NORTH CAROLINA COURT OF APPEALS REPORTS

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143 N.C. APP.

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

SIDNEY S. EAGLES, JR.

Judges

K. EDWARD GREENE
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JOHN M. TYSON
ROBIN E. HUDSON
ALBERT S. THOMAS, JR.
HUGH B. CAMPBELL, JR.
J. DOUGLAS McCULLOUGH
LORETTA COPELAND BIGGS
WANDA G. BRYANT[1]

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GERALD ARNOLD

Former Judges

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JACK COZORT
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JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES D. FULLER

1. Appointed by Governor Michael F. Easley and sworn in 1 March 2001.

Administrative Counsel
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Clerk
JOHN H. CONNELL

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DISTRICT	JUDGES	ADDRESS
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4B	Charles H. Henry	Jacksonville
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	Howard E. Manning, Jr.	Raleigh
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	JACK A. THOMPSON	Fayetteville
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16B	DEXTER BROOKS[1]	Pembroke
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	CHRISTOPHER COLLIER	Mooresville
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	LOTO GREENLEE CAVINESS	Marion
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JOHN B. LEWIS, JR.	Farmville
DONALD L. SMITH[7]	Raleigh

1. Deceased 5 March 2002.
2. Appointed and sworn in 26 February 2002 to fill vacancy left by Howard R. Greeson, Jr. who resigned 31 January 2002.
3. Appointed and sworn in 29 January 2002 to replace William Helms who retired 31 July 2001.
4. Appointed and sworn in 1 May 2002 to replace L. Oliver Noble, Jr. who retired 1 February 2002.
5. Appointed and sworn in 1 February 2002.
6. Appointed and sworn in 1 February 2002.
7. Currently assigned to Court of Appeals.

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	RUSSELL SHERRILL III	Raleigh
	CATHERINE C. STEVENS[7]	Gastonia

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WALTER P. HENDERSON	Trenton
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Appointed Chief Judge 1 April 2002 to replace Wayne G. Kimble, Jr who resigned as Chief Judge.
2. Appointed and sworn in 1 February 2002.
3. Appointed and sworn in 25 January 2002 to replace Robert Anderson who died 21 November 2001.
4. Appointed and sworn in 28 January 2002 to fill vacancy left by Anna M. Wagoner who resigned 16 November 2001.
5. Appointed and sworn in 25 April 2002 to replace Susan C. Taylor who was appointed to Superior Court.
6. Resigned 8 February 2002.
7. Appointed and sworn in 25 January 2002.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
JULIA S. WHITE

Deputy Chief of Staff
KRISTI J. HYMAN

Director of Administrative Services
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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

LEE CYCLE CENTER, INC. D/B/A WILSON CYCLE CENTER, AND LEE MOTOR COMPANY, INC., PLAINTIFFS v. WILSON CYCLE CENTER, INC., D/B/A CAROLINA MOTORSPORTS, MARK L. ELLIS, DANIEL ELLIS, AND CAROLINA MOTORSPORTS OF WILSON, INC., DEFENDANTS

No. COA00-382

(Filed 17 April 2001)

1. Pleadings— amending complaint to include additional plaintiff—motion to dismiss—breach of contract

The trial court did not abuse its discretion in a breach of contract action by allowing plaintiff Lee Cycle to amend its complaint to include Lee Motor as a plaintiff and by denying defendants' motion to dismiss for failure to state a claim, because: (1) plaintiff's failure to initially name Lee Motor as a plaintiff did not result in a lack of subject matter jurisdiction; and (2) plaintiffs were permitted to bring a breach of contract action since they have sufficiently alleged they were in privity of contract with defendants.

2. Contracts— breach—findings of fact—conclusions of law

The trial court did not err in a breach of contract action by its findings of fact and conclusions of law that defendants breached the agreement and damaged plaintiffs, because: (1) defendants continued to use the name "Wilson Cycle Center" in violation of the agreement; (2) defendants continued to advertise they sold motorcycles and watercraft in their Wilson store in violation of the agreement; and (3) defendants led plaintiffs to

believe they were delivering a pre-sold watercraft to one customer when defendants instead later sold it to a new customer for approximately $1,000.00 over what they indicated the first customer would be paying.

3. Contracts— breach—motion for judgment notwithstanding the verdict—sufficiency of evidence

The trial court did not err in a breach of contract action by denying defendants' motion for judgment notwithstanding the verdict, because plaintiffs presented substantial evidence that: (1) a contract existed between plaintiff Lee Motor and defendants, and plaintiff Lee Cycle was permitted to sue on this contract based on privity; and (2) defendants breached the agreement by using the name "Wilson Cycle Center," by advertising the sale of motorcycles and watercraft within the prohibited area, and by breaching the verbal agreement.

4. Contracts— breach—motion for new trial—sufficiency of evidence

The trial court did not abuse its discretion in a breach of contract action by denying defendants' motion for a new trial when the trial court did not commit any errors of law and plaintiffs presented substantial evidence that defendants breached the agreement.

5. Costs— attorney fees—breach of contract action—no statutory basis

The trial court erred in a breach of contract action by awarding plaintiffs attorney fees even though the parties drafted a contractual provision in their agreement providing that the breaching party pay attorney fees in the event the non-breaching party brings suit to enforce the agreement, because there is no express statutory authority permitting the award of attorney fees in breach of contract cases.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendants from judgment dated 27 September 1999 by Judge James E. Ragan, III in Wilson County Superior Court. Heard in the Court of Appeals 30 January 2001.

Farris and Farris, P.A., by Robert A. Farris, Jr. and Caroline F. Quinn, for plaintiff-appellees.

Narron & Holdford, P.A., by I. Joe Ivey, for defendant-appellants.

GREENE, Judge.

Wilson Cycle Center, Inc. (Wilson Cycle), d/b/a Carolina Motorsports, and Carolina Motorsports of Wilson, Inc. (collectively, Defendants) appeal a judgment dated 27 September 1999 awarding damages to Lee Cycle Center, Inc., (Lee Cycle) d/b/a Wilson Cycle Center (WCC), and Lee Motor Company, Inc. (Lee Motor) (collectively, Plaintiffs).[1]

Lee Cycle filed a complaint against Defendants alleging Defendants breached an October 1994 asset purchase agreement between Defendants and Lee Cycle (the agreement). Defendants filed an answer denying most of Lee Cycle's allegations, however, admitting it had entered into the agreement with Lee Cycle. On 19 March 1998, Lee Cycle filed a motion to amend its complaint to allow Lee Motor to intervene in the action. On 23 March 1998, Defendants filed a motion to dismiss Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6). The trial court, however, allowed Lee Cycle to amend its complaint and denied Defendants' motions, allowing Defendants thirty days to file responsive pleadings. Lee Cycle amended its complaint adding Lee Motor as a plaintiff and further alleged: John F. Lee (Lee) is the president and sole shareholder of Plaintiffs; Lee signed the agreement and promissory note on behalf of Lee Cycle; and Lee Cycle performed all the obligations to Defendants and received all the benefits from Defendants.

In a non-jury trial, Plaintiffs presented evidence that in October 1994, Lee, on behalf of Lee Motor, entered into the agreement with Wilson Cycle. Lee testified the agreement was entered into on behalf of Lee Motor because Lee Cycle was not incorporated at the time of the agreement. The agreement provided Lee Motor would pay $187,500.00 "plus the cost of the new motorcycle[,] ATV[,] personal watercraft[,] Yamaha generator and lawnmower inventory" to Wilson Cycle for:

1. We note Plaintiffs also filed suit against Mark L. Ellis (M. Ellis) and Daniel Ellis (D. Ellis), individually, however, the trial court dismissed Plaintiffs' action as to M. Ellis and D. Ellis.

(a) The trade name, "Wilson Cycle Center" or any similar sounding derivative thereof; and

(b) All new motorcycles; "all terrain vehicles" (Hereinafter "ATVs"): personal watercraft; Yamaha generators and lawnmowers; all new accessories and parts, as defined herein; any noncurrent parts and accessories, as defined herein (any used inventory is specifically excluded under this Agreement); and

. . . .

(d) Any used motorcycles, personal watercraft, ATV[]s, new or used mopeds as agreed upon between the parties . . . .

Wilson Cycle further agreed that Wilson Cycle, along with M. Ellis and D. Ellis, would not

directly or indirectly own, manage, operate, control, be employed by or be connected with, in any manner, with any new motorcycle or new personal watercraft sales dealer within a thirty-five (35) mile radius of the present location of [Wilson Cycle's] principal place of business for a period of five years.

The agreement also purported to "bind and inure to the benefit of the parties . . . and their respective heirs, successors and assigns." The parties also included an attorney's fees provision in the agreement obligating the breaching party pay "all costs, attorney[']s[] fees or other expenses arising out of any suit or action brought to enforce any rights conferred" under the agreement.

In January 1995, the parties finalized the agreement. On behalf of Lee Cycle, Lee executed a check as down payment on the agreement in the amount of $80,290.73 and signed a promissory note (the promissory note) for the remaining debt owed on the agreement to be paid in sixty monthly installments beginning 20 February 1996. On 22 March 1995, Plaintiffs contacted Defendants concerning Defendants' display of a sign with the name "Wilson Cycle Center" printed on it and a sign advertising Yamaha products for sale. After "several months" and "[s]everal repeated requests," Defendants removed the sign advertising Yamaha products.

In May 1995, Defendants contacted Plaintiffs about certain orders Defendants made prior to the agreement in which Defendants

had taken deposits on personal watercraft prior to receiving the personal watercraft from Sea-Doo. And, [Plaintiffs] made an

> agreement with [Defendants] (the verbal agreement), that [Defendants] could bring their customers that they had deposits from to [Plaintiffs'] store and [Plaintiffs] would deliver the units for them. But, [Defendants] would get the profits from the sale because [Defendants] had presold the units.
>
> As it turned out, . . . [Defendants] would come and get the units without bringing the customers, and for whatever various reasons, the customer was never available to come get the personal watercraft when [Defendants] would come and get it. And, [Plaintiffs], in good faith, agreed to let [Defendants] carry the personal watercrafts [Defendants] had deposits on, assuming that [Defendants] were selling [the watercrafts] to the people that [Defendants] had told [Plaintiffs] [Defendants] had deposits from.

Plaintiffs were told a particular watercraft was being sold to Richard Hurst (Hurst), and in fact, the same watercraft, with the same vehicle identification number, was sold to Jerry Temple (Temple) in Wilson on 4 June 1995. Defendants sold the watercraft to Temple for $6,201.00 after Plaintiffs believed they were selling it to Hurst for $4,666.50. Defendants also continued to use the trade name "Wilson Cycle Center" on receipts, business envelopes, and billing statements as late as June 1995. On 7 August 1995, Defendants officially changed the corporate name of Wilson Cycle Center, Inc. to Carolina Motorsports of Wilson, Inc.

In or about March 1996, Defendants opened a Carolina Motorsports in Kinston, located outside the geographic boundary established in the agreement, selling new and used motorcycles, personal watercraft, ATVs, boats, and other recreational vehicles. Defendants, however, continued to advertise Carolina Motorsports in Wilson as buying and selling motorcycles, without making any distinction as to whether the motorcycles were new or used.

In February 1997, Plaintiffs hired Ed Stutzman (Stutzman) of Invisible Audit to make a purchase from Carolina Motorsports in Wilson. Stutzman went to Carolina Motorsports in Wilson, "less than two miles from [WCC]." Stutzman asked M. Ellis if Defendants had any "new Yamaha[]s for sale" and M. Ellis informed him that Defendants "had a new one in the back which was being sent to [their] Kinston store." M. Ellis showed Stutzman a Yamaha Timberwolf all terrain vehicle and told Stutzman he was running a special on it for $3,750.00. Stutzman gave M. Ellis a deposit and M.

