in North Carolina.

Rejection of Uninsured and Underinsured Motorist coverage is governed by N.C. Gen. Stat. § 20-279.21 (b)(4) which states that an automobile insurance policy "[s]hall . . . provide underinsured

motorist coverage, to be used *only with a policy that is written at limits that exceed those prescribed by subdivision (2)* [i.e. $25,000/$50,000] of this section[.]" (Emphasis added). The rejection form signed by plaintiff's husband showed UIM coverage was available to them. However, because plaintiff was not purchasing a policy written at limits that exceeded the minimum limits of $25,000/$50,000, UIM coverage was not actually available. Where the language of a statute is unambiguous, the language of the statute controls. *Britt v. N.C. Sheriffs' Training and Educ. Stnds. Comm'n*, 348 N.C. 573, 501 S.E.2d 75 (1998). Section 20-279.21(b)(4) clearly states UIM coverage is to be provided to policies with limits exceeding the minimum limits unless rejected. Plaintiff was not eligible for UIM coverage at the time the rejection was signed, and the clear textual interpretation of the statute is that the policy at issue was simply not subject to the provisions of N.C. Gen. Stat. § 20-279.21(b)(4).

This presents an issue of whether the rejection form was ambiguous in that it was printed stating "[UIM] . . . coverage options are available to me." Indeed, UIM coverage was available *if* plaintiff opted for higher coverage limits. However, since she did not, UIM coverage was *not* available to her. We note that the rejection form is not objectionable on its face. Promulgated by the North Carolina Rate Bureau and approved by the North Carolina Commissioner of Insurance, it was simply inapplicable to anyone purchasing a minimum limits policy.

In cases of ambiguity, this Court has traditionally and consistently held that there is a presumption of coverage and it is provided wherever possible by liberal construction of the insurance policy. *Allstate Ins. Co. v. Runyon Chatterton*, 135 N.C. App. 92, 518 S.E.2d 814 (1999). In such case, the policy must be construed in favor of coverage and against the insurer. *North Carolina Farm Bureau Mutual Ins. Co. v. Mizell*, 138 N.C. App. 530, 530 S.E.2d 93 (2000); *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970). We further note a rejection form signed when the UIM coverage was available to the policyholder can extend beyond subsequent renewals, even when there are modifications. *See* N.C. Gen. Stat. § 20-279.21(b)(4).

Since the purported rejection of underinsured coverage in this case was not valid, we view this matter more properly as a failure to reject underinsured motorist coverage. *See* N.C. Gen. Stat. § 20-279.21(b)(4). At the time of plaintiff's injuries, her highest bodily injury limit was $100,000 per person and $300,000 per accident.

Accordingly, the plaintiff's UIM coverage was in the same amount. *See* N.C. Gen. Stat. § 20-279.21(b)(4).

This conclusion, based on statutory law, is also viable under contract theory. A statute in effect at the time the contract is signed becomes part of the contract. *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985). An insurance policy is a contract. *Gaston County Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 524 S.E.2d 558 (2000); *Deason v. J. King Harrison Co., Inc.*, 127 N.C. App. 514, 491 S.E.2d 666 (1997). A party may waive a contract right by an intentional and voluntary relinquishment. *Nye v. Lipton*, 50 N.C. App. 224, 273 S.E.2d 313 (1980). However, a person cannot waive a right that does not exist. *Fetner v. Rocky Mount Marble & Granite Works*, 251 N.C. 296, 302, 111 S.E.2d 324, 328 (1959). Nor may a party "waive a right before he or she is in a position to assert it." 28 Am. Jur. 2d *Estoppel and Waiver* § 201 (2000). There was simply no consideration in the instant case. Plaintiff's right to reject or waive UIM coverage was not in existence at the time of the "rejection."

> [W]aiver is the intentional relinquishment of a known right, either express or to be implied[.] . . . "It is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right."

Danville Lumber & Manuf. Co. v. Gallivan Bldg., 177 N.C. 103, 113, 97 S.E. 718, 720 (1919) (quoting Bishop on Contracts, § 792). Plaintiff was not in possession of a right to UIM coverage. Thus, the lack of the existence of the right renders the waiver ineffective.

Additionally, a meaningful discussion of UIM coverage is unlikely when the applicant is not in a position to purchase and the agent is not in a position to sell the coverage. This is consistent with the plain meaning of the statute and the legislative intent to provide UIM coverage to those who purchase policies with liability coverage higher than the mandatory minimum, absent appropriate rejection.

For the reasons stated herein, we affirm the trial court.

AFFIRMED.

Judges MARTIN and TIMMONS-GOODSON concur.

CHATEAU MERISIER, INC., PLAINTIFF v. LE MUEBLE ARTISANAL GEKA, S.A., DOMINIQUE MERCIER, AND GASTON MAULIN, DEFENDANTS

No. COA00-360

(Filed 3 April 2001)

1. **Process and Service— failure to serve within thirty days—new summons issued—jurisdiction proper**

The trial court properly denied defendant's motion to dismiss for lack of jurisdiction based on an alleged improper service of process under N.C.G.S. § 1A-1, Rule 4(c) and (d), because: (1) the original summons was issued on 12 February 1997, was not served within thirty days, and plaintiff did not seek an endorsement or an alias or pluries summons within 90 days; and (2) plaintiff's election to issue a new summons whereby plaintiff's action was deemed to have begun on 22 July 1997 meant the summons was properly issued on that date.

2. **Discovery— sanctions—failure to serve answers or objections to interrogatories—failure to serve written responses to request for production**

The trial court did not abuse its discretion by awarding sanctions under N.C.G.S. § 1A-1, Rule 37(d) based on defendant's failure to serve answers or objections to interrogatories or to serve written responses to a request for production under N.C.G.S. § 1A-1, Rule 34 even though defendant alleges the trial court failed to consider less severe sanctions, because it is apparent the trial court considered all available sanctions before entering its order when the trial court did not impose the more severe sanctions requested by plaintiff.

Appeal by defendant Le Mueble Artisanal GEKA, S.A. (GEKA) from judgment entered 5 October 1999 by Judge James M. Webb and filed 8 October 1999 in Guilford County Superior Court. Heard in the Court of Appeals 26 January 2001.

Richard M. Greene for plaintiff-appellee.

Stephen E. Lawing for defendant-appellant.

WALKER, Judge.

Plaintiff is engaged in importing and selling furniture to wholesalers and showrooms. Defendant GEKA is a French company which manufactures furniture in France and distributes its product in the United States. Plaintiff alleges GEKA terminated its distributorship agreement with plaintiff in order to avoid paying commissions on furniture sales for which plaintiff had solicited customers. On 12 February 1997, plaintiff filed a complaint which included claims for breach of contract, quantum meruit, unfair and deceptive trade practices and an accounting. Plaintiff has filed a voluntary dismissal as to defendants Mercier and Maulin.

During the course of discovery, plaintiff alleges that GEKA repeatedly failed to disclose information and documents requested in interrogatories and requests for the production of documents. Plaintiff filed a motion for sanctions on 10 September 1999. The findings of the trial court can be summarized as follows: Plaintiff filed its first set of interrogatories and first request for production of documents on 1 October 1997. GEKA was requested to provide information and documents relating to its sales to Masco Corporation, Beacon Hill, or any of their associates or subsidiaries. GEKA answered the interrogatories and provided the documents requested after a protective order was entered. However, no information regarding sales to Intro-Europe, a subsidiary of Masco Corporation and affiliate of Beacon Hill, was provided. Plaintiff notified GEKA that the documents provided were incomplete and gave GEKA two weeks to produce additional documents. On 8 October 1998, GEKA supplemented its answers; however, no information was provided concerning Intro-Europe.

Further, in April 1999, two officials of Beacon Hill admitted in depositions that GEKA had sold furniture to Intro-Europe. Plaintiff then filed its second set of interrogatories and request for production of documents requesting specific information in regard to GEKA's sale of furniture to Intro-Europe. GEKA answered plaintiff's interrogatories on 25 August 1999 but failed to respond to plaintiff's request for production of documents. As a result of GEKA's failure to comply with discovery, the plaintiff's third motion for sanctions was granted in part and denied in part. The trial court ordered that GEKA's answer be stricken, that it pay attorney's fees in the amount of $1,970.00 and that a default judgment be entered in favor of plaintiff as to the issues of breach of contract and quantum meruit. However, the trial court denied plaintiff's motion for sanctions "as to all damage issues."

[1] In its first assignment of error, GEKA contends the trial court lacked jurisdiction because it was not properly served with a summons. The original summons was issued on 12 February 1997, when the complaint was filed; however, the summons was never served and, on 22 July 1997, a second summons was issued and served on GEKA's registered agent. GEKA moved to dismiss for lack of jurisdiction which was denied by the trial court on 9 August 1999. GEKA asserts that plaintiff's failure to comply with the requirements of Rule 4(d) of the N.C. Rules of Civil Procedure rendered the summons invalid and thus did not confer jurisdiction over GEKA.

Service of a summons must be made "within 30 days after the date of the issuance of the summons." N.C.R. Civ. P. 4(c) (1999). If service is not completed within that time it becomes "dormant." Thereafter, the action may be revived or "continued in existence" by either securing an endorsement of the original summons or issuing an alias or pluries summons within ninety days. N.C.R. Civ. P. 4(d) (1999). If the summons is not served within thirty days nor revived within ninety days, the action is discontinued. N.C.R. Civ. P. 4(e) (1999); *Shiloh Methodist Church v. Keever Heating & Cooling*, 127 N.C. App. 619, 621, 492 S.E.2d 380, 382 (1997); *County of Wayne v. Whitley*, 72 N.C. App. 155, 323 S.E.2d 458 (1984). If an action is discontinued, a new summons may be issued; however, the action is deemed to have commenced on this later date. *Shiloh* at 622, 492 S.E.2d at 382. Nevertheless, GEKA contends that under this Court's ruling in *Integon General Ins. Co v. Martin*, 127 N.C. App. 440, 490 S.E.2d 242 (1997), the plaintiff was required to seek an extension of the original summons. However, *Integon* is distinguishable. There, second, third and fourth summonses were issued, each within ninety days of the preceding summons. However, none of these summonses was indicated as alias or pluries summonses and each failed to reference the original summons. This Court held that these omissions broke the "chain of custody" required to continue the original action and that the service of the fourth summons had the "double effect of initiating a new action and discontinuing the original one." *Integon* at 441, 490 S.E.2d at 244.

In the case at bar, the original summons was issued on 12 February 1997 and was not served within thirty days. Thereafter, plaintiff did not seek an endorsement nor an alias or pluries summons within ninety days. Rather, plaintiff elected to issue a new summons whereby plaintiff's action was deemed to have begun on 22 July 1997, the date it was issued. The trial court properly denied GEKA's motion to dismiss for lack of jurisdiction.

[2] GEKA next contends the trial court erred in that it awarded sanctions without considering less severe sanctions. When a party fails to serve answers or objections to interrogatories or to serve written responses to a request for production under Rule 34, the trial court is authorized to "make such orders in regard to the failure as are just" which include imposition of sanctions. N.C.R. Civ. P. 37(d) (1999). Permissible sanctions under Rule 37 include striking a party's pleadings, rendering a default judgment and requiring a party to pay reasonable attorney's fees caused by its failure. "Sanctions under Rule 37 are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that discretion." *Hursey v. Homes By Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995). The trial court may be reversed for 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. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

GEKA does not dispute the authority of the trial court to impose sanctions in accordance with Rule 37. However, it argues that the trial court must consider less severe sanctions before striking a party's pleadings. *See Cheek v. Poole*, 121 N.C. App. 370, 465 S.E.2d 561 (1996); *Goss v. Battle*, 111 N.C. App. 173, 432 S.E.2d 156 (1993). GEKA asserts that there is nothing in the record or in the order to indicate the trial court considered less severe sanctions; thus, the order should be vacated.

In its motion for sanctions, plaintiff requested that the trial court strike and dismiss GEKA's answer, deem the factual allegations in the complaint to be established, render a default judgment against GEKA, and require GEKA to pay expenses and attorney's fees. After a hearing, the trial court elected not to impose the more severe sanctions requested by plaintiff, but instead plaintiff's motion was "allowed in part and denied in part." The trial court ordered that GEKA's answer be stricken, that plaintiff be granted a default judgment on its first and second claims, and that GEKA pay expenses and attorney's fees. The trial court explicitly denied plaintiff's motion for sanctions as to "all damage issues." Here, the transcript of the hearing reveals that plaintiff requested more severe sanctions while GEKA argued that it should not be sanctioned. The trial court allowed plaintiff's request in part. Thus, it is apparent that the trial court considered all available sanctions before entering its order. *See Hursey v. Homes By Design*, 121 N.C. App. 175, 464 S.E.2d 504 (1995). We conclude the trial court did not abuse its discretion in imposing sanctions in light of GEKA's actions in this case.