Ellis informed Stutzman that he would have to deliver the vehicle to Stutzman in Greenville because Carolina Motorsports in Wilson had "sold out," and, thus, "the paper work for the (new) Timberwolf would have to be written up at the Kinston store." M. Ellis wrote Stutzman a receipt for the deposit and "proceeded to cross out the name, address and phone number at the top of the receipt which read[] 'Wilson Cycle Center, Inc., P.O. Box 4445, 237-7076, Wilson, NC 27893' with a permanent black marker." M. Ellis "then stamped in red ink 'Carolina Motorsports' under the name, address and phone number he had crossed out. He then wrote Kinston in black ink to the right of the Carolina Motorsports stamp." Later that day, Stutzman went back to Carolina Motorsports in Wilson and paid the rest of the purchase price for the Timberwolf. M. Ellis wrote Stutzman a receipt and again marked through the business name, address, and telephone number and wrote in "Carolina Motorsports Kinston, NC." M. Ellis, however, told Stutzman he could not take delivery of the vehicle at the Wilson store and instead allowed Stutzman to take delivery of the Timberwolf 17.4 miles from Carolina Motorsports in Wilson. A week later, Stutzman received an invoice and training certificate from Defendants' Kinston store.

At the close of Plaintiffs' evidence and the close of all the evidence, Defendants renewed their 12(b)(6) motion alleging Plaintiffs failed to state a cause of action based on a lack of standing or subject matter jurisdiction and made motions for directed verdict. The trial court denied Defendants' motions. On 15 September 1999, Plaintiffs' attorney submitted an affidavit stating he had expended about 129 hours on this case and "[b]ased on the time, effort and expertise required in connection with this matter, it is [his] belief that a fee in the amount of $30,000.00 would be fair and reasonable, plus costs." The trial court found as fact:

> that Plaintiff Lee Motor . . . entered into the Purchase Agreement with [WCC] . . . ; that . . . Lee Cycle . . . was and is the beneficiary and Obligor of the Promissory Note supporting [the] [a]greement . . . .
>
> . . . .
>
> . . . [I]n addition to the . . . [a]greement, the parties entered into [the] verbal agreement whereby Plaintiff[s] [were] to deliver to Defendant[s] certain pre-sold Sea Doo personal water craft to allow Defendant[s] to consumate said sales and Plaintiff[s] did in fact deliver to Defendant[s] a 1995 Sea Doo bearing serial number

ZZNA4015L495 on or about May 6, 1995, for sale to . . . Hurst; but that Defendant[s], instead sold said vehicle to . . . Temple on or about June 4, 1995, at a profit of $1,000.00; and that

Fifth, Defendants have further breached the . . . agreement with Plaintiffs as follows:

(a) Defendants continue to use the name "Wilson Cycle Center";

(b) Defendants competed with Plaintiff[s] in violation of the covenant not to compete, particularly maintaining a business within thirty-five (35) miles of Defendants location on Highway 301 North of Wilson, North Carolina, which was, for all intents and purposes an extension of the Kinston location of the business . . . .

(1) New parts were kept and sold in the Wilson store;

(2) A new motorcycle (Big Dog) was delivered to the Wilson store and kept on premises;

(3) Other Yamaha products (ATV[s]) were sold from the Wilson location;

(4) Radio and newspaper ads advertise the Wilson store;

(5) Both the Kinston and Wilson locations were operated under the same corporate name; and that

Sixth, [the trial court] finds a[s] fact that ATV[]s are not includ[ed] within the definition of "motorcycle[,]"[] and the only advertising which violated the agreement between the parties [were] ads in the Wilson market which advertised the Wilson store as a sight for sales of either new product or ads which did not designate whether product was new or used . . . .

The trial court concluded as a matter of law that Defendants had breached the agreement with Plaintiffs and awarded Plaintiffs $10.00 as damages and $22,575.00 for attorney's fees for breach of the agreement. The trial court also concluded Defendants breached the verbal agreement and awarded Plaintiffs $1,000.00 as compensatory damages for breach of the verbal agreement. Defendants moved for a judgment notwithstanding the verdict and for a new trial. The trial court, however, denied Defendants' motions.

The issues are whether: (I) the trial court abused its discretion in permitting Lee Cycle to amend its complaint; (II) the trial court erred by concluding Defendants breached the agreement; (III) the trial court erred in denying Defendants' motion for judgment notwithstanding the verdict; (IV) the trial court erred in denying Defendants' motion for a new trial; and (V) there was a statutory basis for the trial court's award of attorney's fees to Plaintiffs.

I

[1] Defendants argue the trial court erred in allowing Lee Cycle to amend its complaint to include Lee Motor as a plaintiff. In support of this argument, Defendants contend: (A) Lee Cycle's failure to initially name Lee Motor as a plaintiff resulted in the lack of subject matter jurisdiction and (B) Lee Cycle was not permitted to bring a breach of contract action because Lee Cycle was not in privity of contract with Defendants. We disagree.

A

Subject matter jurisdiction

This Court has held that a plaintiff's failure to join a party does not result in "a lack of jurisdiction over the subject matter of the proceeding." *Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 573, 344 S.E.2d 789, 793, *disc. review denied*, 318 N.C. 418, 349 S.E.2d 601 (1986). A plaintiff is permitted to request to amend a complaint to add a party, *Goodrich v. Rice*, 75 N.C. App. 530, 533-34, 331 S.E.2d 195, 197 (1985), and a trial court's ruling on the plaintiff's motion to amend its complaint will not be disturbed on appeal, absent an abuse of discretion, *Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 247 (2000). In this case, despite Lee Cycle's failure to name Lee Motor as a plaintiff, the trial court had subject matter jurisdiction over the action. We cannot hold the trial court abused its discretion by permitting Lee Cycle to amend its complaint and add Lee Motor as a plaintiff.

B

Privity of contract

To withstand a motion to dismiss for failure to state a claim in a breach of contract action, a plaintiff's allegations must either show it was in privity of contract, or it is a direct beneficiary of the contract. *See Chandler v. Jones*, 173 N.C. 427, 429, 92 S.E. 145, 146 (1917). Privity has been defined as " 'a [d]erivative interest founded on, or

growing out of, contract, connection, or bond of union between parties; mutuality of interest.' " *Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 15, 472 S.E.2d 358, 366 (1996) (quoting *Black's Law Dictionary* 1199 (6th ed. 1990)), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172 (1997). If a plaintiff is an intended beneficiary to a contract, the law implies privity of contract. *Id.*

In this case, viewing Plaintiffs' allegations in the light most favorable to Plaintiffs, *see Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986) (in ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, a trial court must determine "whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiffs, give rise to a claim for relief on any theory"), *disc. review denied*, 318 N.C. 694, 351 S.E.2d 746 (1987), Plaintiffs have sufficiently alleged privity of contract: Plaintiffs' complaint alleges Lee Cycle and Lee Motor are owned by the same sole shareholder; Lee, president of Lee Cycle and Lee Motor, signed the agreement and executed the promissory note; and Lee Cycle performed all the obligations of the agreement and received all the benefits from the seller. These allegations are sufficient to establish "a derivative interest founded on, or growing out of, contract, connection, or bond of union between the parties." Accordingly, the trial court properly denied Defendants' motion to dismiss for failure to state a claim.

II

[2] Defendants argue the trial court's findings of fact are not supported by the evidence and do not support the conclusions of law that Defendants breached the agreement and damaged Plaintiffs. We disagree.

Appellate review of findings of fact "made by a trial judge, without a jury, is limited to . . . whether there is competent evidence to support the findings of fact." *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996). A trial court's conclusions of law, however, are reviewable *de novo* on appeal. *Id.* at 336, 477 S.E.2d at 215. "For a breach of contract the injured party is entitled as compensation therefor[e] to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed." *Perfecting Serv. Co. v. Product Dev. & Sales Co.*, 259 N.C. 400, 415, 131 S.E.2d 9, 21 (1963). Additionally, nominal damages are allowed where a legal right has been invaded but there has been no substantial loss or in-

jury to be compensated. *Potts v. Howser*, 274 N.C. 49, 61, 161 S.E.2d 737, 747 (1968).

In this case, there is competent evidence to support the trial court's findings of fact Defendants breached both the agreement and the verbal agreement. Evidence presented at trial shows: Defendants continued to use the name "Wilson Cycle Center"; Defendants continued to advertise they sold motorcycles and watercraft in their Wilson store; and Defendants led Plaintiffs to believe they were delivering a pre-sold Sea Doo watercraft to Hurst when Defendants instead later sold it to Temple for approximately $1,000.00 over what they indicated Hurst would be paying. Accordingly, $1,000.00 in damages to Plaintiffs puts the parties in the position they would have been in had the verbal agreement not been breached. In addition, the trial court did not err in awarding Plaintiffs $10.00 in nominal damages. The trial court's findings of facts establish Defendants breached the agreement, thus, Plaintiffs were entitled to some damages, despite not obtaining substantial injury as a result of the breach. Therefore, the trial court's findings of fact are supported by competent evidence and support the trial court's conclusions of law.

III

[3] Defendants next argue the trial court erred in denying Defendants' motion for judgment notwithstanding the verdict. We disagree.

In order to prevail on a claim for breach of contract, a plaintiff's evidence must show a valid contract existed between the parties, the defendant breached the terms of the contract, the facts constituting the breach, and damages resulted from the breach. *Claggett v. Wake Forest University*, 126 N.C. App. 602, 608, 486 S.E.2d. 443, 446 (1997).

In this case, viewing the evidence in the light most favorable to Plaintiffs, *see Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986) (on a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the non-moving party), Plaintiffs produced substantial evidence to support every element of a breach of contract claim, *see Cobb v. Reitter*, 105 N.C. App. 218, 220, 412 S.E.2d 110, 111 (1992) (moving party entitled to judgment notwithstanding the verdict only if the non-moving party is unable to produce substantial evidence of the elements of its claim for relief). Plaintiffs established a contract existed between Lee

Motor and Defendants and we have stated in Part I of this opinion that Lee Cycle was permitted to sue on this contract. Furthermore, evidence existed Defendants breached the agreement by using the name "Wilson Cycle Center," by advertising the sale of motorcycles and watercraft within the prohibited area, and by breaching the verbal agreement. Accordingly, this evidence is substantial evidence Defendants breached the agreement with Plaintiffs. *See id.* (substantial evidence is evidence a reasonable mind might accept to support a conclusion). The trial court, therefore, did not err in denying Defendants' motion for judgment notwithstanding the verdict.

IV

[4] Defendants next argue the trial court erred in denying their 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 that errors of law occurred at trial or 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 I, II, and III of this opinion that the trial court did not commit any errors of law and Plaintiffs presented substantial evidence Defendants breached the agreement, we cannot say, based on this record, the trial court's decision not to grant Defendants a new trial was an abuse of discretion or resulted in a miscarriage of justice.

V

[5] Defendants finally argue the trial court erred in awarding Plaintiffs attorney's fees without a statutory basis for such an award. We agree.

It is well established in this State that "[e]ven in the face of a carefully drafted contractual provision indemnifying a party for such attorney[']s[] fees as may be necessitated by a successful action on the contract itself, our courts have consistently refused to sustain such an award absent statutory authority therefor." *Stillwell Enterprises, Inc. v. Interstate Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814-15 (1980);[2] *see Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 167, 510 S.E.2d 690, 695, *disc.*

2. Our Supreme Court has carved out an exception to this general rule, permitting the enforcement of attorney's fees provisions contained in separation agreements. *Bromhal v. Stott*, 341 N.C. 702, 704, 462 S.E.2d 219, 221 (1995).

review denied and appeal dismissed, 350 N.C. 379, 536 S.E.2d 70 (1999) (successful litigant cannot recover attorney's fees as costs absent an express statutory basis for such an award). In this case, despite a contractual provision in the agreement providing the breaching party pay attorney's fees in the event the non-breaching party brings suit to enforce the agreement, there is no express statutory authority permitting the award of attorney's fees in breach of contract cases.

Plaintiffs first contend N.C. Gen. Stat. § 6-21.2 provides the statutory basis for the trial court's award of attorney's fees. We disagree. This section provides:

> Obligations to pay attorney[']s[] fees upon any note, conditional sale contract or other evidence of indebtedness . . . shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected . . . after maturity . . . .