Affirmed.

Judges HUNTER and CAMPBELL concur.

JOSEPH PATRICK SUMMEY, PLAINTIFF v. RONALD BARKER, FORSYTH COUNTY SHERIFF; AND HARTFORD INSURANCE COMPANY, SURETY; MICHAEL SCHWEITZER, CHIEF JAILER OF FORSYTH COUNTY IN THEIR OFFICIAL CAPACITIES; LINDA SIDES; JOE MADDUX, CORRECTIONAL MEDICAL SERVICES, INC., D/B/A CORRECTIONAL MEDICAL SYSTEMS A/K/A CORRECTIONAL MEDICAL SERVICES, DEFENDANTS

No. COA00-106

(Filed 3 April 2001)

1. **Appeal and Error— appealability—public official's immunity**

Orders denying dispositive motions based on public official's immunity affect a substantial right and are immediately appealable.

2. **Immunity— governmental—action against sheriff and jailer—surety bond**

The trial court correctly denied defendants' Rule 12(b)(6) motion to dismiss claims for negligence and violations of civil rights where a plaintiff who suffered from hemophilia alleged that defendants, the sheriff and the chief jailer, failed to respond properly to a nosebleed while he was incarcerated, resulting in his hospitalization. According to the complaint, defendants were public officers acting in their official capacities and a bond had been purchased, which removed the protection of governmental immunity.

Appeal by defendants Barker, Schweitzer, and Hartford Insurance Company from order entered 14 December 1999 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 15 February 2001.

Smith & Combs, by John R. Combs and Steven D. Smith, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and Stacey M. Stone, for defendant-appellants.

MARTIN, Judge.

Plaintiff filed this action alleging claims against defendants arising from events allegedly occurring while plaintiff was incarcerated in the Forsyth County Jail. Plaintiff, who suffers from hemophilia, alleged that defendants failed to respond properly to plaintiff's nose bleed, which ultimately caused him to be hospitalized for more than ten days at Baptist Hospital in Winston-Salem. Plaintiff alleged claims for relief for negligence, violations of plaintiff's civil rights under Article I of the North Carolina Constitution, and against defendants Barker and Schweitzer for breach of their statutory duties and malfeasance in office. Plaintiff alleged that defendant Hartford was the surety on the sheriff's official bond.

Defendants Barker, Schweitzer, and Hartford, as sheriff's surety, moved to dismiss plaintiff's first and second claims for relief, alleging negligence and a violation of Article I of the North Carolina Constitution, contending that public official's immunity barred plaintiff's negligence claim, and that monetary claims could not be brought in state court for violations of the state constitution. The trial court granted defendants' motion to dismiss plaintiff's second claim for relief under Article I of the North Carolina Constitution but denied defendants' motion to dismiss the negligence claim against defendants Barker, Schweitzer, and Hartford. Defendants appeal the trial court's denial of their motion to dismiss the first claim for relief.

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[1] Defendants have appealed from an interlocutory order. 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). Orders denying dispositive motions based on public official's immunity affect a substantial right and are immediately appealable. *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). We review the appeal of interlocutory orders in these cases because " 'the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.' " *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996) (citations omitted). Thus, defendants' appeal is properly before us.

[2] In reviewing the denial of a motion to dismiss 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). The issue before this Court is whether public official's immunity bars plaintiff's claims alleging negligence against defendants Barker and Schweitzer. We hold that, to the extent of the bond required by G.S. § 58-76-5, public official's immunity does not bar plaintiff's claim, and we therefore affirm the trial court's denial of defendants' motion to dismiss.

In general, "the doctrine of governmental, or sovereign, immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity." *Messick v. Catawba County, N.C.*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). A public official sued in his official capacity "operates against the public entity itself, as the public entity is ultimately financially responsible for the compensable conduct of its officers." *Epps*, 112 N.C. App. at 203, 468 S.E.2d at 850.

Governmental or sovereign immunity "prevents the State or its agencies from being sued without its consent." *Corum v. University of North Carolina*, 97 N.C. App. 527, 533, 389 S.E.2d 596, 599 (1990), *affirmed in part, reversed in part on other grounds*, 330 N.C. 761, 413 S.E.2d 276 (1992). The doctrine of governmental immunity "is inapplicable, however, where the state has consented to suit or has waived its immunity through the purchase of liability insurance." *Messick*, 110 N.C. App. at 714, 468 S.E.2d at 493-94. Defendants contend public official's immunity bars plaintiff's claims against defendants in their official capacities. Pursuant to statute, however, public officers may be sued in their official capacities:

> Every person injured by the neglect, misconduct, or misbehavior in office of any clerk of the superior court, register, surveyor, sheriff, coroner, county treasurer, or other officer, may institute a suit or suits against said officer or any of them and

> their sureties upon their respective bonds for the due performance of their duties in office in the name of the State . . . .

N.C. Gen. Stat. § 58-76-5. "By expressly providing for this cause of action, the General Assembly has abrogated common law immunity where a public official causes injury through 'neglect, misconduct, or misbehavior' in the performance of his official duties or under color of his office." *Slade v. Vernon*, 110 N.C. App. 422, 427-28, 429 S.E.2d 744, 747 (1993). The statutory requirement of a bond removes the sheriff "from the protective embrace of governmental immunity, but only where the surety is joined as a party to the action." *Messick*, 110 N.C. App. at 715, 431 S.E.2d at 494. Our courts have recognized that both sheriffs and deputy sheriffs are public officers. *Id.* at 718, 431 S.E.2d at 496.

In the present case, plaintiff brings suit against defendants Barker and Schweitzer: "Ronald Barker, Forsyth County Sheriff; and Hartford Insurance Company, Surety; Michael Schweitzer, chief jailer of Forsyth County, in their official capacities." The complaint identifies defendant Barker as "Sheriff" of "Forsyth County," "a duly elected official" who "exercises authority over local confinement facilities, including . . . the supervision of personnel of the Forsyth County Jail"; and identifies defendant Schweitzer as Chief Jailer with supervisory authority over personnel at the Forsyth County Jail. Moreover, the complaint alleges:

> 31. The acts or admissions and or negligence of the Forsyth County Jail personnel who failed to render appropriate medical care to the Plaintiff are imputed to Michael Schweitzer, Chief Jailer Forsyth County, Ronald Barker Sheriff of Forsyth County, operating in their official capacity; and Forsyth County.

According to the complaint, therefore, defendants Barker and Schweitzer were public officers acting in their official capacities. Plaintiff also alleged that defendant Barker had furnished a bond pursuant to G.S. § 162-8 and G.S. § 58-76-5, and had purchased the bond from defendant Hartford, and joined Hartford as surety. Defendants, accordingly, are not immune from suit because of the existence of the bond which operates to remove the protection of governmental immunity. The denial of defendants' motion to dismiss plaintiff's first claim for relief is affirmed.

Affirmed.

Judges TIMMONS-GOODSON and TYSON concur.

MOORE COUNTY, BY AND THROUGH ITS CHILD ENFORCEMENT AGENCY, MOORE COUNTY DSS ON BEHALF OF NATHAN EVANS v. EARL BROWN

No. COA00-531

(Filed 3 April 2001)

Public Assistance— child support—action to recover—terminated parental rights

The trial court did not err by denying DSS's motion for child support arrearages where the child was born to a mother married to a man other than defendant; the child was placed in foster care with the mother's consent; the mother consented to adoption and her husband signed a denial of paternity; defendant contacted DSS and stated that he believed he was the child's father; genetic testing showed a 99.5% probability that defendant was the father; his attempts to enter the child's life were resisted by DSS, which filed a petition to terminate his parental rights; DSS filed a complaint for paternity and support against defendant on the same day his parental rights were terminated; the court adjudicated defendant to be the father and entered an ongoing support order; defendant's motion to terminate support due to the termination of his parental rights was granted; and DSS's motion to establish arrearages for public assistance previously paid was denied. The trial court was vested with considerable discretion to consider both law and equity in determining whether to grant DSS's motion and was not required to grant the motion simply because it was made within the statute of limitations. Moreover, the absence of the elements of equitable estoppel is not grounds for reversing the order.

Appeal by plaintiff from order entered 4 January 2000 by Judge Lillian Jordan in Moore County District Court. Heard in the Court of Appeals 15 March 2001.

Catherine B. Cowling, for plaintiff-appellant.

Rowland & Yauger, by Michael C. Rowland, Jr., for defendant-appellee.

TYSON, Judge.

Plaintiff, Moore County, by and through its Child Enforcement Agency, Moore County Department of Social Services ("DSS"),

appeals an order denying the collection of public assistance arrearages from defendant, Earl Brown ("Brown"). We affirm the trial court's order.

Nathan Daniel Evans ("Nathan"), the minor child at issue, was born to Denise Ann Epps ("Epps") on 27 June 1985. Epps was married to Danny Steve Evans ("Evans") at the time of Nathan's birth. Nathan was placed in DSS custody in September 1988. On 5 April 1989, Nathan was placed in foster care with Epps' consent. Nathan has remained in foster care at all times pertinent to this matter. Epps consented to Nathan's adoption on 17 October 1989. Evans signed a Denial of Paternity of Nathan on 5 May 1992.

In June 1998, Brown contacted DSS and stated that he believed he was Nathan's biological father. On 22 September 1998, Brown submitted to genetic testing. Test results showed a 99.51% probability that Brown was Nathan's father. Brown's attempts to enter Nathan's life were resisted by DSS. DSS filed a petition to terminate Brown's parental rights. On 4 October 1999, the trial court terminated Brown's parental rights.

On the same day, DSS filed a Complaint for Paternity and Support against Brown. The matter was heard on 16 November 1999. Brown was adjudicated to be Nathan's father, and the trial court entered an order of ongoing support. Brown filed a Motion to Terminate Support on 8 December 1999. On 21 December 1999, the trial court granted the motion due to termination of Brown's parental rights.

Following the hearing on 21 December 1999, DSS made an oral motion to establish arrearages against Brown for public assistance that DSS previously paid for Nathan. The trial court denied the motion on 4 January 2000. In its order, the trial court incorporated prior findings of fact and conclusions of law from the 4 October 1999 order terminating Brown's parental rights. The trial court specifically incorporated into the order its previous finding of no evidence, "that DSS or Child Support diligently pursued [Brown] to recover the reasonable costs of the care of [Nathan]." The trial court found that DSS had presented no further evidence on the issue of support; and specifically, that DSS "presented no evidence of the amount of arrearage."

The trial court concluded that "there are equitable arguments that exist such that [DSS] should not be allowed to establish arrear-

ages in this case . . . ." The trial court specifically referenced its conclusion of law from the termination order that the court "does not look favorably upon [DSS] attempting to recover such costs, more than eleven years after the child was placed in foster care." DSS appeals.

DSS assigns error to the trial court's denial of its motion to establish arrearages. In support, DSS argues: (1) that DSS should be allowed to collect arrearages from Brown because DSS complied with the applicable statute of limitations; and (2) that Brown should be required to pay arrearages "due to the fact that no equitable estoppel argument applies in this case." We affirm the trial court's denial of the motion.

The summary of the hearing reveals that Brown objected to DSS' motion to establish arrearages on grounds that DSS' Complaint for Paternity and Support was filed on 4 October 1999, the same day that Brown's parental rights were terminated. Brown argued that DSS only became aware of Brown's claim to paternity after Brown voluntarily came forward, one and one-half years prior to termination of his parental rights. Brown opposed the termination of his parental rights. Evidence was also presented that establishes DSS had never pursued Epps, Nathan's mother, for reimbursement of public assistance for Nathan, despite DSS' custody of Nathan since 1988. DSS had also never pursued Brown prior to its December 1999 motion.

DSS argues that the trial court erred in denying the motion to establish arrearages where the applicable statute provides that such actions may be commenced up until "five years subsequent to the receipt of the last grant of public assistance." N.C. Gen. Stat. § 110-135. DSS argues that Nathan received public assistance in 1999, and thus, the motion was timely.

Brown does not dispute that DSS has legal authority to pursue arrearages under the statute of limitations set forth in G.S. § 110-135. Brown argues that the trial court was vested with discretion to consider the equity of granting DSS' motion to pursue Brown for arrearages, and that the trial court's denial of the motion due to equitable considerations should be afforded deference. We agree.

Trial court orders regarding the obligation to pay child support "are accorded substantial deference by appellate courts and our review is limited to a 'determination of whether there was a

clear abuse of discretion.' " *Biggs v. Greer*, 136 N.C. App. 294, 296, 524 S.E.2d 577, 581 (2000) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). " 'Where trial is by judge and not by jury, the trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.' " *Security Credit Leasing, Inc. v. D.J.'s of Salisbury, Inc.*, 140 N.C. App. 521, 528, 537 S.E.2d 227, 232 (2000) (quoting *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612-13 (1993)).