N.C.G.S. § 6-21.2 (1999). Thus, section 6-21.2 allows (1) the party owed the debt (2) to recover attorney's fees (3) after the debt has matured (4) provided it is written in the note, conditional sale contract, or other evidence of indebtedness. N.C.G.S. § 6-21.2; *see First Citizens Bank & Tr. Co. v. 4325 Park Rd. Assocs., Ltd.*, 133 N.C. App. 153, 157, 515 S.E.2d 51, 54 (attorney's fees in the event of default by the maker of a promissory note), *disc. review denied*, 350 N.C. 829, 539 S.E.2d 284 (1999); *RC Associates v. Regency Ventures, Inc.*, 111 N.C. App. 367, 373-74, 432 S.E.2d 394, 398 (1993) (one purpose of N.C. Gen. Stat. § 6-21.2 "is to allow the debtor a last chance to pay the outstanding balance to avoid litigation and the award of attorney's fees").

In this case, the parties owed the debt, Defendants, are not seeking to recover attorney's fees. In any event, the debt has not matured. Accordingly, section 6-21.2 cannot form the statutory basis to award Plaintiffs attorney's fees, thus, the trial court erred in awarding Plaintiffs attorney's fees.

Plaintiffs alternatively contend that N.C. Gen. Stat. § 6-20 provides the statutory basis for the attorney's fees award. We disagree. Section 6-20 provides for the trial court to allow "costs" in its discretion. N.C.G.S. § 6-20 (1999). Assessable costs in civil cases are limited to those items listed in section 7A-305. *Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 474, 500 S.E.2d 732, 738, *reversed on other grounds*,

351 N.C. 27, 519 S.E.2d 308 (1999). Attorney's fees are permitted under section 7A-305 only "as provided by law." N.C.G.S. § 7A-305(d) (1999); *see Records v. Tape Corp. and Broadcasting System v. Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602 (attorney's fees "are not recoverable . . . as an item . . . of costs, absent express statutory authority for fixing and awarding them"), *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973). Thus, section 6-20 does not authorize a trial court to include attorney's fees as a part of the costs awarded under that section, unless specifically permitted by another statute.

Affirmed in part, and reversed in part.

Judge JOHN concurs.

Judge TYSON concurs in part and dissents in part with separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

I concur in parts I through IV of the majority's opinion. I disagree with the majority's conclusion that plaintiffs are not entitled to recover attorney's fees under either G.S. § 6-21.2 or G.S. § 6-20. Accordingly, I respectfully dissent from part V of the majority's opinion.

As the majority's opinion notes, G.S. § 6-21.2 provides:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness . . . shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected . . . after maturity . . . .

N.C. Gen. Stat. § 6-21.2 (1999) (emphasis supplied). The majority's opinion concludes that G.S. § 6-21.2 does not provide statutory authority for plaintiffs to recover attorney's fees because "the party owed the debt, Defendant, is not seeking to recover attorney's fees." I disagree with this analysis.

The phrase "other evidence of indebtedness" contained in G.S. § 6-21.2 has been defined by our Supreme Court to include "any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obliga-

tion to pay money." *Stillwell Enterprises, Inc. v. Interstate Equipment Co.*, 300 N.C. 286, 294, 266 S.E.2d 812, 817 (1980). The Supreme Court stated that such a definition "does no violence to any of the statute's specific provisions and accords well with its general purpose to validate a debt collection remedy expressly agreed upon by contracting parties." *Id.* at 294, 266 S.E.2d 817-18 (emphasis supplied).

In *Stillwell*, the Supreme Court reversed this Court's holding that G.S. § 6-21.2 was inapplicable, and that an award of attorney's fees arising out of a lease dispute was improper. *Id.* at 295, 266 S.E.2d at 818. The Court noted that the lease agreement at issue contained a legally enforceable obligation by the plaintiff-lessee to remit rental payments to the defendant-lessor in exchange for use of property. *Id.* at 294, 266 S.E.2d at 818. Holding that such an agreement "is obviously an 'evidence of indebtedness,' " the Court held: "we see no reason why the obligation by plaintiff to pay attorneys' fees incurred by defendant upon collection of the debts arising from the contract itself should not be enforced to the extent allowed by G.S. § 6-21.2." *Id.* at 294-95, 266 S.E.2d at 818 (emphasis supplied).

This Court has also held that "evidence of indebtedness" under G.S. § 6-21.2 applies to a stock purchase agreement. *Nucor Corp. v. General Bearing Corp.*, 103 N.C. App. 518, 520, 405 S.E.2d 776, 777 (1991), *rev'd on other grounds*, 333 N.C. 148, 423 S.E.2d 747 (1992) (holding G.S. § 6-21.2 authorizes award of attorney's fees under agreement obligating the defendant to convey to the plaintiff outstanding stock in defendant's corporation and to pay additional fees, where such agreement was clearly evidence of indebtedness).

Paragraph 13 of the Asset Purchase Agreement ("Agreement") in this case expressly requires the parties to indemnify each other "for any damages incurred . . . as a result of the breach of any warranty . . . including all costs, attorneys' fees or other expenses arising out of any suit or action brought to enforce any rights conferred hereunder." (emphasis supplied). Paragraph 13 of the Agreement further provides:

> In the event of any violation by the Seller of any representations and/or warranties set forth herein, including but not limited to the provisions of Paragraph 11 hereof ["Covenant Not to Compete"], then Purchaser shall have the right to offset any payments that may be due the Seller pursuant to the provisions hereof in the

amount by which Purchaser has been damaged by any such breach.

(emphasis supplied).

The $1,010.00 awarded plaintiffs by the trial court is "evidence of indebtedness." The Agreement provided for payments over and above the promissory note. Paragraph 13 of the Agreement also provides plaintiffs the right to offset the amount owed under the agreement by the $1,010.00 awarded. Plaintiffs sought such an offset and cancellation of the outstanding notes in their complaint. Plaintiffs are creditors of defendants on a "matured" debt. Thus, consistent with the Supreme Court's holding in *Stillwell*, G.S. § 6-21.2 provides authority for plaintiffs to recover the attorney's fees "upon collection of the debts arising from the contract itself." *Stillwell* at 294-95, 266 S.E.2d at 818 (emphasis supplied).

The trial court's award of attorney's fees is also authorized by G.S. § 6-20. G.S. § 6-20 provides that, "[i]n other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law." N.C. Gen. Stat. § 6-20 (1999). A trial court may, in its discretion, award attorney's fees under G.S. § 6-20 if "just and equitable." *Batcheldor v. Boyd*, 119 N.C. App. 204, 208, 458 S.E.2d 1, 3-4, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 753 (1995) (citing *Wachovia Bank & Trust Co. v. Dodson*, 260 N.C. 22, 131 S.E.2d 875 (1963)); *see also, Alsup v. Pitman*, 98 N.C. App. 389, 390, 390 S.E.2d 750, 751 (1990) (recoverable costs under G.S. § 6-20 may, in trial court's discretion, include expenses for depositions).

In suits in equity, the allowance of costs rests in the discretion of the court. *Worthy v. Brower*, 93 N.C. 492 (1885). Under G.S. § 6-20, the trial court's allowance of attorney's fees as a part of costs is within the court's sound discretion and "will not be disturbed on appeal absent an abuse of discretion." *Wachovia Bank of North Carolina, N.A. v. Bob Dunn Jaguar, Inc.*, 117 N.C. App. 165, 175, 450 S.E.2d 527, 533 (1994) (citation omitted).

In this case, plaintiffs sought the equitable remedies of (1) cancellation of the Agreement, (2) prohibiting defendants from collecting any sums due under the Agreement, and (3) returning to plaintiffs any monies paid under the Agreement. The trial court ordered that defendants be "restrained from any further violations of the Agreement." This remedy is equitable in nature. Thus, under G.S. § 6-20, the trial court had discretion to award plaintiffs costs, in-

cluding attorney's fees. Defendants present no evidence of an abuse of discretion in the trial court's award. I would affirm the trial court's award of attorney's fees under either G.S. § 6-21.2 or G.S. § 6-20. I, therefore, respectfully dissent from part V of the majority's opinion.

IN THE MATTER OF MICAH STORM DULA, A MINOR CHILD

No. COA00-391

(Filed 17 April 2001)

1. Termination of Parental Rights— Permanency Planning order—child placed outside of home for 19 months

A Permanency Planning order continuing custody of a child with the Caldwell County Department of Social Services was reversed and remanded where the child had been in the custody of DSS and in placement outside the home for 19 months and the court did not direct DSS to initiate termination of parental rights proceedings or make findings as permitted by N.C.G.S. § 7B-907(d)(1-3).

2. Termination of Parental Rights— efforts to reunite parent and child—findings

The trial court had no obligation to further attempt to reunite a child in DSS custody with his parent and was obligated to locate permanent placement outside the parent's home where the court found that DSS had made numerous efforts to prevent or eliminate the need for placement outside the home.

Judge TYSON concurring in part and dissenting in part.

Appeal by respondent mother from order filed 10 January 2000 by Judge Jonathan L. Jones in Caldwell County District Court. Heard in the Court of Appeals 30 January 2001.

Elizabeth M. Spillman for petitioner-appellee.

Austen D. Jud for respondent-appellant.

No brief filed by attorney advocate.

GREENE, Judge.

Davida Elaine Dula (Respondent) appeals a "Permanency Planning Juvenile Review" order filed 10 January 2000 continuing custody of Respondent's child with the Caldwell County Department of Social Services (DSS).

The child was originally removed from Respondent's custody by DSS on 1 May 1998, after an investigation by DSS of a report of alleged child abuse. A non-secure custody order was filed by the trial court on 21 May 1998 placing custody with DSS and that order was continued in effect until the trial on the merits of the alleged abuse. On 23 October 1998, the child was adjudicated by the trial court to be an abused child within the meaning of section 7A-517(1).[1] On that same day, the trial court entered a "Juvenile Disposition Order" continuing custody of the child with DSS and found that "reasonable efforts have been made by [DSS] to prevent or eliminate the need for removal of the child from [Respondent], but removal was necessary to protect the safety and health of the child." The matter was reviewed again on 18 March 1999 and custody remained with DSS. On 12 May 1999, the trial court entered a "Permanency Planning" order directing placement of the child to continue with DSS and indicated the "permanent goal in this case shall be one of reunification [of the child] with the mother." The trial court found that DSS had "exercised reasonable and diligent efforts to prevent the need for removal."

On 10 January 2000, the trial court filed its second "Permanency Planning Juvenile Review" order in response to a hearing held on 1 December 1999. In this order, the trial court found in pertinent part that "[t]here are no relatives of the [child] who are willing and able to provide proper care and supervision of the [child] in a safe home," DSS has "made reasonable efforts to prevent or eliminate the need for placement of the juvenile," and that a return of the child to Respondent "would be an extremely dangerous action." The trial court then ordered custody of the child to remain with DSS, "reunification efforts . . . [to] cease," and a plan of adoption for the child to "be pursued" by DSS.

The issues are whether: (I) the 10 January 2000 Permanency Planning order must be reversed because the trial court did not com-

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1. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-101(1) (1999).

ply with the mandates of N.C. Gen. Stat. § 7B-907(d); and (II) the department of social services is required to continue reasonable efforts to reunite the parent and child after the child has been in a placement outside the home for 15 of the 22 months preceding a section 7B-907 hearing.

I

[1] A trial court is required to conduct a permanency planning hearing in every case where custody of a child has been removed from a parent. N.C.G.S. § 7B-907(a) (1999).[2] This hearing must be conducted "within 12 months after the date of the initial order removing custody." *Id.* The purpose of the hearing is to "develop a plan to achieve a safe, *permanent* home for the juvenile within a reasonable period of time." *Id.* (emphasis added). If the juvenile has been in the custody of a county department of social services and in a placement outside the home for "15 of the most recent 22 months" preceding the section 7B-907 hearing, the trial court is required, unless certain findings are made,[3] to "order the director of the department of social services to initiate a proceeding to terminate the parental rights of the parent." N.C.G.S. § 7B-907(d) (1999).

In this case, at the time of the 1 December 1999 permanency planning hearing, the child had been in the custody of DSS and in placement outside the home for 19 months (1 May 1998 through 1 December 1999) of the most recent 22 months. The trial court, therefore, was required to either direct DSS to initiate termination of parental rights proceedings against Respondent or make findings as permitted by section 7B-907(d)(1-3). The trial court did neither.[4] Accordingly, the 10 January 2000 order must be reversed and remanded for entry of an order consistent with the mandate of section 7B-907(d).

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2. This statute applies to all abuse, neglect, and dependency review hearings commenced on or after 1 January 1999 and, thus, applies to this case.

3. Findings which will relieve the trial court of its section 7B-907(d) obligation are: "The permanent plan for the juvenile is guardianship or custody with a relative or some other suitable person"; "the filing of a petition for termination of parental rights is not in the best interests of the child"; or "[t]he department of social services has not provided the juvenile's family with such services as the department deems necessary, when reasonable efforts are still required to enable the juvenile's return to a safe home." N.C.G.S. § 7B-907(d)(1-3) (1999).

4. The order of the trial court directing DSS to pursue a plan of adoption is not sufficient compliance with section 7B-907(d).

II

[2] Respondent argues the 10 January 2000 order must be reversed because the trial court ordered all parent-child reunification efforts cease. This argument must be overruled.

Any order placing or continuing the placement of a child in the custody of the department of social services must include findings that the department of social services "has made reasonable efforts to prevent or eliminate the need for placement of the juvenile." N.C.G.S. § 7B-507(a)(2) (1999). The department of social services can be relieved of this obligation if the trial court enters certain findings of fact consistent with section 7B-507(b). N.C.G.S. § 7B-507 (1999).

The department of social services can also be relieved of the obligation of making reasonable efforts if a child has been in placement outside the home for the period of time and under the conditions referenced in section 7B-907(d). If the department of social services has made unsuccessful reasonable efforts during the 15 months the child has been in placement outside the home, pursuant to section 7B-907(b), the efforts of the department of social services and the courts must be redirected to developing a permanent placement for that child *outside* the home, not parent-child reunification. Indeed, reasonable efforts, by definition, "means the diligent and timely use of permanency planning services by a department of social services to develop and implement a permanent plan for the juvenile," when a court "determines that the juvenile is not to be returned home." N.C.G.S. § 7B-101(18) (1999).

In this case, the trial court made numerous findings in its orders entered prior to 10 January 2000 and in the 10 January 2000 order that DSS had made "reasonable efforts to prevent or eliminate the need for placement of the juvenile" outside the home. Respondent does not assign error to those findings. Thus, the trial court, at the permanency planning hearing on 1 December 1999, had no obligation to further attempt to reunify the parent and child and, indeed, had the obligation to locate permanent placement for the child outside of Respondent's home.

Respondent raises an additional assignment of error which we need not address in light of our resolution of the issues presented. We note, however, there is merit to Respondent's argument the trial court erred in permitting Tamara Hayman to testify with regard to statements made to her by Respondent's aunt, who did not testify,

concerning Respondent's treatment of the child. This testimony constituted inadmissible hearsay, *see* N.C.G.S. § 8C-1, Rule 802 (1999), and on remand should not be considered by the trial court.

Reversed and remanded.

Judge JOHN concurs.

Judge TYSON concurs in part and dissents in part with separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

I concur with the majority's opinion that the trial court's order ceasing reunification efforts must be reversed. I would remand this matter for further proceedings toward reuniting Micah with his mother, consistent with Micah's best interest, in light of the overriding purpose of the Juvenile Code toward reunification of a child with the natural parent(s). I dissent as to the majority opinion's instructions to the trial court on remand. I agree with the majority's opinion that in making appropriate findings on remand, the trial court may not consider the hearsay testimony of DSS counselor, Tamara Hayman, of conversations with Pam Trivette, Ms. Dula's aunt.

The pertinent facts are as follows. Respondent, Davida Dula, is the single mother of Micah Storm Dula, a minor child born on 3 January 1998, who is the subject of this action. Ms. Dula was eighteen years-old in June 1998 when this action was instituted.

On Saturday, 25 April 1998, during the evening, Ms. Dula took Micah to Valdese General Hospital in Valdese, North Carolina, complaining that Micah was crying continuously. Ms. Dula and Micah remained at the hospital for approximately six and one-half hours while doctors performed blood work and x-rays on Micah. Dr. Stanley Yuan treated and released Micah that evening, prescribing antibiotics and pain medication. Ms. Dula and Micah arrived home after midnight on Sunday, 26 April 1998.

Later that morning, Ms. Dula testified that she changed Micah's diaper at approximately 5:00 a.m. and noticed his right leg was swelling. Ms. Dula placed Micah into the bed with her, and the two slept until approximately 11:15 a.m when Ms. Dula's boyfriend, James Kaylor, returned. Ms. Dula stated that Micah's leg continued to swell since earlier that morning. Ms. Dula wanted to return Micah to

Valdese Hospital, but her family advised her to take Micah to Grace Hospital in Morganton, North Carolina.

Ms. Dula brought Micah to Grace Hospital on Sunday afternoon, 26 April 1998. Micah was suffering from a swollen right leg. Dr. Myron Smith examined Micah at Grace Hospital. Dr. Smith found that Micah's right femur was broken, and placed a cast on the leg.

Ms. Dula informed doctors that she had taken Micah to Valdese Hospital the previous evening. Ms. Dula told Dr. Smith that the x-ray technician at Valdese Hospital was a large man, who had picked Micah up by one arm and one leg and placed him on the x-ray table. Ms. Dula testified that she heard Micah scream while he was in the x-ray room.

While Micah was being treated at Grace Hospital, doctors at Valdese Hospital interpreted the results of Micah's x-rays taken the previous evening, 25 April 1998. The x-rays revealed healing 5th through 7th right rib fractures, with a possible fracture of the left 6th rib. Dr. Yuan, at Valdese Hospital, later stated that if Micah's leg had been broken the previous evening, it would have shown in x-rays and in the examination. Dr. Yuan further stated that he did not detect any swelling in Micah's leg, or that Micah was in any significant pain. Grace Hospital reported the incident to petitioner, Caldwell County Department of Social Services ("DSS").

Ms. Dula was interviewed at Grace Hospital by DSS employee Tamara Hayman, and Jim Bryant, of the Caldwell County Sheriff's Department. Ms. Dula stated that she was Micah's primary caregiver, although she lived with her boyfriend, James Kaylor. Ms. Dula explained the child's rib injuries by stating that Micah sometimes slept in her bed, and that "she may have bumped him or he could have rolled over on a pacifier or bottle."

Mr. Kaylor stated to Hayman and Bryant that he left the house at 9:00 a.m. on Sunday, 26 April 1998, to retrieve his own son. Upon returning home at approximately 11:15 a.m., Mr. Kaylor stated that he also noticed Micah's right leg was swollen and informed Ms. Dula. The two decided to take Micah to the hospital.

On Monday, 27 April 1998, Ms. Dula was further interviewed by Natalie Adams of the Burke County Department of Social Services. Ms. Dula told Ms. Adams that her aunt, Pam Trivette, had babysat Micah on Friday, 24 April 1998. Ms. Dula stated that she did not believe her aunt had harmed Micah. Ms. Dula told Ms. Adams that she

believed the right leg fracture was caused by the rough treatment of Micah by the x-ray technician at Valdese Hospital.

Ms. Dula was again interviewed by Tamara Hayman of Caldwell County DSS on Wednesday, 29 April 1998. She told Ms. Hayman that the only place Micah's leg could have been broken was in the x-ray room at Valdese Hospital. Ms. Dula explained the child's broken ribs by stating that she may have bumped him, or that he could have rolled over on a pacifier or bottle. Ms. Dula's mother, Jewel King, told Ms. Hayman that Pam Trivette, Ms. Dula's aunt, babysat Micah from Thursday, 24 April 1998, to Friday, 25 April 1998.

On 1 May 1998, DSS filed a petition alleging that Micah was an abused and neglected juvenile. DSS obtained non-secure custody of Micah on 1 May 1998. A guardian ad litem and attorney advocate were appointed on 4 May 1998. On 6 May 1998, Ms. Dula consented to DSS' non-secure custody of Micah. A trial on the merits was scheduled for 3 June 1998.

On 28 May 1998, Micah was examined by Dr. Vandana Shashi of Brenner Children's Hospital at Wake Forest University in Winston-Salem, North Carolina. Dr. Shashi's skeletal survey revealed healing bilateral rib fractures of the right lateral 3rd through 6th ribs, and left lateral 7th and 8th ribs. The survey also revealed a healing fracture of the mid shaft of the right femur.

Ms. Dula filed a motion to strike and a motion to dismiss the petition on 28 May 1998. On 3 June 1998, the trial court ordered that the hearing on non-secure custody be continued until 15 July 1998, due to the trial judge's need for recusal. The court further ordered that a hearing on Ms. Dula's motions would proceed on 10 June 1998. The trial court granted Ms. Dula's motions to strike and dismiss on 10 June 1998. The trial court dissolved the non-secure custody order, but orally continued non-secure custody with DSS with Ms. Dula's consent.

On 24 June 1998, DSS filed a second petition alleging that Micah was an abused and neglected juvenile. The trial court ordered that Micah remain in DSS custody on 26 August 1998. A hearing was set for 7 October 1998. Following the hearing, the trial court entered an order on that date adjudicating Micah to be an abused juvenile. On 29 October 1998, the trial court filed a juvenile disposition order in which it held that Micah's removal from Ms. Dula's custody was necessary for his safety and well-being. The trial court incorporated the

findings of the guardian ad litem, various disposition reports, and psychological evaluations of Ms. Dula. The trial court made no finding that Ms. Dula had injured Micah.

The trial court ordered that Micah continue to remain in non-secure custody of DSS, but held that the goal of the case would be reunification with the mother, Ms. Dula. In order to achieve the goal, the trial court required Ms. Dula to successfully complete a DSS Family Services Case Plan ("Case Plan") toward reunification. The Case Plan required Ms. Dula to perform such tasks as: (1) being honest and cooperative with DSS and the guardian ad litem, (2) completing a nurturing class program, (3) submitting to a psychological evaluation, (4) maintaining employment, and (5) maintaining a suitable household. The Case Plan also stated that "[s]hould [Ms. Dula] be unable to give an explanation of her son's injuries that is consistent with the medical findings, she should be able to understand how such injuries could occur and ways to insure that such injuries might not occur again."

Following another continuance on 7 January 1999, due to rescheduling of judges, the trial court reviewed the 7 October 1998 disposition order on 17 February 1999. The trial court incorporated into its findings of fact reports from the guardian ad litem, DSS, the hospitals, and Foothills Mental Health facility. The trial court again ordered that the goal of the case be reunification with Ms. Dula. Ms. Dula was ordered to submit to an updated psychological evaluation, including a current parent stress test, and to continue to comply with all requirements of the Case Plan. The trial court scheduled a permanency planning hearing for 12 May 1999.

On 12 May 1999 the court entered a juvenile review order stating that reunification efforts were to continue. The trial court again incorporated the findings of the guardian ad litem and DSS into its order. The trial court ordered that reasonable effort should be made to return Micah to his home within a reasonable period of time. Ms. Dula was ordered to continue to comply with the Case Plan. The trial court scheduled a permanency planning review for 1 September 1999.

The 1 September 1999 hearing was further continued due to rescheduling of judges. The trial court held the second permanency planning hearing on 3 November 1999. During that hearing, the trial court allowed Tamara Hayman to testify that Ms. Dula's aunt, Pam Trivette, had stated that Ms. Dula had assaulted her. Ms. Hayman also

testified that Ms. Trivette told her that Ms. Dula would "sling" Micah at her, and stated that "a baby's bones are tough." Ms. Hayman further testified that Ms. Trivette stated that Ms. Dula had smoked marijuana.

On 1 December 1999, the trial court entered an order ceasing reunification efforts between Ms. Dula and Micah. The order allowed for continued visitation by Ms. Dula, but authorized DSS to pursue a plan for Micah's "relative placement or adoption." The trial court found as fact that when Micah was examined on Saturday, 25 April 1998, the doctors did not find any evidence of swollen joints or extremities, or any evidence of leg discomfort or trauma. The court determined, based on Dr. Yuan's statements, that if Micah's leg had been broken on 25 April 1998, the injury would have shown from the x-rays and examination. The trial court further found that the x-ray technician at Valdese Hospital did not pick up Micah by one leg and one arm, and that the technician did not break Micah's leg. The court determined that Micah had not screamed, nor did he show signs of discomfort during the radiology examination at Valdese Hospital.