The trial court was not required to grant DSS' motion simply because DSS moved to establish arrearages within the applicable statute of limitations. We also do not agree with DSS' assertion that an absence of the elements of equitable estoppel is grounds for reversing the trial court's order, assuming *arguendo*, that Brown failed to establish such a claim. The trial court was vested with considerable discretion to consider both law and equity in determining whether to grant DSS' motion. *See, e.g., Maney v. Maney*, 126 N.C. App. 429, 431, 485 S.E.2d 351, 352 (1997) (in ruling on issues of child support, "trial court may consider the conduct of the parties, the equities of the given case, and any other relevant facts.").

The trial court's findings were supported by competent evidence in the record, and are therefore conclusive. The trial court's findings support its conclusion of law that equitable factors prohibited DSS from pursuing Brown for arrearages. DSS failed to show an abuse of the trial court's considerable discretion in denying the motion. Accordingly, we affirm the trial court's order.

Affirmed.

Judges MARTIN and TIMMONS-GOODSON concur.

INVESTORS TITLE INSURANCE COMPANY, PLAINTIFF v. HELEN BEAL MONTAGUE F/K/A HELEN R. BEAL, DEFENDANT

No. COA00-120

(Filed 3 April 2001)

Mortgages— assumption—deed of trust—condition of collecting on note

A case involving assumption of a mortgage arising out of the purchase of a condominium is remanded for a determination of whether plaintiff is willing to assign the deed to defendant in order to collect from defendant on the note, because an assignee of a note and deed of trust who seeks to collect from the mortgagor is required to assign the deed of trust to the mortgagor as a condition of collecting on the note.

Appeal by plaintiff from judgment filed 17 November 1999 by Judge James L. Baker, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 February 2001.

Horack, Talley, Pharr & Lowndes, P.A., by Robert B. McNeill, for plaintiff-appellant.

Kennedy Covington Lobdell & Hickman, by Roy H. Michaux, Jr., for defendant-appellee.

GREENE, Judge.

Investors Title Insurance Company (Plaintiff) appeals a 17 November 1999 order granting summary judgment in favor of Helen Beal Montague f/k/a Helen R. Beal (Defendant) and denying Plaintiff's motion for summary judgment.

On 27 May 1982, Defendant executed a Deed of Trust (the Deed) to secure a Deed of Trust Note (the Note) on a loan made by the City of Charlotte to Defendant in the amount of $65,200.00. Defendant used the loan to purchase "Unit #8" in the Churchill Condominium (the Condo). On 12 June 1984, Defendant sold the Condo to Edna V. Johnson (Johnson). As part of the purchase price for the Condo, Johnson entered into an assumption agreement with Banker's Mortgage Corporation to assume the balance owing on Defendant's loan (the assumption agreement). The assumption agreement provided Defendant would "not be released of liability unless stated oth-

erwise." From the record, it appears the assumption agreement did not provide for the release of Defendant from liability.

Johnson died intestate in Mecklenburg County on 28 November 1993. Donald S. Gillespie, Jr. (Gillespie) was appointed as commissioner for the sale of Johnson's real property. On 7 March 1995, Gillespie sold the Condo to Norman A. Holmes (Holmes) for $64,000.00 and the Mecklenburg County Superior Court fixed 17 March 1995 as the last date for an upset bid. No upset bids were filed and on 21 March 1995, the superior court confirmed the sale of the Condo.

In 1996, the City of Charlotte instituted foreclosure proceedings on the Condo. Plaintiff provided title insurance to Holmes on the Condo, and pursuant to Plaintiff's insurance policy with Holmes, Plaintiff was required to pay off the Note.[1] Foreclosure proceedings were never completed and Plaintiff was assigned the Deed and the Note in August 1997. On 30 October 1997, Plaintiff informed Defendant by letter that it had "received an [a]ssignment of the Note and [the] Deed" and demanded Defendant pay "$64,907.26 excluding interest from June 11, 1996." On 9 September 1998, Plaintiff again contacted Defendant by letter and requested Defendant pay the balance of the Note. Plaintiff further informed Defendant that if the balance of the Note was not paid in full within five days, Plaintiff had the option of recovering attorney's fees in the event Plaintiff brought suit to enforce the Note.

Defendant made no payments on the Note and Plaintiff instituted suit against Defendant on 30 September 1998. Defendant's answer alleged: Defendant never received demand for payment on the Note, other than a demand from Plaintiff; Defendant was not a party to the foreclosure proceedings and did not have actual notice to such proceedings; and Plaintiff has not offered to assign the Deed and the Note to Defendant upon payment. Defendant moved for summary judgment on 14 October 1999 and Plaintiff moved for summary judgment on 5 November 1999. On 16 November 1999, at a hearing on the parties' motions for summary judgment, the trial court denied Plaintiff's motion for summary judgment and allowed Defendant's motion for summary judgment.

The dispositive issue is whether an assignee of a note and deed of trust, who seeks to collect from the mortgagor, is required to assign

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1. Plaintiff insured Holmes against any outstanding debts or liens on the Condo.

the deed of trust to the mortgagor as a condition of collecting on the note.

Defendant argues Plaintiff must assign Defendant the Deed in order to collect payment on the Note. Plaintiff, however, contends that it is under no obligation to assign the Deed to Defendant upon payment of the Note. We agree with Defendant.

A person who assumes a mortgage becomes the principal debtor and the mortgagor becomes the surety on the debt, *Wachovia Realty Investments v. Housing, Inc.*, 292 N.C. 93, 105, 232 S.E.2d 667, 674 (1977), and, thus, the mortgagor "remains liable to the mortgagee as the debtor to whom the credit was directly extended," *Brown v. Turner*, 202 N.C. 227, 229, 162 S.E. 608, 609 (1932). In the event of a default, the mortgagee, or the holder of the promissory note, has the right to either bring an action *in personam*, choosing to go after the debtors, or may bring an action *in rem*, choosing to foreclose on the property. *Id.* at 230, 162 S.E.2d at 609. If the mortgagee brings an action against the mortgagor and the mortgagor pays the debt, the mortgagor is subrogated to the rights of the mortgagee against the person who assumed the mortgage. *Hatley v. Johnston*, 265 N.C. 73, 83, 143 S.E.2d 260, 267 (1965). The mortgagor has several options of seeking reimbursement. He may bring an action to foreclose on the property, sue to recover the land, or bring an action against the person who assumed the mortgage. *Id.*

In this case, there is no dispute Defendant remains liable on the Note. If Defendant is called on to pay the Note, however, she is entitled to all the rights and privileges contained in the Deed, including the right to foreclose on the property named in the Deed. Thus, Defendant's obligation to pay pursuant to the Note is conditioned upon her obtaining the right to foreclose on the property named in the Deed. If Plaintiff is not willing to assign its rights in the Deed to Defendant, summary judgment for Defendant is proper. If Plaintiff is willing to assign its rights in the Deed to Defendant, it is entitled to collect from Defendant on the Note and summary judgment would not be proper. Although Plaintiff argues in its brief to this Court that it has no obligation to assign the Deed to Defendant, as a condition of collecting on the Note, Plaintiff nowhere concedes it is not willing to assign the Deed to Defendant if that is what is required to collect on the Note.[2] Accordingly, this case must be remanded for

2. It does appear, however, it would be unlikely for Plaintiff to assign the Deed to Defendant, as this would result in the foreclosure of property which it insured.

a determination of whether Plaintiff is willing to assign the Deed to Defendant.

Defendant asserts two other grounds to support summary judgment in her favor. We reject each of these arguments. First, the City of Charlotte had no obligation to provide Defendant with notice of the foreclosure proceeding, as mandated by section 45-21.16(a), because the foreclosure never progressed to a hearing before the clerk of the superior court. Second, when Plaintiff paid the City of Charlotte and took assignment of the Note and the Deed it did not release the property from the Deed. Thus Defendant, as the mortgagor, was not released from her obligation on the Note. *See* N.C.G.S. § 45-45.1(2) (1999) (mortgagor is released "to the extent of the value of the property released").

Remanded.

Judges McCULLOUGH and HUDSON concur.

ALEXANDER HAMILTON LIFE INSURANCE COMPANY OF AMERICA F/K/A JEFFERSON-PILOT PENSION LIFE INSURANCE COMPANY, PLAINTIFF v. J&H MARSH & McCLENNAN, INC., SUCCESSOR TO JOHNSON & HIGGINS CAROLINAS, INC., AND HARTFORD FIRE INSURANCE COMPANY, DEFENDANTS

No. COA00-475

(Filed 3 April 2001)

Appeal and Error— appealability—partial summary judgment

Plaintiff's and defendants' appeals were dismissed as interlocutory where plaintiff filed an action seeking recovery for breach of contract and negligence and the trial court granted summary judgment for defendant Hartford on the breach of contract claim, denied summary judgment on the issues of negligence and agency, and denied defendant J&H's motion for summary judgment concerning the extent of damages. The trial court did not certify that there was no just reason for delay, and plaintiff's claims for breach of contract and negligence do not present identical factual issues that create the possibility of two trials on the same issues.

Appeal by plaintiff and defendants from judgment entered 24 January 2000 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 13 March 2001.

Sharpless & Stavola, P.A., by Frederick K. Sharpless and Eugene E. Lester III, for plaintiff appellant-appellee.

Kennedy Covington Lobdell & Hickman, L.L.P., by Raymond E. Owens, Jr., and Russell F. Sizemore, for defendant appellant-appellee J&H Marsh & McClennan, Inc.

Faison & Gillespie, by O. William Faison, Michael R. Ortiz, John-Paul Schick and Broderick W. Harrell, for defendant appellant-appellee Hartford Fire Insurance Company.

McCULLOUGH, Judge.

Plaintiff filed this action on 18 August 1998 seeking recovery from defendants under theories of breach of contract and negligence. By order issued 24 January 2000, the trial court granted partial summary judgment for defendant Hartford Fire Insurance Company (Hartford) on the issue of breach of contract, but denied summary judgment on issues of negligence and agency. The trial court also denied defendant J&H Marsh & McClennan's (J&H) motion for summary judgment concerning the extent of plaintiff's damages. From this order, plaintiff and defendants appeal.

Defendant Hartford filed a motion to dismiss plaintiff's appeal, arguing that it is interlocutory with no immediate right to appeal. After reviewing the record before us, we agree and dismiss the appeal.

We do not review interlocutory orders as a matter of course. N.C. Gen. Stat. § 1A-1, Rule 54(b) (1999); *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). There are two instances, however, where a party may appeal interlocutory orders. The first instance arises where there has been a final determination as to one or more of the claims, and the trial court certifies that there is no just reason to delay the appeal. *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). The trial court in the instant case made no such certification. Thus, plaintiff is limited to the second avenue of appeal, namely where "the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). In such cases, we may review the appeal

under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1). *Id.* The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party. *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Whether a substantial right is affected is determined on a case-by-case basis, and should be strictly construed. *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982); *Buchanan v. Rose*, 59 N.C. App. 351, 352, 296 S.E.2d 508, 509 (1982).

In the instant case, plaintiff argues that the trial court's order affects its substantial right to avoid the possibility of inconsistent verdicts in separate trials. Our Supreme Court has held that the right to avoid the possibility of two trials on the same issues is a substantial right that may support immediate appeal. *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982). If there are no factual issues common to the claim determined and the claims remaining, however, no substantial right is affected. *Britt v. American Hoist and Derrick Co.*, 97 N.C. App. 442, 445, 388 S.E.2d 613, 615 (1990). In the instant case, plaintiff claims that there are common issues involving agency that create a possibility of inconsistent verdicts.

Contrary to plaintiff's contentions, its claims involving breach of contract and those involving negligence do not present identical factual issues that create the possibility of two trials on the same issues. The trial court's grant of partial summary judgment on plaintiff's first and second claims dealt only with the insurance contract between plaintiff and defendant Hartford and Hartford's alleged breach thereof. Plaintiff's breach of contract claim does not impact plaintiff's alternative claim that J&H was Hartford's agent for negligence purposes. Further, plaintiff's first and second claims do not involve the joint liability of both defendants, but that of defendant Hartford alone. If plaintiff successfully proves the issue of Hartford's imputed negligence at trial, and then successfully appeals the grant of summary judgment on the issue of breach of contract, a second trial would only involve the issue of plaintiff's coverage under the insurance contract. If plaintiff fails to prove the issue of Hartford's imputed negligence through agency at trial, then it is free to appeal that judgment and have all issues determined at the same time.

Because a second trial would not require plaintiff to retry the agency issue, there are no overlapping issues and the possibility of

inconsistent verdicts does not exist. As such, this appeal is interlocutory and falls under no applicable exception. We hold that plaintiff's appeal is interlocutory and must be dismissed. Defendant J&H's appeal is similarly premature, as it seeks this Court's determination on the question of plaintiff's damages before the question of liability is even established.

"The rule against interlocutory appeals promotes judicial economy by avoiding fragmentary, premature and unnecessary appeals and permits the trial court to fully and finally adjudicate all the claims among the parties before the case is presented to the appellate court." *Jarrell v. Coastal Emergency Services of the Carolinas*, 121 N.C. App. 198, 201, 464 S.E.2d 720, 722-23 (1995). We dismiss plaintiff's and defendants' appeals and remand the case to the trial court.

Dismissed and remanded.

Judges GREENE and HUDSON concur.

CLARENCE KEITH WILLIAMSON, PLAINTIFF v. JUANITA HUNT WILLIAMSON, DEFENDANT

No. COA00-147

(Filed 3 April 2001)

Divorce— alimony—cohabitation

The trial court on 5 August 1998 correctly ordered plaintiff to pay support to defendant from the time of separation, 9 October 1994, until the time defendant began cohabiting, 16 June 1995, where the court had entered an order for postseparation support on 3 December 1996. It is not relevant that defendant began cohabiting prior to either the postseparation support or alimony award; in cases in which the dependant spouse receives alimony or postseparation support pursuant to a judgment or court order, cohabitation or remarriage terminates that spouse's right to receive payments. However, the supporting spouse must file a motion with the court, notify the dependent spouse, and obtain a court order authorizing termination of payments as of a date certain and may not automatically cease paying.

Appeal by defendant from order entered 17 August 1998 by Judge J. Henry Banks in Vance County District Court. Heard in the Court of Appeals 19 February 2001.

Michael B. Sosna for the defendant-appellant.

No brief filed for the plaintiff-appellee.

EAGLES, Chief Judge.

Plaintiff and defendant were married on 26 November 1971 and were separated 9 October 1994. On 3 December 1996, based on a hearing on 29 October 1996, the trial court entered an order for post-separation support finding that defendant was a dependant spouse and plaintiff was a supporting spouse. The divorce decree was entered 30 October 1996. On 4 June, 25 June, 16 July and 30 July of 1998 the trial court conducted a hearing regarding a pending motion for alimony. On 5 August 1998, plaintiff moved to terminate alimony payments on the basis that defendant was cohabiting. The trial court found that defendant had been cohabiting since 16 June 1995 and ordered that plaintiff pay support to defendant from the time of the separation until the time defendant began cohabiting. From this order, defendant appeals.

The evidence tended to show the following. During the course of the marriage and before the separation, plaintiff engaged in illicit sexual behavior. According to G.S. § 50-16.3A(a), if the supporting spouse commits illicit sexual behavior during the marriage and prior to separation, the dependant spouse shall be paid alimony. Pursuant to the 3 December 1996 order, defendant received postseparation support payments from plaintiff. When defendant applied for an alimony hearing, plaintiff made an oral motion that the trial court receive evidence of cohabitation and modify the defendant's claim because defendant was cohabiting. The trial court denied the motion but during the hearing allowed testimony concerning defendant's cohabitation. Immediately after the hearing, plaintiff moved to modify, suspend or terminate alimony payments pursuant to G.S. § 50-16.9. The trial court ordered that plaintiff was not obligated for alimony or postseparation support payments from the time defendant's cohabitation began.

G.S. § 50-16.9(b) states that if a dependant spouse remarries or cohabitates, alimony "shall terminate":

> (b) If a dependent spouse who is receiving postseparation support or alimony from a supporting spouse under a judgment or order of a court of this State **remarries or engages in cohabitation, the postseparation support or alimony shall terminate**. Postseparation support or alimony shall terminate upon the death of either the supporting or the dependent spouse.
>
> As used in this subsection, cohabitation means the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations. Nothing in this section shall be construed to make lawful conduct which is made unlawful by other statutes.

G.S. § 50-16.9 (emphasis added). Defendant argues that this statute refers to a modification of alimony. Defendant asserts "cohabitation" is not a defense in an initial action for alimony. We disagree.

Under G.S. § 50-16.9, if the dependant spouse is receiving spousal support payments pursuant to a judgment or order of this state and cohabitates or remarries, "alimony shall terminate." Here, defendant was awarded postseparation support payments at the 29 October 1996 hearing. That the defendant began cohabiting prior to either the postseparation support or alimony award is not relevant. Here, the defendant both received payments pursuant to a court order and engaged in cohabitation since 16 July 1995. The statute clearly and unequivocally states that where these circumstances exist, the support payments shall terminate.

This Court in *Bookholt v. Bookholt*, 136 N.C. App. 247, 253, 523 S.E.2d 729, 733 (1999) faced a similar issue. However, the action in *Bookholt* was filed before 1 October 1995. This Court stated:

> Our current statutes affirmatively state that **cohabitation automatically terminates** any alimony obligation. N.C. Gen. Stat. § 50-16.9(b) (1999). However, this statute only applies in actions filed on or after 1 October 1995. *Id.*, Editor's note. Because the instant action was filed 16 July 1993, the automatic termination provision in section 50-16.9(b) is not applicable here.

> No such cohabitation provision appeared in the pre-1995 version of the statute.

Id. (emphasis added). Here, the original complaint was filed 19 April 1996. The current version of G.S. § 50-16.9 is applicable here.

In cases in which the dependant spouse receives alimony or postseparation support pursuant to a judgment or court order, cohabitation or remarriage terminates that spouse's right to receive payments. G.S. § 50-16.1. This is not to say that a supporting spouse can automatically cease paying the dependant spouse without a court order. The supporting spouse must first file a motion with the trial court, notify the dependant spouse, and obtain a court order authorizing termination of payments as of a date certain.

Accordingly, the order of the trial court is

Affirmed.

Judges HUNTER and CAMPBELL concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 3 APRIL 2001

BRITTIG v. BRITTIG No. 00-105	Buncombe (98CVD2538)	No error in part, and vacate the order in part
BURCH v. GASTON CTY. ex rel. BURCH No. 99-1365	Gaston (84CVD1558)	Affirmed
CENTURA BANK v. QUEENSBORO INDUS., INC. No. 00-98	Nash (99CVS830)	Reversed
CHEEK v. SUTTON No. 99-1623	Forsyth (98CVS3123)	No Error
CRAWFORD v. WYATT No. 99-1590	Buncombe (98CVD3418)	Affirmed
GREEN v. GREEN No. 00-425	Haywood (98CVD448)	Affirmed
HARRIS v. NASH-ROCKY MT. BD. OF EDUC. No. 00-108	Halifax (99CVS772)	Affirmed
HILL v. GARRISON No. 00-93	Henderson (98SP146)	Affirmed
IN RE SIBLEY No. 00-115	Onslow (98J240)	Affirmed
INLAND GREENS HOA, INC. v. CARTER No. 00-367	New Hanover (96CVS2681)	Affirmed
STATE v. ATWATER No. 00-128	Durham (98CRS50130)	No error
STATE v. BARNETT No. 00-208	Guilford (99CRS23891) (99CRS23892) (99CRS23893)	No error
STATE v. CARTER No. 00-32	Robeson (96CRS14484)	No error
STATE v. COLEMAN No. 00-243	Orange (98CRS013485)	No error
STATE v. ELSTON No. 00-213	Mecklenburg (98CRS22866) (98CRS22867)	No error

STATE v. HUNTER No. 00-249	Forsyth (99CRS10674) (99CRS10675) (99CRS10682)	No error
STATE v. RIDGILL No. 99-1149	Forsyth (98CRS12071) (98CRS12072) (99CRS2035)	No error
STATE v. SACKETT No. 00-294	Rowan (98CRS17712) (98CRS17713)	No error
STATE v. SCOTT No. 99-1383	Richmond (98CRS8632)	No error
TEAM TRANSPORT, INC. v. FIRST NAT'L BANK SOUTHEAST No. 99-1587	Rockingham (98CVS463)	Affirmed in part, reversed in part and remanded
YANDLE v. FALLS No. 00-110	Mecklenburg (99CVS9879)	Reversed and remanded

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ADMINISTRATIVE LAW

Review of final agency decision—Division of Services for Blind—federal Rehabilitation Act—The superior court had jurisdiction to review a final agency decision from the Division of Services for the Blind under the federal Rehabilitation Act even though the Act did not then provide for judicial review of final agency decisions because neither the Act's statutory provisions nor federal cases expressly prohibited judicial review and the Department of Health and Human Services and its Division of Services for the Blind are not fully exempt from the North Carolina Administrative Procedure Act. **Hedgepeth v. N.C. Div. of Servs. for the Blind, 338.**

Review of final agency decision—standard of review not stated for each separate issue—A trial court review of a final agency decision of the Division of Services for the Blind was reversed and remanded where the trial court stated the proper standards of review (both de novo and whole record) but failed to delineate which standard the court utilized in resolving each separate issue raised. Moreover, the confusion inherent in the trial court's order is compounded by the lack of a transcript or other record of proceedings before the superior court. **Hedgepeth v. N.C. Div. of Servs. for the Blind, 338.**

ALCOHOLIC BEVERAGES

Impaired driver—companions furnishing alcohol—common law negligence—insufficient evidence—The trial court did not err by granting summary judgment for defendant Williams and erred by denying summary judgment for defendant Currie in an action arising from plaintiff being struck by Bhayani's vehicle after he had been drinking with Williams and Currie. Plaintiff cannot maintain a common law negligence claim against Williams and Currie for furnishing alcoholic beverages because there was no evidence that they furnished Bhayani with alcoholic beverages at any time on the day of the accident. **Smith v. Winn-Dixie Charlotte, Inc., 255.**

Impaired driver—furnisher of alcohol—common law negligence—driver not noticeably intoxicated—The trial court erred by not granting summary judgment for defendant Schewzyk where plaintiff was injured in a car accident with defendant Bhayani after Bhayani consumed alcoholic beverages purchased from Winn-Dixie by defendant Schewzyk. There was evidence that Bhayani drove his vehicle to the Winn-Dixie parking lot and that Schewzyk furnished Bhayani with alcoholic beverages in the parking lot, but there was no evidence that Bhayani was noticeably intoxicated at the time Schewzyk furnished him with the beverages. **Smith v. Winn-Dixie Charlotte, Inc., 255.**

Impaired driver—seller of alcohol—common law negligence—purchaser not noticeably intoxicated—The trial court did not err by granting summary

ALCOHOLIC BEVERAGES—Continued

judgment for defendant Winn-Dixie where plaintiff was injured in a car accident with defendant Bhayani after Bhayani consumed alcoholic beverages purchased from Winn-Dixie by defendant Schewzyk. Evidence that defendant entered a Winn-Dixie was sufficient to show that Winn-Dixie knew or should have known that he was going to drive a motor vehicle because a reasonable person could find that someone traveling to and from a grocery store does so by motor vehicle (but this does not create a per se rule of liability); however, there was no evidence that Schewzyk consumed alcoholic beverages prior to making a purchase at Winn-Dixie or that he exhibited any signs of intoxication at the time of the sale. **Smith v. Winn-Dixie Charlotte, Inc., 255.**

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Appealability—contributory negligence—judgment n.o.v.—substantial right—Although an appeal from the trial court's grant of judgment notwithstanding the verdict in favor of plaintiff on the issue of contributory negligence is an interlocutory order, defendant has a substantial right to an immediate appeal. **Desmond v. City of Charlotte, 590.**

Appealability—denial of motion to dismiss for lack of jurisdiction—The denial of a motion to dismiss for lack of jurisdiction is immediately appealable. **Golds v. Central Express, Inc., 664.**

Appealability—denial of summary judgment—collateral estoppel—substantial right—The denial of a motion for summary judgment based on collateral estoppel may affect a substantial right and defendants' appeal, although interlocutory, was properly before the Court of Appeals. **McCallum v. N.C. Coop. Extension Serv., 48.**

Appealability—denial of summary judgment—governmental immunity—The denial of summary judgment was immediately appealable where defendant claimed governmental immunity as an affirmative defense. **Craig v. Asheville City Bd. of Educ., 518.**

Appealability—governmental and public official's immunity—substantial right—Although an appeal from the denial of a motion for summary judgment is generally an interlocutory order, defendants have a right to an immediate appeal where they claimed governmental and public official's immunity. **Thompson v. Town of Dallas, 651.**

Appealability—interlocutory discovery order—attorney-client privilege—substantial right—Although interlocutory discovery orders are generally not appealable, defendants' appeal from an order partially granting plaintiff's request for the production of documents affects a substantial right and is immediately appealable where defendants asserted attorney-client privilege. **Evans v. United Servs. Auto. Ass'n, 18.**