The trial court found that Ms. Dula was alone with Micah the following morning, Sunday, 26 April 1998. Ms. Dula's boyfriend, Mr. Kaylor, noticed Micah's swollen leg upon returning home mid-morning Sunday, and suggested they go to the hospital. The trial court found that old rib fractures were discovered during Micah's medical examinations. The court determined that the fractures occurred while Micah was in Ms. Dula's primary care.

The trial court concluded that Ms. Dula failed to comply with the Case Plan because she failed to offer any explanation for Micah's injuries that was consistent with the medical findings. The court determined that "[t]he juvenile's return to his own home would be contrary to his best interest," and that reunification efforts "clearly would be futile and inconsistent with the juvenile's health, safety and need for a safe, permanent home within a reasonable period of time."

I. Order Ceasing Reunification

Ms. Dula alleges that the trial court abused its discretion by ordering that all reunification efforts between Ms. Dula and Micah cease. The essential intent and aims of the Juvenile Code, and more specifically a permanency planning hearing, "is to reunite the parent(s) and the child, after the child has been taken from the cus-

tody of the parent(s)." *Matter of Shue*, 311 N.C. 586, 596, 319 S.E.2d 567, 573 (1984). G.S. § 7B-100 sets forth the purpose of the Juvenile Code:

> (1) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents; (2) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family; (3) To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence; and (4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents.

N.C. Gen. Stat. § 7B-100 (1999) (emphasis supplied). The Juvenile Code, including G.S. § 7B-907, applicable to permanency planning hearings, must be interpreted and construed so as to implement these goals and policies. N.C. Gen. Stat. § 7B-100. I review the record in this case in light of these essential goals.

On three separate occasions and over more than one year, the trial court ordered that the continuing goal of the case be reunification. This goal was also clearly stated by DSS, and numerous counselors and professionals who met with and tested Ms. Dula. However, the trial court, *sua sponte*, and without a recommendation from DSS, ordered that reunification efforts cease in its 1 December 1999 order. The trial court based its conclusion on the finding that Ms. Dula failed to fully comply with the Case Plan because she failed to explain Micah's injuries consistent with the medical findings:

> [Ms. Dula] has offered several explanations none of which are explained by the medical evidence or are consistent with the medical evidence. . . . She has not accepted any responsibility whatsoever for the injuries to this child. . . . She has completed all of the services the Department of Social Services has to put her in a position of being able to care for the child, except she has failed to provide explanation for the child's injuries which would allow for the return of the child if the reasons for the explanations for the child's injuries could be addressed.

(emphasis supplied). In essence, the trial court determined Ms. Dula had complied with all other Case Plan requirements and that Ms. Dula was in a position to care for Micah, but that her failure to explain Micah's injuries to the satisfaction of the court warranted termination of reunification.

I agree that the trial court had the authority to cease reunification efforts pursuant to G.S. § 7B-507(b) if competent evidence supports that decision:

> (b) In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that: (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.

N.C. Gen. Stat. § 7B-507(b) (1999). The trial court made the statutory finding that reunification efforts "clearly would be futile and inconsistent with the juvenile's health, safety and need for a safe, permanent home within a reasonable period of time." However, all competent evidence before the trial court did not support this finding, and the trial court's conclusion that reunification efforts should cease.

Significantly, DSS never recommended nor requested that reunification efforts cease. In fact, DSS advised the trial court of Ms. Dula's many improvements in its 3 November 1999 permanency planning report. DSS specifically recognized that "Ms. Dula has worked hard to ensure that she is doing [all Case Plan requirements and court orders] and has made many improvements in these areas since her son was placed in foster care." DSS advised the trial court "that Ms. Dula has complied with all services provided to her as well as maintained housing and employment. She has successfully completed the nurturing class program, she has complied with all testing recommended, she has maintained regular contact with the agency and the foster parents, and with her son." DSS did not recommend that reunification be ceased, but recommended that the case be reviewed after three months, based on its findings.

The trial court never found that Ms. Dula abused Micah. DSS acknowledged in its report to the trial court that while "it is be-

lieved that Ms. Dula did cause the injuries to her son or is aware of who did, this has never been proven and she continues to deny any involvement or knowledge." DSS acknowledged that Ms. Dula had been consistent in explaining Micah's injuries from the beginning of the case: "[t]hese were that for the broken ribs he must have rolled over on a bottle or pacifier. For the leg she blames the x-ray technician at the hospital." Beyond such explanations, Ms. Dula simply testified that she did not know to a certainty how the injuries occurred, but that Ms. Trivette, who often babysat Micah, could have been responsible.

The trial court placed an unfair burden of proof on Ms. Dula. The burden of proving a negative is "almost impossible as a practical matter." *Shue*, 311 N.C. at 595, 319 S.E.2d at 573. DSS found that Ms. Dula's explanation for Micah's injuries was consistent from the beginning of the case, and Ms. Dula testified under oath that she did not know to a certainty how the injuries occurred. The trial court's determination that Ms. Dula failed to accept responsibility for the injuries implies that the trial court would only be satisfied with Ms. Dula's confession to hurting her child.

Moreover, the trial court never found that Ms. Dula had failed to understand how such injuries could occur, and ways to prevent future injuries. The Case Plan requirement, on which the trial court relied, could be fulfilled in one of two ways: "[s]hould Davida be unable to give an explanation of her son's injuries that is consistent with the medical findings, she should be able to understand how such injuries could occur and ways to insure that such injuries might not occur again." (emphasis supplied). Ms. Dula's successful completion of nurturing classes and other extensive DSS training and testing, as well as her consistent visitations with her son, supports a finding that Ms. Dula had, in fact, learned proper methods to care for Micah.

In summary, the trial court ordered that reunification cease: (1) despite finding that Ms. Dula had "completed all of the services the Department of Social Services has to put her in a position of being able to care for the child," (2) despite DSS's recommendation that reunification efforts continue due to Ms. Dula's improvements, (3) despite the absence of any proof or finding that Ms. Dula had ever hurt Micah, and (4) despite the absence of a finding that Ms. Dula had not come to understand how to prevent similar injuries. The evidence does not support the trial court's statutory finding that reunification efforts were "futile." *See* N.C. Gen. Stat. § 7B-507(b) (1999). The trial

court's findings do not support the conclusion that reunification efforts between Ms. Dula and Micah should cease.

The essential purposes in interpreting these statutes, including G.S. § 7B-907(d), applied by the majority, is to assure "fairness and equity" for both juveniles and parents, and to work toward reunification while preventing the inappropriate separation of juveniles from their natural parents. *See* N.C. Gen. Stat. § 7B-100. In light of such purposes, I cannot agree with the majority's opinion that Micah's presence in DSS custody "for 15 of the most recent 22 months" under G.S. § 7B-907(d) mandates the conclusion that all efforts to reunify Micah with Ms. Dula should cease.

Micah had been in DSS custody for almost 18 months prior to the 3 November 1999 hearing, not because of Ms. Dula's inaction, procrastination, or abandonment of Micah, but because of DSS' and the trial court's delays and constant continuances over a period of several months. During this time, Ms. Dula was steadfastly working toward reunification and had completed all DSS Case Plan requirements, and did not miss available opportunities to visit her son. Nearly three years have passed since Micah was taken from his mother. In light of these circumstances, I cannot agree that the majority's result is "fair and equitable," consistent with the express purpose of G.S. § 7B-100, as stated in *Shue, supra.*

In light of the essential aim of the Juvenile Code toward reunification of a child with its parent(s), *see Shue, supra*, G.S. § 7B-100, I would hold that the trial court's error constituted an abuse of discretion. Accordingly, I would reverse the trial court's order ceasing reunification efforts, and remand for further proceedings toward reuniting Micah with his mother, consistent with Micah's best interest, and DSS' consistent recommendations.

II. Hearsay Testimony

I agree with the majority that, on remand, the trial court may not consider Ms. Hayman's testimony regarding out-of-court statements made by Ms. Dula's aunt, Pam Trivette. The trial court permitted Ms. Hayman to testify at the 3 November 1999 hearing that she had a conversation with Ms. Trivette in a parking lot on 10 August 1998 before the hearing on the second petition. Ms. Trivette was not present in court at this hearing where the testimony was given. Ms. Hayman testified that Ms. Trivette told her that Ms. Dula had assaulted her, and

that Ms. Dula smokes marijuana. Ms. Hayman also testified that Ms. Trivette stated that Ms. Dula repeatedly failed to support Micah's head, and that Ms. Dula would "sling" Micah at her, stating that "she couldn't take it anymore." Ms. Hayman also testified that Ms. Trivette told Hayman that when she cautioned Ms. Dula about her rough treatment of Micah, Ms. Dula responded "that a baby's bones are tough."

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (1999). These out-of-court statements made by Ms. Trivette were offered solely by DSS to show the truth of Ms. Dula's fitness to care for Micah. These statements were hearsay.

I am cognizant that not every admission of hearsay testimony constitutes reversible error. *See State v. Watts*, — N.C. App. —, 539 S.E.2d 37 (2000). I further acknowledge, as DSS argues, that the record contains other evidence of Ms. Dula's temper, as well as marijuana use. DSS performed at least three drug tests on Ms. Dula, all with negative results. However, Ms. Trivette's statements, most notably that Ms. Dula would "sling" Micah at her and state that his bones "are tough," were sufficiently damaging to be prejudicial.

This hearsay testimony is also suspect in light of the sixteen-month time lapse between Ms. Trivette's purported statements on 10 August 1998 and Ms. Hayman's testimony in November 1999. Ms. Hayman was the first DSS counselor to interview Ms. Dula at Grace Hospital. Numerous hearings and interviews had occurred since. Accordingly, I agree with the majority's opinion that the trial court may not consider such evidence when making appropriate findings under G.S. § 7B-907, consistent with G.S. § 7B-100 and *Shue*, on remand.

TIMOTHY H. CRAIG, AND THE CHATHAM COUNTY AGRIBUSINESS COUNCIL, PLAINTIFFS v. COUNTY OF CHATHAM, CHATHAM COUNTY HEALTH DEPARTMENT AND THE CHATHAM COUNTY BOARD OF HEALTH, DEFENDANTS

No. COA00-15

(Filed 17 April 2001)

1. **Counties; Public Health— ordinance—health board rules—swine farms—preempted by state law**

The trial court erred by granting summary judgment for defendant county and by denying summary judgment for plaintiffs on the issue of the county's swine ordinance and health board swine farm operation rules, because the ordinance and rules are preempted by state law when the General Assembly has provided a complete and integrated regulatory scheme of swine farm regulations as noted in the legislative purpose sections of N.C.G.S. §§ 106-801 and 143-215.10A.

2. **Zoning— county ordinance—swine farms—power given by state**

The trial court did not err by granting summary judgment in favor of defendant on the issue of the county's zoning ordinance stating that it was applicable only to swine farms served by an animal waste management system having a design capacity of 600,000 pounds steady state live weight or greater, because the ordinance is not preempted by state law when the county enacted the ordinance under the express statement of power given by the state under N.C.G.S. § 153A-340(b)(3).

3. **Zoning— county ordinance—swine farms—restriction of local action without express declaration**

The General Assembly can restrict local action by a county without an express declaration to that effect, because: (1) the General Assembly does not have to retain sole authority or completely delegate to one agency all authority in order to provide a complete and integrated regulatory scheme; and (2) N.C.G.S. § 160A-174(b)(5) provides that the creation of a complete and integrated regulatory scheme bars local action.

4. **Zoning— county ordinance—swine farms—higher standard of conduct precluded**

A county is precluded from enacting an ordinance requiring a higher standard of conduct or condition regarding higher set-

back and buffer distances in relation to swine farms because: (1) the General Assembly has addressed the issue of distance as it relates to swine farms, N.C.G.S. § 160A-174(b); and (2) the state's action precludes the county from any further regulation.

Judge HUDSON concurring.

Appeal by plaintiffs from judgment entered 25 October 1999 by Judge J.B. Allen, Jr. in Chatham County Superior Court. Heard in the Court of Appeals 8 January 2001.

Ward and Smith, P.A., by Catherine Ricks Piwowarski, Kenneth R. Wooten and Frank H. Sheffield Jr., for plaintiff-appellants.

The Brough Law Firm, by G. Nicholas Herman, for defendant-appellees.

EAGLES, Chief Judge.

This appeal presents the issue of whether Chatham County exceeded its authority to enact certain swine farm regulations.

At the outset, we note that the Chatham County Board of Health and the Chatham County Board of Commissioners are not entities capable of being sued. *See* G.S. § 153A-11 (1999) (granting counties the right to sue and be sued). The present action concerns three sets of Chatham County regulations. The Chatham County Board of Commissioners enacted two ordinances, one entitled "Chatham County Ordinance Regulating Swine Farms" (Swine Ordinance) and another entitled "An Ordinance to Amend the Chatham County Zoning Ordinance to Provide for the Regulation of Swine Farms" (Zoning Ordinance). In addition, the Chatham County Board of Health adopted a set of rules entitled "Chatham County Board of Health Swine Farm Operation Rules" (Health Board Rules).

The Swine Ordinance and the Health Board Rules are identical. The Swine Ordinance and Health Board Rules each set up a system to regulate the operation, construction and expansion of swine farms in Chatham County. The regulations both define swine farms as, "any tract or contiguous tracts of land . . . under common ownership or control which is devoted to raising 250 or more animals of the porcine species." Operators of farms meeting this definition must obtain permits to expand, operate or construct a swine farm. Generally, to obtain a permit the operator must show that he or she has complied with the minimum applicable state and federal require-

ments for animal waste management systems and the other provisions of the swine ordinance.

The regulations do not merely establish a permitting system. They also establish various requirements for setback distances and buffer zones for farms and spray fields. In each category, the county's regulatory requirements are more stringent than those of the State. Additionally, the county regulations contain a financial responsibility provision that requires an operator of a swine farm to guarantee "$2500 per acre feet of [the farm's] waste lagoon capacity." The purpose is to guarantee availability of funds to pay for any necessary clean up costs or to remedy any violations. The operator must guarantee availability of these funds through cash or a cash equivalent placed in escrow or through a promissory note or deed of trust. Finally, the county requires semi-annual tests on wells located on the property of a swine farm.

The Zoning Ordinance makes swine farms a conditional use requiring compliance with the swine ordinance. Unlike the other county enactments, the Zoning Ordinance defines swine farms as:

> Any tract or contiguous tracts of land in Chatham County which is devoted to raising animals of the porcine species and which is served by an animal waste management system having a design capacity of 600,000 pounds steady state live weight (SSLW) or greater, regardless of the actual number of swine on the farm.

Plaintiffs, Timothy H. Craig and the Chatham County Agribusiness Council, allege that the State has preempted regulation of this area by "covering the field." Specifically, plaintiffs cite to the Swine Farm Siting Act G.S. § 106-800 (1999), the Animal Waste Management Systems Act G.S. § 143-215.10A (1999) and the regulations of the North Carolina Department of Environment and Natural Resources 15A NCAC 2H .0200 (2000) as demonstrating that the General Assembly has intended to preempt the field. Additionally, plaintiffs allege that the County Board of Commissioners and the Health Board had no authority to enact their respective regulations, that the Health Board went beyond its rule-making authority by considering non-health factors and that the regulations violated the Pollution Control Act, G.S. § 143-215.105 (1999).

The trial court granted defendant's motion for summary judgment and denied the plaintiffs' motion for summary judgment. Plaintiffs appeal.

Summary judgment is appropriate if (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law. G.S. § 1A-1 N.C.R. Civ. P. 56(c) (1999); *see also Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998). The parties both argue and we agree that there are no issues of material fact. Therefore, our only considerations are whether the trial court erred as a matter of law in granting the defendant's motion for summary judgment and in denying the plaintiffs' motion for summary judgment.

Plaintiffs contend that the General Assembly has preempted the field of swine farm regulation. Although plaintiffs acknowledge that the General Assembly did not include an explicit declaration of preemption in the text of the General Statutes, they argue that the General Assembly has created a "complete and integrated system of regulation." This type of regulation would bar any local action regulating swine farms in the absence of an explicit statutory exception. Defendant counters that the county and Health Board's police power and the county's zoning power are sufficient to enable them to enact these regulations. G.S. § 153A-121 (1999); G.S. § 130A-39 (1999) and G.S. § 153A-340 (1999).

We note at the outset that our Supreme Court has already determined that the more specific police power limitations of G. S. § 160A-174 (1999) also apply to county ordinances. *See State v. Tenore*, 280 N.C. 238, 185 S.E.2d 644 (1972). G.S. § 160A-174 states that:

> (b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:
>
> . . . .
>
> (5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.

In our analysis, *Greene v. City of Winston-Salem*, 287 N.C. 66, 213 S.E.2d 231 (1975) is instructive. *Greene* concerned a Winston-Salem ordinance that required sprinklers in all high rise buildings. The plaintiff argued that the General Assembly had preempted the

field by creating the State Building Code. *Id.* at 75, 213 S.E.2d at 237. The Supreme Court agreed and held that the General Assembly had created a "complete and integrated regulatory scheme." *Id.* The Court arrived at this conclusion despite the absence of express language from the General Assembly stating a legislative intent to preempt the field. The Supreme Court stated: "We do not think that the Legislature must retain sole authority, or completely delegate to one agency all authority, in order to provide a complete and integrated regulatory scheme which would exclude local regulation." *Id.* According to the Court, a contextual reading of all the relevant statutes compelled the conclusion that the State had preempted the field. *Id.* Specifically, the General Assembly's delegation of enforcement power to the Commissioner of Insurance as well as the sheer breadth and scope of the regulations impressed the Supreme Court that the State had covered the field. *Id.*

Likewise, in *State v. Williams*, 283 N.C. 550, 196 S.E.2d 756 (1973), the Supreme Court invalidated a local ordinance that purported to make it unlawful for a person to possess beer on the public streets of Mount Airy. At that time, the General Statutes provided that individuals eighteen or older could purchase, transport or possess malt beverages for their own use without restriction. *Id.* at 554, 196 S.E.2d at 758. The Supreme Court concluded that the General Assembly had completely regulated the field. *Id.* at 554, 196 S.E.2d at 759. In explaining its decision the Court noted that the General Assembly had stated that it intended to create a uniform system for the control of alcoholic beverages. *Id.* The Court then stated:

> The General Assembly clearly intended to pre-empt the regulation of malt beverages in order to prevent local governments from enacting ordinances such as the one in question. . . . The ordinance in question is not consistent with the general law in that . . . the ordinance purports to regulate a field in which a state statute has provided a complete and integrated regulatory scheme to the exclusion of local regulations.

Id.

More recent cases have resulted in similar holdings. In *Onslow County v. Moore*, 129 N.C. App. 376, 499 S.E.2d 780, *disc. review denied*, 349 N.C. 361, 525 S.E.2d 453 (1998), this Court considered a county ordinance that prohibited the operation of an adult business within 1000 feet of another adult business. Ultimately, the Court held that the State had preempted the county's authority to regulate

through the enactment of a statute that prohibited the operation of two adult businesses within the same building. *Moore*, 129 N.C. App. at 386, 499 S.E.2d at 787. Although the General Assembly later amended the statute to allow counties to regulate, the following language is relevant here.

> We conclude that N.C. Gen. Stat. § 14-202.11 does in fact preempt the ordinance's requirement regarding the distance that must be kept between two adult and/or sexually oriented businesses. . . . Thus, **because the General Assembly has already addressed the issue of the distance required between these types of businesses, to the extent that the ordinance attempts to increase that distance to 1000 feet, it is preempted by N.C. Gen. Stat. § 14-202.11.**

Id. (emphasis added); *see also In Re Application of Melkonian*, 85 N.C. App. 351, 355 S.E.2d 503, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 91 (1987).

[1] In light of these precedents we will now consider the current state swine farm regulations and determine whether the General Assembly has fully addressed and preempted this field. The Swine Farm Siting Act's stated purpose is to assist the development of pork production "by lessening the interference with the use and enjoyment of adjoining property." G.S. § 106-801 (1999). The Act carries out this purpose through a series of setback and notice requirements. Like the Chatham County regulations, this Act applies only to farms that have 250 or more hogs. The setback provisions in G.S. § 106-803 read in pertinent part:

> (a) A swine house or a lagoon that is a component of a swine farm shall be located:
>
> (1) At least 1,500 feet from any occupied residence.
>
> (2) At least 2,500 feet from any school; hospital; church; outdoor recreational facility; national park; State Park, . . . historic property . . . .
>
> (3) At least 500 feet from any property boundary.
>
> (4) At least 500 feet from any well supplying water to a public water system as defined in G.S. 130A-313.
>
> (5) At least 500 feet from any other well that supplies water for human consumption. . . .

(a1) The outer perimeter of the land area onto which waste is applied from a lagoon that is a component of a swine farm shall be at least 75 feet from any boundary of property on which an occupied residence is located and from any perennial stream or river other than an irrigation ditch or canal.

The notice provisions impose the following additional requirements.

Any person who intends to construct a swine farm whose animal waste management system is subject to a permit under Part 1 or 1A of Article 21 of Chapter 143 of the General Statutes shall, after completing a site evaluation and before the farm site is modified, notify all adjoining property owners; all property owners who own property located across a public road, street, or highway from the swine farm; the county or counties in which the farm site is located; and the local health department or departments having jurisdiction over the farm site of that person's intent to construct the swine farm. This notice shall be by certified mail sent to the address on record at the property tax office in the county in which the land is located. Notice to a county shall be sent to the county manager or, if there is no county manager, to the chair of the board of county commissioners. Notice to a local health department shall be sent to the local health director. The written notice shall include all of the following:

(1) The name and address of the person intending to construct a swine farm.

(2) The type of swine farm and the design capacity of the animal waste management system.

(3) The name and address of the technical specialist preparing the waste management plan.

(4) The address of the local Soil and Water Conservation District office.

(5) Information informing the adjoining property owners and the property owners who own property located across a public road, street or highway from the swine farm that they may submit written comments to the Division of Water Quality, Department of Environment and Natural Resources.

G.S. § 106-805 (1999).

While not limited to swine farms, the Animal Waste Management Systems Act and the regulations enacted pursuant to it apply only to farms with 250 or more swine. G.S. § 143-215.10B (1999). In the act's statement of purpose the General Assembly noted:

> It is critical that the State balance growth with prudent environmental safeguards. **It is the intention of the State to promote a cooperative and coordinated approach to animal waste management among the agencies of the State with a primary emphasis on technical assistance to farmers. To this end, the General Assembly intends to establish a permitting program for animal waste management systems that will protect water quality and promote innovative systems and practices while minimizing the regulatory burden.** Technical assistance, through operations reviews will be provided by the Division of Soil and Water Conservation. Permitting, inspection and enforcement will be vested in the Division of Water Quality.

G.S. § 143-215.10A (1999) (emphasis added). The Act goes on to require a permit for construction or operation of an animal waste management system and directs the Environmental Management Commission to create a permitting system. G.S. § 143-215.10C (1999). In directing the creation of these regulations, the General Assembly mandated that the E.M.C. should:

> [E]ncourage the development of alternative and innovative animal waste management technologies. The Commission shall provide sufficient flexibility in the regulatory process to allow for the timely evaluation of alternative and innovative animal waste management technologies and shall encourage operators of animal waste management systems to participate in the evaluation of these technologies. The Commission shall provide sufficient flexibility in the regulatory process to allow for the prompt implementation of alternative and innovative animal waste management technologies that are demonstrated to provide improved protection to public health and the environment.

G.S. § 143-215.10C(g) (1999). The Commission has created this system for operators to obtain approval for an animal waste management system plan in 15A NCAC 2H. 0200 (2000) *et seq.* Specifically, 15A NCAC 2H .0217 (2000) sets out the procedures for operators to develop an approved animal waste management plan. These regula-

tions mandate (1) required setbacks and vegetative buffers from perennial waters; (2) compliance with the minimum specifications of the U.S. Department of Agriculture's Soil Conservation Service; (3) certification of a technical specialist designated by the Soil and Water Conservation Commission; (4) a required on-site inspection to ensure that animal waste storage and treatment structures meet all standards and specifications; and (5) a required procedure for notifying the Division of Environmental Management of a change in ownership and a statement that the new owner has read, understands and will follow the waste management system plan.