Appealability—jurisdiction to review final agency decision—not waived—The question of whether the superior court had jurisdiction over a final agency decision involving the Division of Services for the Blind was reviewable even though it was raised for the first time on appeal. Objections to jurisdiction can be raised at any time, even on appeal or by a court sua sponte. **Hedgepeth v. N.C. Div. of Servs. for the Blind, 338.**

APPEAL AND ERROR—Continued

Appealability—order setting aside dismissal—An appeal was dismissed as interlocutory where defendant obtained a dismissal as a result of plaintiffs' failure to respond to interrogatories, plaintiffs' motion for reconsideration was granted, the orders of dismissal were rescinded, and defendant appealed. The avoidance of trial is not a substantial right; defendant's rights may be adequately protected by timely exception and subsequent assignment of error upon the entry of final judgment in the trial court. **Yang v. Three Springs, Inc., 328.**

Appealability—partial summary judgment—Plaintiff's and defendants' appeals were dismissed as interlocutory where plaintiff filed an action seeking recovery for breach of contract and negligence and the trial court granted summary judgment for defendant Hartford on the breach of contract claim, denied summary judgment on the issues of negligence and agency, and denied defendant J&H's motion for summary judgment concerning the extent of damages. The trial court did not certify that there was no just reason for delay, and plaintiff's claims for breach of contract and negligence do not present identical factual issues that create the possibility of two trials on the same issues. **Alexander Hamilton Life Ins. Co. of Am. v. J&H Marsh & McClennan, Inc., 699.**

Appealability—production of internal documents—no request for trial court to bifurcate discovery—Although defendants contend the trial court erred in an action for breach of contract and bad faith against an insurer by requiring defendants to produce internal documents relating to the bad faith issue prior to a demonstration that the pertinent homeowners' policy provides coverage for plaintiff, this issue is not properly before the Court of Appeals. **Evans v. United Servs. Auto. Ass'n, 18.**

Appealability—public official's immunity—Orders denying dispositive motions based on public official's immunity affect a substantial right and are immediately appealable. **Summey v. Barker, 688.**

Assignment of error—issues included—The Court of Appeals considered both issues of negligence and contributory negligence, even though plaintiff's assignment of error referred only to contributory negligence, because the issues were intertwined and the trial court did not state its reasons for the grant of summary judgment. **Thompson v. Bradley, 636.**

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Briefs—page limit—footnotes—Footnotes are not to be used as a means to avoid the page limitations specified in the appellate rules. **State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 127.**

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Preservation of issues—failure to give notice of intent to appeal based on denial of motion to suppress—Although defendant contends the search of

APPEAL AND ERROR—Continued

his person was without probable cause and that the evidence found during the subsequent search of his vehicle should have been suppressed since it was "fruit of the poisonous tree," this appeal is dismissed because the record fails to show that defendant gave notice of intent to appeal to the trial court and prosecutor prior to entry of a guilty plea following denial of a motion to suppress. **State v. Brown, 491.**

Preservation of issues—failure to include reference in record on appeal—Although plaintiff contends in a workers' compensation case that N.C.G.S. § 97-29 violates the Americans with Disabilities Act (ADA) under 42 U.S.C. § 1201 et seq., plaintiff did not preserve this issue because she failed to include any reference to the ADA in the record on appeal. **Clark v. Sanger Clinic, P.A., 350.**

Preservation of issues—failure to object—failure to allege plain error—Although defendant assigns error to the questioning and detention by a North Carolina Highway Patrol trooper to support his convictions for operating a motor vehicle without a valid operator's license and injury to personal property, defendant failed to properly preserve this issue where he made no objection at trial and did not argue plain error. **State v. Reaves, 629.**

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Intent to injure plaintiff—summary judgment improper—The trial court erred by granting summary judgment in favor of defendant on plaintiff's claim for negligence where defendant admitted he intentionally backed his vehicle into plaintiff's truck, plaintiff's complaint stated a cause of action for only assault and battery, and the one-year statute of limitations for assault and battery under N.C.G.S. § 1-54 had already run. **Britt v. Hayes, 190.**

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BAIL AND PRETRIAL RELEASE

Domestic violence—unconstitutional detention—effect on superseding charges—The statute permitting detention of a defendant arrested for domestic

BAIL AND PRETRIAL RELEASE—Continued

violence for a period of up to 48 hours to await a hearing before a judge on the conditions of pretrial release, N.C.G.S. § 15A-534.1(b), was unconstitutionally applied to defendant in violation of procedural due process as to the original charge of assault on a female where defendant was not taken before a judge until Monday afternoon some 39 hours after he was arrested although judges were available earlier in the day. However, defendant's unconstitutional detention did not entitle him to dismissal of a superseding indictment charging him with assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury. **State v. Clegg, 35.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Motion to dismiss—sufficiency of evidence—Although defendant failed to make a motion to dismiss the charges of breaking or entering or larceny at the close of the State's evidence or at the close of all the evidence to preserve the issue of the sufficiency of the evidence of these charges for appellate review, the Court of Appeals exercised its discretionary authority under N.C. R. App. P. 2 to conclude that the charges against defendant as to the break-in at a golf store should have been dismissed. **State v. Gilmore, 465.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Support modification—not a clerical error—affected substantive rights—beyond trial court's authority—The trial court did not have authority under N.C.G.S. § 1A-1, Rule 60(a) to enter an order purportedly modifying its prior child support order entered nine years earlier that registered a South Carolina order and now attempts to add in its order that the prior South Carolina child support order is specifically nullified. **S.C. Dep't of Soc. Servs. v. Hamlett, 501.**

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Maintenance of sidewalks—negligence action—denial of city's motion for directed verdict improper—The trial court erred in a negligence case involving a municipality's duty to keep its public sidewalks in proper repair under N.C.G.S. § 160A-296(a)(1) by denying defendant city's motion for a directed verdict at the close of plaintiff's evidence. ***Desmond v. City of Charlotte*, 590.**

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Public duty doctrine—protection of individuals with substance abuse problems—no special relationship exception—no special duty exception—The trial court did not err in a negligence case by dismissing plaintiff's complaint against defendant city and defendant police officer based on failure to state a claim upon which relief may be granted even though plaintiff maintains that N.C.G.S. §§ 122C-2 and 122C-301 operate outside the public duty

CITIES AND TOWNS—Continued

doctrine and impose an affirmative duty on the city and its agents to assist individuals with substance abuse problems. **Lane v. City of Kinston, 622.**

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Hearing on motion to dismiss—demolition proceedings—taking of property without just compensation—waiver of notice—The trial court did not err by hearing defendant city's motion to dismiss plaintiffs' complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) for compensation based on an alleged unlawful taking of property arising out of the city beginning demolition proceedings when plaintiffs failed to comply with a consent order requiring them to repair or demolish a structure with substantial building code violations on the pertinent property even though plaintiffs contend they did not have proper notice under N.C.G.S. § 1A-1, Rule 6(d). **Knotts v. City of Sanford, 91.**

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Alleged negligence or misconduct in performance of official duties—notice of lis pendens not required to be cross-indexed on public record—The trial court did not err by granting defendants' N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss plaintiff's claim for the alleged negligence or misconduct of a clerk of superior court in the performance of his official duties based on a failure to cross-index in the public record a notice of lis pendens on defendant's property. **George v. Administrative Office of the Courts, 479.**

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State constitutional claim—issues previously litigated in federal court—Collateral estoppel may prevent the re-litigation of issues that are necessary to the decision of a North Carolina constitutional claim and that have been previously decided in federal court. **McCallum v. N.C. Coop. Extension Serv., 48.**

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Breach of lease—alteration of terms of settlement agreement—The trial court erred by altering the terms of a settlement agreement reached by the parties involving a breach of lease during a mediated settlement conference on 27 June 1997. **Laing v. Lewis, 336.**

CONSTITUTIONAL LAW

Double jeopardy—prosecutor's intention to dismiss misdemeanor—felony jury impaneled—Jeopardy attached when the jury was impaneled and a

CONSTITUTIONAL LAW—Continued

prosecutor's pretrial announcement of his election not to pursue a misdemeanor charge was binding and tantamount to an acquittal where defendant was arrested for felonious larceny from her employer, the charge was reduced to misdemeanor larceny, defendant was tried and convicted, she appealed to superior court for a trial de novo, defendant was then indicted for felonious larceny from her employer, the two charges appeared on the docket, the prosecutor explained that they came from a single occurrence and that he intended to dismiss the misdemeanor charge, defendant was tried and convicted of the felony larceny charge, and the felony conviction was vacated on appeal. **State v. Bissette, 669.**

Due process—felony conviction following appeal of misdemeanor conviction—Defendant's felony larceny conviction in superior court was a violation of her due process rights and was vacated where she was tried and convicted of misdemeanor larceny in district court based on the alleged theft of a copy machine from her employer, she exercised her right to a trial de novo in superior court, and she was then indicted, prosecuted and convicted of felony larceny based on the same alleged occurrence. **State v. Bissette, 669.**

Effective assistance of counsel—failure to object or move for continuance—The failure of defense counsel to object to evidence or move for a continuance in a prosecution for intentionally keeping or maintaining a dwelling used for the keeping and/or selling of a controlled substance did not amount to ineffective assistance of counsel. **State v. Frazier, 361.**

Effective assistance of counsel—failure to recall witnesses—reasoned strategy decision—A defendant did not receive ineffective assistance of counsel in a first-degree sexual offense case when his counsel failed to recall three witnesses and examine them further. **State v. Campbell, 145.**

Effective assistance of counsel—witness not on pretrial list—suspicion of perjury—The decision of defense counsel not to include a witness on the pretrial witness list did not constitute ineffective assistance of counsel where defense counsel made a strategic decision and, more importantly, believed that the witness would perjure himself. The Rules of Professional Conduct prohibited counsel from offering evidence which he knew or reasonably believed to be false. **State v. Miller, 435.**

Freedom of speech—doctor's letter publicizing jurors' names—not protected speech—Defendant doctor's written letter publicizing plaintiffs' names to every physician's mail distribution box at Rowan Regional Medical Center after plaintiffs served as jurors in a medical malpractice case that found a doctor guilty of negligence is not protected speech under the United States or the North Carolina Constitutions, and is, therefore, not a defense to the imposition of liability under the facts alleged by plaintiffs. **Burgess v. Busby, 393.**

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Attorney fees—award to defendants—no showing of negligent infliction of emotional distress—The trial court did not err in a negligence case arising out of an automobile accident by awarding attorney fees to defendants under N.C.G.S. § 6-21.5 regarding plaintiff father's claim for negligent infliction of emotional distress. **Fox-Kirk v. Hannon, 267.**

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DEEDS

Restrictive covenants—number of buildings per lot limited—lots redivided—The trial court erred by ordering that defendants not be permanently enjoined from placing one double wide mobile home on each of defendants' lots where the two lots had originally been one and where restrictive covenants from that time imposed a limit of one dwelling per lot. **Donaldson v. Shearin, 102.**

Subdivision protective covenants—road maintenance fees—combined lots—The trial court did not err by granting a declaratory judgment for plaintiff determining that the purchaser of a subdivision lot which had been formed of two original lots was required by the subdivision protective covenants to pay road maintenance fees for two lots. The obligation to pay the road maintenance fees was a real covenant that ran with the land and the combining of the lots did not alter the real covenants that had previously attached to each lot. **Claremont Prop. Owners Ass'n v. Gilboy, 282.**

DISCOVERY

Claims diary entries—no abuse of discretion—no attorney-client privilege—The trial court did not abuse its discretion by determining that a large number of the claims diary entries prepared by the insurance company defendants detailing actions taken by defendants during the course of plaintiff's insurance claim were not protected by the attorney-client privilege and were discoverable. **Evans v. United Servs. Auto. Ass'n, 18.**

Claims diary entries—no abuse of discretion—no work product privilege—The trial court did not abuse its discretion by denying work product protection to a large number of the claims diary entries prepared by the insurance company defendants detailing actions taken by defendants during the course of plaintiff's insurance claim. **Evans v. United Servs. Auto. Ass'n, 18.**

Internal memoranda—no abuse of discretion—no attorney-client privilege for all documents—The trial court did not abuse its discretion by compelling discovery of four out of a total of thirteen of the insurance company

DISCOVERY—Continued

defendants' internal memoranda even though defendants contend they were protected by the attorney-client privilege. **Evans v. United Servs. Auto. Ass'n, 18.**

Investigative report—no abuse of discretion—no work product privilege—The trial court did not abuse its discretion by compelling discovery of an investigative report compiled by independent claim adjusters hired by the insurance company defendants even though defendants sought to invoke the work product privilege. **Evans v. United Servs. Auto. Ass'n, 18.**

Online procedures manual—no abuse of discretion—The trial court did not abuse its discretion by ordering the discovery of four portions of insurance company defendants' online procedures manual containing information to assist in the investigation and disposition of insurance claims. **Evans v. United Servs. Auto. Ass'n, 18.**

DIVORCE

Alimony—cohabitation—The trial court on 5 August 1998 correctly ordered plaintiff to pay support to defendant from the time of separation, 9 October 1994, until the time defendant began cohabiting, 16 June 1995, where the court had entered an order for postseparation support on 3 December 1996. It is not relevant that defendant began cohabiting prior to either the postseparation support or alimony award; in cases in which the dependant spouse receives alimony or postseparation support pursuant to a judgment or court order, cohabitation or remarriage terminates that spouse's right to receive payments. However, the supporting spouse must file a motion with the court, notify the dependent spouse, and obtain a court order authorizing termination of payments as of a date certain and may not automatically cease paying. **Williamson v. Williamson, 702.**

Judgment—set aside and new hearing—death of party in interim—action abated—The trial court was without jurisdiction to vacate a divorce judgment and resurrect the parties' marriage where a divorce judgment was issued; defendant filed a motion to set aside the judgment as void; the court conducted a hearing as to when the parties began living separate and apart; plaintiff died; and the court allowed defendant's motion for the substitution of the administrator of plaintiff's estate, found that the parties did not separate with the intent to remain separate and apart, and set aside the divorce decree as null and void. **Dunevant v. Dunevant, 169.**

One year's separation—residency—findings labeled as conclusions—The trial court erred by abrogating a divorce decree based on a finding that the decree contained no findings of fact regarding the issues of one year's separation and residency in North Carolina where the appropriate statements appeared under the heading "Conclusions of Law." **Dunevant v. Dunevant, 169.**

DRUGS

Constructive possession—evidence sufficient—The trial court did not err by not dismissing a charge of possession of crack cocaine with intent to sell and deliver where the evidence was sufficient to support constructive possession. **State v. Frazier, 361.**

DRUGS—Continued

Keeping dwelling for selling drugs—sufficiency of evidence—The trial court did not err by not dismissing a charge of intentionally keeping or maintaining a dwelling used for the keeping and/or selling of a controlled substance for insufficient evidence. **State v. Frazier, 361.**

Trafficking by possession or transportation of 28 or more grams—average weight of sample bags—instruction on lesser included offense denied—The trial court did not err in a prosecution for trafficking by possession or transportation of 28 or more grams of heroin by denying defendant's request for an instruction on the lesser-included offense of trafficking by possession or transportation of 14 or more grams but less than 28 where an SBI forensic chemist testified that he examined each of the 671 bags containing an off-white or tan substance seized from defendant, randomly selected and weighed 50 bags, and calculated the total weight of 31 grams by determining the average weight and multiplying by 671. **State v. Holmes, 614.**

Trafficking by possession or transportation of 28 or more grams—sufficiency of evidence—average weight of sample bags—The trial court did not err by denying defendant's motion to dismiss for insufficient evidence charges of trafficking by possessing or transporting 28 or more grams of heroin where an SBI forensic chemist testified that he examined each of the 671 bags containing an off-white or tan substance seized from defendant, randomly selected and weighed 50 bags, and calculated the total weight of 31 grams by determining the average weight and multiplying by 671. **State v. Holmes, 614.**

EMOTIONAL DISTRESS

Intentional infliction—doctor's publication of jurors' names to medical providers—motion to dismiss improperly granted—The trial court erred by granting defendant doctor's motion to dismiss plaintiffs' claim for intentional infliction of emotional distress based on defendant's publication of plaintiffs' names in a written letter to every physician's mail distribution box at Rowan Regional Medical Center after plaintiffs served as jurors in a medical malpractice case that found a doctor guilty of negligence. **Burgess v. Busby, 393.**

Negligent infliction—foreseeability—mother viewing injury of child—denial of directed verdict proper—The trial court did not err by denying defendants' motion for a directed verdict as to plaintiff mother's negligent infliction of emotional distress claim arising out of the severe injury of her child during an automobile accident. **Fox-Kirk v. Hannon, 267.**

EVIDENCE

Attorney-client privilege—burden on party asserting—A party asserting the attorney-client privilege bears the burden of establishing that: (1) the relation of attorney and client existed at the time the communication was made; (2) the communication was made in confidence; (3) the communication relates to a matter about which the attorney is being professionally consulted; (4) the communication was made in the course of giving or seeking legal advice for a proper purpose; and (5) the client has not waived the privilege. **Evans v. United Servs. Auto. Ass'n, 18.**

Automobile accident—loss of services—expert testimony not required—The trial court did not abuse its discretion in a negligence case arising out of an

EVIDENCE—Continued

automobile accident by refusing to permit plaintiff to offer evidence of loss of his own services through the testimony of an expert witness under N.C.G.S. § 8C-1, Rule 702(a) because the jury was capable of rendering a decision on the value of a person's services to himself based on common knowledge. **Warren v. Gen. Motors Corp., 316.**

Automobile accident—unnamed insurance company's original answer—The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by refusing to permit plaintiff to offer the unnamed UIM insurance company's original answer as evidence in the case. **Warren v. Gen. Motors Corp., 316.**

Conversations between plaintiff and deceased defendant—Dead Man's Statute—nonhearsay—no improper reference to settlement negotiations—The trial court did not err in a negligence case by allowing into evidence testimony regarding conversations between plaintiff mother and the now deceased defendant. **Breedlove v. Aerotrim, U.S.A., Inc., 447.**

Doctor's first deposition and second deposition—plaintiff's diagnosis—not misleading or prejudicial—The trial court did not err in a negligence case by allowing portions of the first deposition of a doctor into evidence in addition to the doctor's second deposition concerning plaintiff minor's updated diagnosis taken just five days before trial began where the doctor updated the diagnosis from "possible" to "probable" consequences. **Breedlove v. Aerotrim, U.S.A., Inc., 447.**

Effect of towing on tires—testimony of Trooper—The trial court did not err in a prosecution for second-degree murder arising from driving while impaired by allowing a Trooper to testify as to what happens to a vehicle tire when it is towed from an accident scene after the court refused to allow the Trooper to testify as an expert. **State v. Miller, 435.**

Exclusion of statements from interview with detective—speculation of relevance—The trial court did not err in a first-degree sexual offense case by admitting some of the statements from defendant's interview with a detective while excluding other statements including the child victim's observations of sexual activity around her home. **State v. Campbell, 145.**

Expert testimony—child sexual abuse—It is permissible for an expert to testify that a child exhibits characteristics consistent with abused children, but impermissible for an expert to testify that a child has been sexually abused in the absence of physical evidence. **State v. Grover, 411.**

Expert testimony—negligence—reasonable care for safety—no firsthand knowledge—basis of opinion given—The trial court did not err in a negligence case by admitting the testimony of two experts stating that plaintiff exercised reasonable care for his safety when he was injured by power lines while helping to construct a movie set on defendant landowner's property even though the experts did not testify from firsthand personal knowledge. **Martishius v. Carolco Studios, Inc., 216.**

Hearsay—unavailability—non-testifying treating doctor's letter—no requisite findings of trustworthiness—prejudicial error—The trial court erred in a negligence case arising out of an automobile accident by admitting the 1 July

EVIDENCE—Continued

1998 letter from a non-testifying treating doctor to plaintiffs' counsel under N.C.G.S. § 8C-1, Rule 804(b)(5), the unavailable declarant residual exception to the hearsay rule, which indicated for the first time that a brain injury was more likely for plaintiff minor child, where there were no findings of trustworthiness. **Fox-Kirk v. Hannon, 267.**

Murder—cartridges—foundation—The trial court did not err by admitting into a first-degree murder prosecution three nine-millimeter cartridges given to investigators by the manager of the trailer park where defendant lived and where the bodies were discovered. **State v. Lytch, 576.**

Percentage of profits on gross revenue—lost profits—lay opinion—The trial court did not err by permitting defendant lawn care business's president to testify as to the percentage of profits realized on plaintiff's gross revenue and as to plaintiff's lost profits due to defendant former employee's use of plaintiff's cost history records in securing eight of plaintiff's contracts. **Byrd's Lawn & Landscaping, Inc. v. Smith, 371.**

Polygraph—not admissible—The trial court did not err in a first-degree murder prosecution by not admitting evidence from a polygraph tending to show that defendant was not involved in the offenses charged. **State v. Lytch, 576.**

Prior assault–prior attempted robbery—admissible—The trial court did not err in a first-degree murder prosecution by admitting evidence of an assault and attempted robbery that occurred two days before the murders where the closeness in both geography and time, the similar nature of the assault, and the connection between the bullets found at both scenes presented sufficient similarities for the evidence's admissibility. **State v. Lytch, 576.**

Prior convictions—driving while impaired—reckless driving—malice—The trial court did not err in a prosecution for second-degree murder arising from defendant's impaired driving by admitting defendant's prior convictions for driving while impaired and careless and reckless driving to establish that defendant acted with malice. **State v. Miller, 435.**

Prior inconsistent statement—impeachment—The trial court did not err in an assault and robbery prosecution by allowing the State to impeach two of its witnesses with prior statements to an officer where both witnesses admitted making the prior statements, one of them testified that certain parts of his statement were inaccurate and that he did not remember making parts of his statement, and the facts indicate good faith and an absence of subterfuge. **State v. Riccard, 298.**

Rights waiver executed by defendant—waiver of right to be present—The trial court did not err in a first-degree sexual offense case by admitting into evidence a rights waiver allegedly executed by defendant after the trial court conducted an unrecorded bench conference outside of defendant's presence. **State v. Campbell, 145.**

Testimony of inmate—collateral matter—bias toward prosecution—The trial court did not err in a first-degree murder prosecution by allowing the State to present testimony establishing that an inmate's favorable testimony

EVIDENCE—Continued

for defendant was rendered only after the State spurned his assistance. Although defendant contended that this testimony related to a collateral matter, the testimony exposed the witness's bias against the prosecution. **State v. Lytch, 576.**

Witness's prior conviction—not probative of truthfulness—introduction not plain error—There was no plain error in a murder prosecution where evidence was introduced concerning a defense witness's pending burglary charge which was not probative of the witness's propensity for truthfulness or untruthfulness, but did not have a probable impact on the jury's determination of the witness's truthfulness because the State presented evidence that the witness had previously been convicted of burglary and the witness testified that he had consumed 4 forty-ounce beers on the evening of the shooting. **State v. McEachin, 60.**

Work product privilege—burden on party asserting—A party asserting work product privilege bears the burden of showing: (1) that the material consists of documents or tangible things; (2) which were prepared in anticipation of litigation or for trial; and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer, or agent. **Evans v. United Servs. Auto. Ass'n, 18.**

FALSE ARREST

Preventing execution of court order—reasonable officer—The trial court did not err by granting summary judgment for defendant deputy sheriff on plaintiff's claim for false arrest where plaintiff admitted that the deputy possessed an order to seize equipment, that the deputy told plaintiff he had the right to remove the property from plaintiff's premises, that plaintiff blocked access to the equipment with other machinery, and that plaintiff refused to move that machinery despite numerous requests and warnings that he would be arrested if he did not do so. **Thomas v. Sellers, 310.**

HOMICIDE

Felony murder—assault with a deadly weapon inflicting serious injury—felonious impaired driving—A defendant's conviction for first-degree murder must be vacated based on the State's reliance on four different charges of assault with a deadly weapon inflicting serious injury and felonious impaired driving to support its felony murder charge because those crimes cannot support a felony murder conviction. **State v. Blackwell, 388.**

First-degree murder–instructions—prior attempted robbery—evidence of specific intent—The trial court did not err in a first-degree murder prosecution by instructing the jury that it could consider a prior attempted robbery and shooting as evidence of specific intent. **State v. Lytch, 576.**

First-degree murder—short-form indictment—constitutionality—Although the short-form murder indictment used to charge defendant with first-degree murder did not allege all of the elements of first-degree murder, the trial court did not err in concluding the indictment was constitutional. **State v. Washington, 657.**

HOMICIDE—Continued

First-degree murder—short-form indictment—constitutionality—The short-form murder indictment did not violate defendant's due process rights. **State v. Lytch, 576.**

First-degree murder—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge of first-degree murder (which resulted in a second-degree murder conviction) where the defendant retrieved a gun from a vehicle and said he would kill the group with whom the victim was walking; defendant subsequently said that he thought he "got one" because he had "seen one drop"; eleven spent shell casings were recovered at the scene and matched a gun used by defendant; defendant admitted firing shots into the air until the gun was emptied; the victim died of a gunshot wound to the head; and the victim identified defendant as the person who shot him. **State v. McEachin, 60.**

Motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charges of first-degree murder, robbery with a dangerous weapon, and assault with a dangerous weapon with intent to kill inflicting serious injury. **State v. Washington, 657.**