The General Assembly has also directed that an operator include certain things in an animal waste management plan. G.S. § 143-215.10C(e) states:

> (e) Animal waste management plans shall include all of the following components:
>
> (1) A checklist of potential odor sources and a choice of site-specific, cost-effective remedial best management practices to minimize those sources.
>
> (2) A checklist of potential insect sources and a choice of site-specific, cost-effective best management practices to minimize insect problems.
>
> (3) Provisions that set forth acceptable methods of disposing of mortalities.
>
> (4) Provisions regarding best management practices for riparian buffers or equivalent controls, particularly along perennial streams.
>
> (5) Provisions regarding the use of emergency spillways and site-specific emergency management plans that set forth operating procedures to follow during emergencies in order to minimize the risk of environmental damage.
>
> (6) Provisions regarding periodic testing of waste products used as nutrient sources as close to the time of application as practical and at least within 60 days of the date of application and periodic testing, at least annually, of soils at crop sites where the waste products are applied. . . .
>
> (7) Provisions regarding waste utilization plans that assure a balance between nitrogen application rates and nitrogen crop

> requirements, that assure that lime is applied to maintain pH in the optimum range for crop production, and that include corrective action, including revisions to the waste utilization plan based on data of crop yields and crop analysis, that will be taken if this balance is not achieved as determined by testing conducted pursuant to subdivision (6) of this subsection.
>
> (8) Provisions regarding the completion and maintenance of records on forms developed by the Department, which records shall include information addressed in subdivisions (6) and (7) of this subsection, including the dates and rates that waste products are applied to soils at crop sites, and shall be made available upon request by the Department.

Additionally, the Act sets up two separate inspection requirements. In G.S. § 143-215.10D, the General Assembly requires an annual operations review. As part of this operations review, a technical specialist from the Division of Soil and Water Conservation must review each animal waste management system. The specialist must then report any violations under G.S. § 143-215.10E and any recommended corrective action. Additionally, G.S. § 143-215.10F requires the Division to conduct an annual inspection "to determine whether the system is causing a violation of water quality standards and whether the system is in compliance with its animal waste management plan or any other condition of the permit."

Finally, the General Assembly has expressly limited the county's authority to zone swine farms with one exception. G.S. § 153A-340(b)(1) (1999) prevents a county from zoning a bona fide farm. Bona fide farms include those farms on which livestock is raised. G.S. § 153A-340(b)(2). However, the General Assembly has now given counties the authority to zone swine farms larger than a certain size. The statute reads:

> (3) . . . A county may adopt zoning regulations governing swine farms served by animal waste management systems having a design capacity of 600,000 pounds steady state live weight (SSLW) or greater provided that the zoning regulations may not have the effect of excluding swine farms served by an animal waste management system having a design capacity of 600,000 pounds SSLW or greater from the entire zoning jurisdiction.

G.S. § 153A-340(b)(3). Other than as authorized by that limited statutory exception, counties may not act to zone a swine farm.

When read together, these statutes compel the conclusion that the General Assembly has provided a "complete and integrated regulatory scheme" of swine farm regulations. *See Greene*, 287 N.C. at 75, 213 S.E.2d at 237. The General Assembly has provided for a system of permitting, inspection, setbacks, buffers and waste management. Further, the General Assembly has directed that specific state agencies oversee those regulations. An examination of the county's actions here reveals that the county has attempted to regulate in areas where the State has already enacted comprehensive regulations. Under *Greene* and *Onslow County* the county's actions may not stand unless the county enacted its regulations pursuant to the specific exception in G.S. § 153A-340(b)(3).

The legislative purpose sections in G.S. § 106-801 and G.S. § 143-215.10A only reinforce this conclusion. In G.S. § 106-801, the General Assembly's enactment refers to the necessary balance between economic and environmental considerations. In G.S. § 143-215.10A, the General Assembly notes the necessity for providing a cooperative and coordinated approach to animal waste management. Most important for our purposes, the General Assembly stresses the necessity of minimizing the regulatory burden on farmers. To allow the county commissioners and the county board of health to act here would be wholly inconsistent to the General Assembly's stated goals. Specifically, the county could undermine the State's attempts to minimize the regulatory burden and the balance of economic and environmental interests. Additionally, the county's actions would make it more difficult to provide farmers with the regulatory flexibility needed to develop "alternative and innovative technologies." *See* G.S. § 143-215.10C(g) (1999).

[2] Accordingly, we hold that the county Swine Ordinance and the county Health Board Rules are preempted by State law. The county Zoning Ordinance requires a different analysis. The General Assembly has carved out a specific exception to the laws surrounding swine farms. G.S. § 153A-340(b)(3) permits counties to zone swine farms "having a design capacity of 600,000 pounds steady state live weight (SSLW) or greater." However, the statute forbids counties from completely eliminating from the zoning jurisdiction a farm under that section. Here, Chatham County made the Zoning Ordinance applicable only to swine farms "served by an animal waste management system having a design capacity of 600,000 pounds steady state live weight (SSLW) or greater." Accordingly, the county enacted the zoning ordinance pursuant to the express statement of power given by the State and it is not preempted.

[3] The county argues that the General Assembly may not restrict local action without an express declaration to that effect. We disagree. The Supreme Court in *Greene* made it clear that the General Assembly does not have to retain sole authority or "completely delegate to one agency all authority, in order to provide a complete and integrated regulatory scheme." *Greene*, 287 N.C. at 75, 213 S.E.2d at 237. Rather, the creation of a complete and integrated regulatory scheme bars local action. G.S. § 160A-174(b)(5). We do not believe that *In re Application of Melkonian*, 85 N.C. App. 351, 355 S.E.2d 503 (1987) or *Southern Railway Co. v. City of Winston-Salem*, 4 N.C. App. 11, 165 S.E.2d 751, *aff'd*, 275 N.C. 465, 168 S.E.2d 396 (1969) require an opposite conclusion. *In re Melkonian* involved the plaintiff's attempt to obtain a special use permit to operate a tavern after the ABC Commission had granted plaintiff a license to sell alcoholic beverages. The Court held that the State had preempted the city's permitting system by expressly prohibiting local regulation of alcoholic beverages. *Melokonian*, 85 N.C. App. at 360, 355 S.E.2d at 509. While an express legislative statement is clearly adequate to bar local action, the implementation of a complete and integrated system is also sufficient. We do not read *Melkonian* to hold that an express legislative statement is necessary.

In *Southern Railway*, the Court held that local action was not preempted by a statute that "clearly negative[d] any intention that the statute should be construed as the adoption of a statewide policy." *Southern Railway*, 4 N.C. App. at 20, 165 S.E.2d at 757. The statute in question expressly limited its application to certain streets and roads. *Id.* Here, the defendant points to no language in the regulatory structure that negatives the intent to provide a complete and integrated system or limits its application. Therefore, the county's argument fails.

[4] Finally, the county argues that they are not precluded from setting the regulations' higher setback and buffer distances because "the fact that a State or federal law, standing alone makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition." G.S. § 160A-174(b) (1999). In this context, we disagree. As we held in *Onslow County*, the State's and county's regulations deal with issues of distance and not conduct. Further, the General Assembly has addressed the issue of distance as it relates to swine farms. Therefore, the State's action precludes the county from any further regulation.

Accordingly, we hold that the trial court erred in granting summary judgment for the defendant and in denying summary judgment for the plaintiffs on the issues of the Swine Ordinance and Health Board Rules. However, the trial court was correct in granting summary judgment to the defendant as to the Zoning Ordinance. We now remand this case for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judge SMITH concurs.

Judge HUDSON concurs with a separate opinion.

HUDSON, Judge concurring.

I concur with the result reached by the majority. I write separately because, although I agree that the Swine Ordinance regulations and the Health Board Rules may be identical in substance, I believe the reason the Health Board Rules may not stand is distinct from the reason the Swine Ordinance may not stand.

I agree with the majority that the General Assembly has preempted the field of swine farm regulations. I also agree with the proposition that the regulations in question therefore may not stand unless they are found to have been enacted pursuant to some specific statutory exception, such as N.C.G.S. § 153A-340(b)(3) (1999). However, in addition to G.S. § 153A-340(b)(3), I believe the General Assembly has carved out a specific exception to the state swine farm laws in enacting N.C.G.S. § 130A-39 (1999) ("Powers and duties of a local board of health"). Section (b) of this statute permits a local board of health to "adopt a more stringent rule in an area regulated by the Commission for Health Services or the Environmental Management Commission where, in the opinion of the local board of health, a more stringent rule is required to protect the public health." G.S. § 130A-39(b). I believe this statute provides an express grant of authority to a local board of health to enact more stringent regulations, even where the General Assembly has preempted the area of regulation. I further believe that the Health Board Rules in question fall within this exception because they provide for more stringent regulations than the state swine farm laws enacted by the General Assembly. Thus, I do not believe the Health Board Rules are preempted by State Law.

However, I believe the Health Board Rules may not stand for a different reason. In enacting the Health Board Rules, I believe the Board of Health exceeded its authority and infringed on the legislative power of the General Assembly by taking into consideration not only health related issues but economic issues as well. Determining the proper balance between health concerns and economic concerns is a role reserved for the legislature and, therefore, a local board of health exceeds its authority when it enacts rules based on a balancing of factors other than health. *See City of Roanoke Rapids v. Peedin*, 124 N.C. App. 578, 478 S.E.2d 528 (1996). For this reason, rather than the doctrine of preemption relied upon by the majority, I would deny summary judgment for defendants and grant summary judgment for plaintiffs on the issue of the Health Board Rules.

ROY E. BAGGETT AND PATRICIA BAGGETT, INDIVIDUALLY AND D/B/A BOUTIQUE HOUSE-PORT OF SWANSBORO, PLAINTIFFS V. SUMMERLIN INSURANCE AND REALTY, INC., CHARLES W. SUMMERLIN, AND CHARLES W. SUMMERLIN, JR., D/B/A SUMMERLIN INSURANCE CENTER AND CHARLES W. SUMMERLIN, JR., DEFENDANTS

No. COA00-458

(Filed 17 April 2001)

1. Insurance— flood—"all-risk" coverage—duty to provide necessary coverage—summary judgment

The trial court erred by granting summary judgment for defendant insurance agency and defendant insurance agent on the issue of whether defendants assumed a duty to obtain flood insurance for plaintiffs by assuring plaintiffs they would provide the necessary coverage, because the evidence in the light most favorable to plaintiffs reveals substantial evidence that: (1) the agent was aware of the location of the property near a river and advised plaintiffs that he would provide them with the necessary coverage; (2) the agent had taken care of plaintiffs' insurance needs throughout the relationship of the parties, including placing plaintiffs' coverage with another company when he was no longer doing business with the company which had previously written plaintiffs' coverage; and (3) the agent specifically told plaintiffs they had "all-risk" coverage which was all they needed.

2. Insurance— failure to read insurance policy—contributory negligence—summary judgment

The trial court erred by granting summary judgment for defendant insurance agency and defendant insurance agent on the issue of plaintiffs' alleged contributory negligence in failing to read the pertinent insurance policy which specifically excluded any coverage for flood damage, because the statement of the agent that he would provide plaintiffs with the necessary coverage taken in context with the prior relationship plaintiffs had with the agent, along with the agent's knowledge of the location of the property near a river, is sufficient evidence to support a conclusion that a reasonably prudent person would not have read the insurance contract and would not have seen the explicit flood exclusions.

Judge TYSON dissenting.

Appeal by plaintiffs from order filed 7 February 2000 by Judge W. Allen Cobb, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 30 January 2001.

Ellis, Hooper, Warlick & Morgan, L.L.P., by John D. Warlick, Jr., for plaintiff-appellants.

Manning, Fulton & Skinner, P.A., by Michael T. Medford, for defendant-appellees.

GREENE, Judge.