Second-degree murder—driving while impaired—instruction—malice—The trial court did not err when instructing the jury on malice in a second-degree murder prosecution arising from driving while impaired. Although defendant contended that the court erred by not stating that the act must be performed intentionally, the court gave an instruction expressly approved in *State v. Rich*, 351 N.C. 386. **State v. Miller, 435.**

Second-degree murder—driving while impaired—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge of second-degree murder arising from driving while impaired for lack of sufficient evidence where defendant had prior convictions, was swerving prior to the accident, and had a blood alcohol level far beyond the legal limit four hours after the accident. **State v. Miller, 435.**

IMMUNITY

Governmental—action against sheriff and jailer—surety bond—The trial court correctly denied defendants' Rule 12(b)(6) motion to dismiss claims for negligence and violations of civil rights where defendants, the sheriff and chief jailer, were public officers acting in their official capacities and a bond had been purchased, which removed the protection of governmental immunity. **Summey v. Barker, 688.**

Governmental–probationary teacher—contract not renewed—emotional distress—action not in tort—Governmental immunity did not bar a probationary teacher's claims for lost wages, humiliation, and emotional distress arising from her contract not being renewed because the action was based upon an allegation of a statutory violation rather than a suit in tort. **Craig v. Asheville City Bd. of Educ., 518.**

Governmental—public official—waiver—purchase of liability insurance—The trial court did not err by denying defendants' motion for summary judgment with respect to plaintiff's negligence claim against defendant town and

IMMUNITY—Continued

defendant officer in his official and individual capacities because the defense of governmental immunity was waived to the extent defendant town purchased liability insurance. **Thompson v. Town of Dallas, 651.**

Governmental—sheriff—surety—While the general rule is that suits against public officials are barred by governmental immunity where the official is performing a governmental function, N.C.G.S. § 58-76-5 removes a sheriff from governmental immunity where the surety is added as a party to the action. **Thomas v. Sellers, 310.**

INJUNCTIONS

Enforcement of restrictive covenants—remedy—In an action for a permanent injunction to enforce restrictive covenants remanded on other grounds, the trial court must fashion an appropriate remedy for any violation of the covenants. The appropriateness of the remedy is clearly within the province of the trial court. **Donaldson v. Shearin, 102.**

Temporary restraining order—properly dissolved—The trial court did not err by dissolving plaintiffs' temporary restraining order under N.C.G.S. § 1A-1, Rule 65(b) where the trial court refused to grant a preliminary injunction. **Knotts v. City of Sanford, 91.**

INSURANCE

Automobile—coverage—vehicle furnished to another—An insurance policy did not provide liability coverage for an automobile accident where the dispositive issue was whether the vehicle was furnished for the driver's regular use within the meaning of an exclusion in plaintiff's policy, and the evidence showed that the vehicle was used by the driver on a daily basis for a period of approximately eight weeks after his vehicle had burned although restrictions were placed on his use of the vehicle. **Nationwide Mut. Ins. Co. v. Walters, 183.**

Automobile—supplementary payments clause—emergency first aid—application to third party—The trial court should have entered a judgment on the pleadings for defendant in a declaratory judgment action to define plaintiff's rights under an insurance policy where plaintiff was in an accident with a driver insured by defendant, plaintiff received on-site first aid from emergency medical technicians and further emergency medical care at a hospital, and plaintiff sought to recover under a supplementary payments clause in the driver's liability policy that referred to expenses for emergency first aid, since plaintiff has no standing as a third-party beneficiary to seek enforcement of the clause. **DeMent v. Nationwide Mut. Ins Co., 598.**

Automobile—unnamed UIM insurer—right to participate in trial—The trial court did not err in a negligence case arising out of an automobile accident by permitting the unnamed UIM insurance company to participate in the trial when the insurance company had earlier said it would not participate in the pretrial conference or trial. **Warren v. Gen. Motors Corp., 316.**

UIM claim—notice to insurer—Defendant-insurer's agents had prompt notice of plaintiff's UIM claim where plaintiff stated that he was in and out of defend-

INSURANCE—Continued

ant's local office almost daily to chat and discuss various matters relating to his insurance with his personal agent and that he was "virtually certain" that various members of the office inquired about his son's health and accident recovery progress. **Erwin v. Tweed, 643.**

UIM coverage—family farm trust vehicles—individually owned—The trial court correctly granted summary judgment for plaintiff in a declaratory judgment action to determine UIM coverage for vehicles owned by a family farm trust where defendant contended that plaintiff was not entitled to coverage because the farm trust had a legally independent existence, but the present occupier of the farm is considered as the named insured, and any family member residing in the same household as the named insured is a class I insured under the policy. **Erwin v. Tweed, 643.**

UIM coverage—stacking—private passenger or fleet vehicle—weight of vehicle—issue of fact—The trial court erred in a declaratory judgment action to determine UIM coverage by finding that a business auto policy could be stacked with a personal auto policy and granting summary judgment for plaintiff. An insured party may only stack interpolicy underinsured motorist coverages for non-fleet private passenger vehicles; the weight of the vehicle determines whether it is a private passenger vehicle or a fleet vehicle and there was no information here conclusively determining the weight. N.C.G.S. § 58-40-10(b). **Erwin v. Tweed, 643.**

INTEREST

Purchase of fuel by store—open-ended account—notice—The trial court did not err by concluding that plaintiff was entitled to interest on an amount due for fuel purchased by a store where there was only an oral agreement for the delivery of gasoline, but defendants received statements on a regular basis and an invoice upon each delivery, each of which contained a detailed and specific provision regarding the imposition of finance charges. **Harrell Oil Co. of Mount Airy v. Case, 485.**

JUDGMENTS

Directive not in decretal portion—valid—A judgment containing an unequivocal directive that defendant pay child support constituted a decree of the court even though the directive was not contained in the decretal portion of the judgment. **Langston v. Johnson, 506.**

JURISDICTION

Personal—prima facie proof—The trial court erred by denying a motion to dismiss for lack of personal jurisdiction over the nonresident defendant where the complaint did not state the section of the long-arm statute under which jurisdiction was obtained or allege facts as to activity being conducted in North Carolina by defendant at the time of service of process, and a review of the record and complaint showed that plaintiff failed to meet his burden of proving prima facie a statutory basis for personal jurisdiction. **Golds v. Central Express, Inc., 664.**

JURY

Quotient verdict—juror affidavits properly refused—The trial court did not err in a negligence case arising out of an automobile accident by refusing to consider juror affidavits which indicated that the jury rendered a quotient verdict. **Fox-Kirk v. Hannon, 267.**

LANDLORD AND TENANT

Summary ejectment—commercial lease—The trial court did not err by its entry of summary ejectment in favor of plaintiff based on defendants' failure to pay rent within five days after notice as contained in section 24.1 of the commercial lease. **Southpark Mall Ltd. Part. v. CLT Food Mgmt., Inc., 675.**

LARCENY

Employee—inmate performing mandatory work assignment not an employee—The trial court erred by denying defendant's motion to dismiss the charge of larceny by employee where defendant was an inmate performing a mandatory work assignment. **State v. Frazier, 207.**

Motion to dismiss—sufficiency of evidence—Although defendant failed to make a motion to dismiss the charges of breaking or entering or larceny at the close of the State's evidence or at the close of all the evidence to preserve the issue of the sufficiency of the evidence of these charges for appellate review, the Court of Appeals exercised its discretionary authority under N.C. R. App. P. 2 to conclude that the charges against defendant as to the break-in at a golf store should have been dismissed. **State v. Gilmore, 465.**

LIBEL AND SLANDER

Newspaper article—substantial accuracy—Summary judgment was correctly granted for defendant newspaper in a defamation action arising from a report that defendants had been arrested for contributing to the delinquency of two minors and had been accused of "encouraging cigarette smoking; beer drinking and engaging in sex acts involving a 15-year-old boy and a 16-year-old girl," although plaintiffs contend that the article improperly indicated that they had been arrested for engaging in sex acts with two juveniles, where the article, taken as a whole, is a substantially accurate report of the allegations in the arrest warrants. **Lacomb v. Jacksonville Daily News Co., 511.**

MALICIOUS PROSECUTION

Malice—summary judgment—The trial court properly granted summary judgment for a deputy sheriff, the sheriff, and their surety in their official capacity on a malicious prosecution claim where plaintiff failed to show a genuine issue of material fact as to whether the deputy acted with malice in executing an order of seizure against equipment. **Thomas v. Sellers, 310.**

Trespass—probable cause—The trial court erred by not granting defendants a directed verdict on plaintiff's claim for malicious prosecution in an action arising from the alleged transfer of a store from father to son and a subsequent trespass charge where the record did not contain substantial evidence that defendants instituted the trespass proceeding without probable cause. Based on the undis-

MALICIOUS PROSECUTION—Continued

puted evidence, defendants had probable cause to believe plaintiff was on defendants' premises without authorization after being notified by defendants that plaintiff was not to remain on the premises. **Hill v. Hill, 524.**

MEDICAL MALPRACTICE

Expert witness—same field of specialization—The trial court erred in a medical malpractice action by ruling that plaintiff's expert witness was not qualified under N.C.G.S. § 8C-1, Rule 702 where defendants were general practice pediatricians and the witness was certified in the subspecialty of pediatric gastroenterology and a professor at UCLA. **Edwards v. Wall, 111.**

Joinder of defendants—venue—It was not improper for plaintiff in a medical malpractice action to join all of the defendants who were residents of both Robeson and Cumberland Counties and to file the action in Robeson County when plaintiff was injured in an automobile accident in Robeson County, taken to a hospital in Robeson County, and subsequently transferred to a hospital in Cumberland County where plaintiff alleged that defendants' combined and individual negligence proximately caused injuries. **Stewart v. Southeastern Reg'l Med. Ctr., 456.**

Relevant standard of care—"similar community" rule—The trial court did not err in a medical malpractice case by directing verdict in favor of defendants based on the trial court's conclusion that plaintiffs failed to present competent medical testimony establishing the relevant standard of care under N.C.G.S. § 90-21.12 for prenatal and obstetrical care in Wilmington or similar communities where plaintiff's expert used a national standard of care. **Henry v. Southeastern OB-GYN Asocs., P.A., 561.**

Rule 9(j) extension—location of motion—An extension under N.C.G.S. § 1A-1, Rule 9(j) was properly obtained in Robeson County and was effective against all named defendants where plaintiff was injured in an automobile accident in Robeson County, received treatment at a hospital in Robeson County, was transferred to Cumberland County for further treatment and brought a medical malpractice action against defendants in both counties. **Stewart v. Southeastern Reg'l Med. Ctr., 456.**

Rule 9(j) extension—location of motion—notice and service—Plaintiffs seeking a Rule 9(j) extension are not required to seek an extension in every county where every potential defendant is located, regardless of whether those defendants are ultimately included in the eventual complaint and, because a complaint has not yet been filed, parties seeking a Rule 9(j) extension must neither name nor serve notice upon potential defendants. **Stewart v. Southeastern Reg'l Med. Ctr., 456.**

MOTOR VEHICLES

Automobile accident—causation—issue of fact—The trial court erred by granting summary judgment for defendant in an action arising from an automobile accident where the deposition of Susan Bradley, the driver, placed responsibility for the accident on the passenger, plaintiff's decedent, while defendants' expert stated that the accident was caused by Bradley's steering overcorrection. **Thompson v. Bradley, 636.**

MOTOR VEHICLES

Blood alcohol concentration—extrapolation—Daubert standard—scientific foundation—The trial court did not abuse its discretion in a driving while impaired case by finding that the foundation for an expert's extrapolation testimony regarding defendant's blood alcohol concentration at the time of an accident was sufficient to meet the Daubert standard. **State v. Davis, 81.**

Driving while impaired—aiding and abetting—intent—insufficient evidence—Summary judgment was properly granted for defendant Williams and should have been granted for defendants Schewzyk and Currie in an action arising from plaintiff being struck by Bhayani's vehicle after he had been drinking with Schewzyk, Williams, and Currie. Although plaintiff contended that Schewzyk, Williams, and Currie aided and abetted Bhayani in driving while impaired, consuming alcoholic beverages with Bhayani and not stopping him from driving does not render them guilty as principals. **Smith v. Winn-Dixie Charlotte, Inc., 255.**

Driving while impaired—instruction on defendant's refusal to be tested—no prejudicial error—Even if it were error to instruct the jury in a driving while impaired case that it could consider defendant's refusal to be tested as evidence of defendant's guilt, it was not prejudicial error. **State v. Davis, 81.**

Driving while impaired—no duty to prevent—Summary judgment was properly granted for defendant Williams and should have been granted for defendant Currie in an action arising from plaintiff being struck by Bhayani's vehicle after he had been drinking with Schewzyk, Williams, and Currie where plaintiff contended that Williams and Currie knew that Bhayani was intoxicated and failed to prevent him from driving. This is not a duty which the law of North Carolina places upon a person. **Smith v. Winn-Dixie Charlotte, Inc., 255.**

Driving while impaired—testing of blood and urine—implied consent—search warrant after defendant's refusal—The trial court did not err in a driving while impaired case by concluding that defendant's due process rights were not violated under the implied consent statute of N.C.G.S. § 20-16.2 by the testing of his blood and urine pursuant to a search warrant after defendant's refusal to be tested. **State v. Davis, 81.**

Driving while impaired—testing refusal—use of other procedures—explanation to defendant—If a defendant refuses to be tested pursuant to N.C.G.S. § 20-16.2(a)(1) and the officer elects to pursue "testing pursuant to other applicable procedures of law," this should be explained to the defendant in order that he may make a final decision on whether to be tested, and only if he then refuses should he be reported as having willfully refused to be tested. **State v. Davis, 81.**

NEGLIGENCE

Intent to injure plaintiff—summary judgment improper—The trial court erred by granting summary judgment in favor of defendant on plaintiff's claim for negligence where defendant admitted he intentionally backed his vehicle into plaintiff's truck, the one-year statute of limitations for assault and battery under N.C.G.S. § 1-54 had already run, but plaintiff's interrogatories present a question as to whether defendant intended to injure plaintiff. **Britt v. Hayes, 190.**

NEGLIGENCE—Continued

Judgment notwithstanding the verdict—motion for new trial—properly denied—The trial court did not abuse its discretion in a negligence case by denying defendant's motion for judgment notwithstanding the verdict and alternatively for a new trial. **Breedlove v. Aerotrim, U.S.A., Inc., 447.**

PARTNERSHIPS

Existence—sufficiency of evidence—The trial court did not err by determining that defendants were partners in the Lowgap Grocery and Grill, which they had purchased for their daughter to run. **Harrell Oil Co. of Mount Airy v. Case, 485.**

PLEADINGS

Amendment to answer—no prejudicial error—The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by allowing the unnamed UIM insurance company and defendant driver to amend their answers on the first day of trial. **Warren v. Gen. Motors Corp., 316.**

Rule 11 sanctions—The trial court did not err by denying a motion for Rule 11 sanctions for a complaint filed in North Carolina arising from an automobile accident in Louisiana. **Golds v. Central Express, Inc., 664.**

Rule 11 sanctions—case of first impression—The trial court did not err by denying a motion for Rule 11 sanctions in a declaratory judgment action to interpret an insurance policy where there was no evidence to support a conclusion that sanctions were appropriate under the legal insufficiency or improper purpose standard and the issue raised in the complaint was one of first impression. **DeMent v. Nationwide Mut. Ins. Co., 598.**

POLICE OFFICERS

Execution of court order—good faith—no individual liability—The trial court properly granted summary judgment for Deputy Morton in his individual capacity on claims arising from plaintiff's arrest where Deputy Morton testified that he acted in good faith and without malice, and there is no contrary evidence in the record. **Thomas v. Sellers, 310.**

Suit in individual capacity—punitive damages—The trial court did not err by denying defendants' motion for summary judgment with respect to plaintiff's punitive damages claim against defendant officer in his individual capacity. **Thompson v. Town of Dallas, 651.**

PREMISES LIABILITY

Injury by power lines—contributory negligence—motion for directed verdict and judgment notwithstanding verdict properly denied—The trial court did not err by denying defendant's motions for a directed verdict and judgment notwithstanding the verdict on the issue of plaintiff's contributory negligence as a matter of law when plaintiff was injured by power lines while helping to construct a movie set on defendant landowner's property. **Martishius v. Carolco Studios, Inc., 216.**

PREMISES LIABILITY—Continued

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Slip and fall—detergent on floor—The trial court erred by granting summary judgment for defendant department store in a slip and fall action where plaintiff presented evidence that the liquid on which he slipped was detergent that had leaked from a container onto a shelf, down the side of the shelving structure, and onto the floor, and that the liquid on the tops and sides of the shelves had already dried and become pink at the time of plaintiff's fall. This evidence is sufficient to raise an inference that the detergent had been leaking for such a length of time that defendant should have known of its existence. **Furr v. K-Mart Corp., 325.**

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Child support—action to recover—terminated parental rights—The trial court did not err by denying DSS's motion for child support arrearages; the trial court was vested with considerable discretion to consider both law and equity in determining whether to grant DSS's motion and was not required to grant the motion simply because it was made within the statute of limitations. Moreover, the absence of the elements of equitable estoppel is not grounds for reversing the order. **Moore Cty. ex rel. Evans v. Brown, 692.**

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State employee—termination—due process—employee at will—An Agricultural Extension Agent was barred from bringing a due process claim arising from his discharge because he was an employee-at-will with no cognizable property right in his employment. **McCallum v. N.C. Coop. Extension Serv., 48.**

State employee—termination—insubordination—evidence insufficient—The trial court correctly reversed a decision of the State Personnel Commission, which had upheld the termination of petitioner's employment, where petitioner had worked as an habilitation assistant providing care in the home of a severely disabled client; petitioner complained of sexual harassment by the father of the client; respondent allowed petitioner to take vacation time and to care for the client in petitioner's own home while undertaking an investigation; respondent concluded that petitioner's allegations were without merit and asked petitioner to resume caring for the client in the client's home; and petitioner's employment was terminated when she refused. **Souther v. New River Area Mental Health, 1.**

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Common law—larceny from person—instruction on lesser included offense not required—The trial court did not err in a common law robbery case by denying defendant's request for a jury instruction on the lesser included offense of larceny from the person even though defendant contends the State failed to show defendant assaulted his victims. **State v. White, 201.**

Common law—requested instruction on assault and show of violence rule not required—The trial court did not commit reversible error in a common law robbery case by failing to submit defendant's requested instructions on "assault" and the "show of violence" rule. **State v. White, 201.**

Dangerous weapon—misdemeanor larceny—instruction on lesser included offense not required—The trial court did not err by giving instructions for the offense of robbery with a dangerous weapon under N.C.G.S. § 14-87(a) without instructing on the lesser included offense of misdemeanor larceny. **State v. Washington, 657.**

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Probationary teacher—contract not renewed—appeal—A claim against a board of education for lost wages, humiliation, and emotional distress by a probationary teacher whose contract was not renewed was properly before the superior court even though a statute set forth an appeal process because the alleged injury occurred in 1996 and the amendment creating the appeal process was in 1997. **Craig v. Asheville City Bd. of Educ., 518.**

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Investigatory stop—minimal intrusion for safety of officer—An officer's initial contact with defendant amounted to an investigatory stop rather than an arrest when the officer grabbed defendant's hands and placed them on the wall in order to conduct a pat-down search of defendant's outer clothing after defendant had just exited from a high drug area and defendant refused to stop at the officer's request. **State v. Roberts, 424.**

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Probable cause—informants' tips—The trial court did not err in a narcotics prosecution by denying defendant's motion to suppress evidence seized in a search based upon information from informants where the court found that the tips included a physical description of the perpetrators and their vehicle as well as the time and place the sale of the heroin was to occur; the informants had been reliable, providing information leading to multiple arrests and convictions; the informants had first-hand knowledge of the illegal drug activities involved in this case; and the reliability of the tips was established by police observations leading up to the arrest. **State v. Holmes, 614.**

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Flight by defendant—no good cause for continuance—The trial court did not err by conducting a sentencing hearing for second-degree murder after defendant fled the courthouse where the court suspended proceedings for several minutes while a sheriff searched for defendant, the bailiff informed the court that defendant's car was missing from the parking lot, and defense counsel responded affirmatively when asked if he was ready for the jury to return with the verdict. The record does not reflect a request by defense counsel to continue defendant's sentencing and, in any event, defendant's flight and refusal to participate does not constitute good cause. **State v. Miller, 435.**

Habitual felon—no underlying felony conviction—charge dismissed—An indictment charging defendant with being an habitual felon is dismissed and his conviction vacated where defendant's conviction of larceny by an employee was vacated and there is no felony conviction to which the habitual fellon indictment attaches. **State v. Frazier, 207.**

Habitual felon—stipulation to habitual felon status—issue not submitted to jury—no guilty plea—The trial court erred by sentencing defendant as an habitual felon in case number 98 CRS 10830 when this issue was not submitted to the jury and the record does not show defendant pleaded guilty to being an habitual felon under N.C.G.S. § 14-7.5. **State v. Gilmore, 465.**

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Motion to dismiss—sufficiency of evidence—The trial court did not err in a termination of parental rights case by denying respondent mother's motion to dismiss at the close of petitioner's evidence under N.C.G.S. § 1A-1, Rule 41(b). **In re Blackburn, 607.**

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Trade secrets—confidential cost history records—misappropriation—Plaintiff lawn care business's evidence in an unfair and deceptive trade practices action was sufficient to be submitted to the jury on the question of whether defendant former employee who had served as vice-president and general manager misappropriated plaintiff's confidential cost history records. **Byrd's Lawn & Landscaping, Inc. v. Smith, 371.**

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Not allowed to testify—suspicion of perjury—The trial court did not err in a prosecution for second-degree murder by not allowing a witness, Dillahunt, to testify on defendant's behalf where defense counsel did not include Dillahunt on his pretrial list of witnesses because he believed that Dillahunt would perjure himself and expressed these reservations to the trial court. Defendant failed to show that the trial court's denial of his motion to amend the witness list could not have been the result of a reasoned decision. **State v. Miller, 435.**

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Disability—operation of independent businesses—The Industrial Commission correctly found that plaintiff failed to sustain his burden of proving temporary total disability where plaintiff continued to operate three businesses following his injury and gross profits from those businesses expanded following the injury. **Sims v. Charmes/Arby's Roast Beef, 154.**

Failure to consider motion to submit newly discovered evidence—failure to rule on objection—The Industrial Commission abused its discretion in a workers' compensation case by failing to consider plaintiff employee's motion to submit newly discovered evidence and by failing to rule on plaintiff's objection to defendant employer's submission of new evidence at the hearing before the full Commission. **Jenkins v. Easco Aluminum Corp., 71.**

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Form 21 agreement for compensation cannot challenge any provision of the agreement unless it appears to the satisfaction of the Industrial Commission that there had been error due to fraud, misrepresentation, undue influence, or mutual mistake. **Clark v. Sanger Clinic, P.A., 350.**

Form 60—no presumption of disability—The Industrial Commission correctly determined that filing a Form 60 admitting compensability and liability for plaintiff's injury did not entitle plaintiff to a presumption of disability, as would have been the case had the parties filed a Form 21. **Sims v. Charmes/Arby's Roast Beef, 154.**

Industrial Commission—authority to sit en banc—N.C.G.S. § 97-85 does not provide the Industrial Commission with the express authority to sit en banc to hear cases, nor does it evince any intent by the legislature that the Commission do so. The Industrial Commission is an administrative agency of the State and has only the limited power and jurisdiction either expressly or impliedly granted by the legislature to enable it to administer the Workers' Compensation Act. **Sims v. Charmes/Arby's Roast Beef, 154.**

Jurisdiction—fraud in handling claim—The trial court did not err by granting dismissals under N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6) of actions alleging fraud, bad faith, unfair and deceptive practices, intentional infliction of emotional distress, and civil conspiracy arising from the handling of plaintiff's workers' compensation claim. The opinion (after a rehearing) in *Johnson v. First Union Corp.*, 131 N.C. App. 142, governs; the North Carolina Workers' Compensation Act gives the Industrial Commission exclusive jurisdiction over workers' compensation claims and all related matters, including issues such as those raised in the case at bar. **Deem v. Treadaway & Sons Painting and Wallcovering, Inc., 472.**

Jurisdiction—occupational disease—time for filing complaint—The Industrial Commission properly exercised jurisdiction in a workers' compensation case when it concluded that plaintiff employee timely filed his claim for an occupational disease under N.C.G.S. § 97-58 even though plaintiff was disabled as of 20 September 1992 but was not advised by a competent medical authority that his disease was a result of his occupation until April 1994, three months after plaintiff filed his claim. **Terrell v. Terminix Servs., Inc., 305.**

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Maximum weekly benefit—failure to adjust annually—due process—equal protection—N.C.G.S. § 97-29 does not violate the due process and equal protection clauses of the constitution although it fails to adjust a disabled employee's compensation rate to equal the maximum weekly benefit computed annually. **Clark v. Sanger Clinic, P.A., 350.**

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additional medical providers and treatment related to her stomach reduction surgery and the resulting complications in a workers' compensation case is reversed and remanded where the Commission did not state any reason for its ruling. **Clark v. Sanger Clinic, P.A., 350.**

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