Roy E. Baggett (Mr. Baggett) and Patricia Baggett (Mrs. Baggett) (collectively, Plaintiffs), individually and d/b/a Boutique House-Port of Swansboro, appeal an order filed 7 February 2000 granting a motion for summary judgment in favor of Summerlin Insurance and Realty, Inc. (the Summerlin Agency) and Charles W. Summerlin, Jr. (Summerlin) (collectively, Defendants).[1]

Plaintiffs have owned the Boutique House, a ladies clothing store in Jacksonville, since 1981. Jamie D. McGlaughon (McGlaughon), of the Bailey Insurance and Realty Company, provided commercial insurance coverage on the Boutique House from May 1990 until July 1993 and then again from July 1996 until the present. The coverage

1. We note Plaintiffs voluntarily dismissed the action against Charles W. Summerlin and Charles W. Summerlin, Jr. d/b/a Summerlin Insurance Center and Charles W. Summerlin, individually.

for the Boutique House included coverage for: the building in the amount of $122,500.00; business personal property in the amount of $100,000.00; loss of income, money and securities, exterior signs and glass; and business liability in the amount of $1,000,000.00. The policy McGlaughon provided Plaintiffs was an "all-risk coverage" policy which specifically excluded flood coverage. In fact, McGlaughon stated in his deposition testimony that most commercial policies excluded flood coverage and clients would have to obtain separate coverage for flood insurance.

In a deposition taken 25 November 1998, Mrs. Baggett testified that in 1993 Summerlin asked to look at the insurance policy Plaintiffs had with McGlaughon so Summerlin could provide Plaintiffs with a proposal for a policy with the Summerlin Agency. It was Plaintiffs' understanding that Summerlin was proposing coverage on the Boutique House equivalent to what Plaintiffs had with McGlaughon. Summerlin gave Plaintiffs an insurance quote providing for coverage at a less expensive annual premium than the amount Plaintiffs were paying to McGlaughon. Plaintiffs canceled McGlaughon's coverage of the Boutique House and procured coverage with the Summerlin Agency. Plaintiffs never indicated to McGlaughon they were getting greater property insurance coverage with the Summerlin Agency than with McGlaughon, only that they were getting less expensive coverage. In fact, it was Mrs. Baggett's understanding that Summerlin was providing her with coverage equivalent to what she had with McGlaughon.

The Summerlin Agency provided Plaintiffs with an "all-risk coverage" policy (the Summerlin Policy). The Summerlin Policy provided coverage for: the building in the amount of $122,500.00; business personal property in the amount of $150,000.00; general liability in the amount of $1,000,000.00; medical expenses in the amount of $5,000.00 per person; and fire legal liability in the amount of $100,000.00. When asked if the Summerlin Policy included peak inventory coverage, Summerlin told Plaintiffs that they had "an all-risk coverage. That's all [they] would need." The Summerlin Policy, however, specifically excluded flood coverage and provided:

> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> . . . .

g. Water

(1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not . . . .

Summerlin stated in his affidavit that he did not tell Mrs. Baggett he would procure flood insurance for the Boutique House and recalled "pointing out to [Mrs.] Baggett in a conversation," near the time he sought to procure insurance on the Boutique House, "that the coverage of any insurance policy is limited by exclusions set forth in the policy and that the exclusion for loss caused by flood and earthquake is a standard exclusion."

Mrs. Baggett stated she did not have flood insurance on the Boutique House in Jacksonville and she never asked Summerlin to procure flood insurance on the Boutique House. Mrs. Baggett was satisfied the Summerlin policy provided her with identical coverage as that provided by McGlaughon at a cheaper rate.

From July 1993 through July 1996, Plaintiffs received several renewal notices for the Summerlin Policy. Each time Plaintiffs received the renewal notice, they paid the premium without questioning Summerlin on the coverage. During the 1994/1995 policy coverage period, Summerlin advised Mrs. Baggett she "would be receiving a Notice of Cancellation of the insurance coverage . . . . He advised [her] not to worry about it[,] . . . he would place the coverage with some other company . . . [because] he was no longer doing business with the company which had previously written [Plaintiffs'] coverage."

In August 1995, Plaintiffs entered into a lease of a building to operate a ladies and children clothing store in Swansboro (the Boutique House-Port). Mrs. Baggett telephoned Summerlin and informed him of her lease of the Boutique House-Port and the requirement she have $250,000.00 of liability insurance, but that she did not "know if there's anything else [she] need[ed]." Summerlin stated he knew the location of the Boutique House-Port and was aware it was near the White Oak River. According to Mrs. Baggett, Summerlin told her he would provide "the necessary coverage." Summerlin procured the additional liability coverage as requested by Mrs. Baggett and did not offer Mrs. Baggett any other coverage. In August 1995, Mrs. Baggett received a two-page amendment adding the Boutique House-Port to the Summerlin Policy. Mrs. Baggett stated she did not have any conversation with Summerlin about flood coverage.

In July 1996, as Hurricane Bertha was near Puerto Rico, Mrs. Baggett telephoned Summerlin and informed him that Hurricane Bertha was "down off the coast of Puerto Rico" and asked "if that thing comes, [is the Boutique House-Port] going to be covered down there on that water front." Summerlin responded, " 'well, maybe you will or maybe you won't.' " After asking Summerlin what he meant by his statement and informing him that she had a lot of inventory at the Boutique House-Port, Summerlin told Mrs. Baggett " 'it's got a woman's name, so it's not going to be much to it.' " Mrs. Baggett did not inquire further and ended her conversation with Summerlin. Summerlin never gave Mrs. Baggett any assurance that the Boutique House-Port would be fully covered and she never discussed with Summerlin moving any of her inventory from the Boutique House-Port.

On 12 July 1996, Plaintiffs rented a truck to move the inventory from the Boutique House-Port, however, rising waters from the White Oak River and the Intracoastal Waterway prevented Plaintiffs from moving the inventory. Hurricane Bertha caused severe damage to the Boutique House-Port's interior and its fixtures and ruined most of Plaintiffs' inventory. After inspecting the Boutique House-Port, Mr. Baggett went to Summerlin's office to explain that the Boutique House-Port had flooded and asked Summerlin what Plaintiffs should do. Summerlin told Mr. Baggett to " 'go ahead and act just like [Plaintiffs didn't] have [any] insurance or anything. . . . Go down there and clean the mess up. . . . Take the carpet out, do whatever you got to do to try to sacrifice the merchandise you can.' " Mr. Baggett asked Summerlin if he should wait until after an insurance adjuster looked at the Boutique House-Port before cleaning the store. Summerlin told Mr. Baggett to go ahead and start cleaning and he would get an insurance adjuster to the Boutique House-Port as soon as possible. An insurance adjuster came to the Boutique House-Port a few days later and took pictures. A week later, the insurance adjuster informed Plaintiffs the Summerlin Policy did not cover the damage done to the Boutique House-Port. Mr. Baggett read the Summerlin Policy and discovered it was an "all-risk policy" and went to Summerlin to inquire about the coverage. Summerlin confirmed the Boutique House-Port was not covered for flood damage.

At no time during the period Plaintiffs had the Summerlin Policy did Plaintiffs ask Summerlin to procure flood coverage and Summerlin did not indicate to Plaintiffs they had flood coverage. According to Defendants' telephone call sheet, Mrs. Baggett stated

she did not want sign, glass, or flood coverage for the Boutique House-Port. Summerlin also stated that as Hurricane Bertha approached, he reminded Mrs. Baggett she did not have flood coverage.

After learning the Summerlin policy did not cover the Boutique House-Port for flood damage, Plaintiffs canceled their insurance with Summerlin on 17 July 1996. On 2 January 1998, Plaintiffs filed a complaint alleging Defendants: negligently failed to procure flood insurance on the Boutique House-Port; did not timely notify Plaintiffs of their failure to obtain flood insurance; breached their contract; and committed unfair and deceptive trade practices.[2] Defendants filed a motion for summary judgment on 12 August 1999 and the trial court granted Defendants' motion.

The issues are whether: (I) an agent, by making a promise to a customer to obtain "the necessary coverage" on a building located near the White Oak River, undertakes a duty to obtain flood insurance; and (II) Plaintiffs were negligent in not reading the Summerlin Policy.

I

[1] Plaintiffs argue a genuine issue of material fact exists as to whether Defendants, by assuring Plaintiffs they would provide "the necessary coverage," assumed a duty to obtain flood insurance for Plaintiffs.

An insurance agent, who undertakes an obligation to procure an insurance policy for a customer, has a duty to procure that insurance and will be held liable (in negligence) for any damage resulting from a breach of that duty. *Barnett v. Security Ins. Co. of Hartford*, 84 N.C. App. 376, 378, 352 S.E.2d 855, 856-57 (1987). Communications between a customer and an agent, as well as their conduct, are relevant on the question of whether the agent has undertaken to procure a policy of insurance. *Alford v. Tudor Hall and Assoc. Inc.*, 75 N.C. App. 279, 282, 330 S.E.2d 830, 832, *disc. review denied*, 315 N.C. 182, 337 S.E.2d 855 (1985). For example: if the communications and/or conduct " 'lull the [customer] into the belief that such insurance has been effected, the law will impose upon the . . . agent the obliga-

2. Plaintiffs have presented no argument in their brief to this Court concerning their allegations of breach of contract or unfair and deceptive trade practices. Accordingly, we do not address whether summary judgment was properly granted on these claims.

tion' " to procure the insurance. *Id.* (citation omitted). For another example: "if the parties have had prior dealings where the agent customarily has taken care of the customer's needs without consultation," then a legal duty can arise to procure the insurance, even "without express and detailed orders from the customer and acceptance by the agent." *Id.*

In this case, the evidence viewed in the light most favorable to Plaintiffs, *see Wrenn v. Byrd*, 120 N.C. App. 761, 763, 464 S.E.2d 89, 90 (1995) (must view evidence in light most favorable to non-moving party on motion for summary judgment), *disc. review denied*, 342 N.C. 666, 467 S.E.2d 738 (1996), reveals substantial evidence Summerlin assumed an obligation to procure flood insurance on the Boutique House-Port property.[3] Summerlin was aware of the location of the property and advised Mrs. Baggett he would provide her with "the necessary coverage." Throughout the relationship of the parties, Summerlin had taken care of Mrs. Baggett's insurance needs, including placing Plaintiffs' coverage with another company when he was no longer doing business with the company which had previously written Plaintiffs' coverage. Summerlin specifically told Plaintiffs they had "all-risk" coverage, which was all they needed. Accordingly, a genuine issue of fact exists and the trial court erred in granting summary judgment for Defendants on this basis.[4]

II

[2] Defendants argue, in the alternative, Plaintiffs were contributorily negligent and, thus, barred from any recovery because they failed to read the Summerlin Policy which specifically excluded any coverage for flood damage.

A person who signs a contract generally has a duty to read it and become knowledgeable of its contents and is negligent if he fails to do so. *Elam v. Smithdeal Realty & Ins. Co.*, 182 N.C. 600, 603, 109 S.E. 632, 634 (1921). If, however, a person of reasonable business pru-

3. "Summary judgment is proper where there is no genuine issue as to any material fact." *Johnson v. Trustees of Durham Technical Community College*, 139 N.C. App. 676, 680, 535 S.E.2d 357, 361, *appeal dismissed and disc review denied*, 353 N.C. 265, — S.E.2d — (2000); N.C.G.S. § 1A-1, Rule 56 (1999). "An issue is genuine where it is supported by substantial evidence." *Johnson*, 139 N.C. App. at 681, 535 S.E.2d at 361.

4. As there is no dispute in this record that Summerlin was the agent of the Summerlin Agency in his transactions with Mrs. Baggett, summary judgment must be reversed as to both Defendants.

dence would have been misled or placed off his guard, the failure to read the contract does not constitute negligence. *Id.*; *see R-Anell Homes, Inc. v. Alexander & Alexander, Inc.*, 62 N.C. App. 653, 659, 303 S.E.2d 573, 577 (1983) (a jury could "find that [a] plaintiff's reliance on [a] defendant's presumably superior knowledge of the insurance business was reasonable, and [the] plaintiff was not contributorily negligent" in failing to read an insurance policy).

In this case, there is no indication Plaintiffs read the Summerlin Policy as it pertained to coverage and exclusions on the Boutique House-Port. The statement of Summerlin that he would provide Plaintiffs with "the necessary coverage," taken in the context of the prior relationship Plaintiffs had with Summerlin, and the latter's knowledge of the location of the property near the White Oak River, however, is sufficient evidence to support a conclusion that a reasonably prudent person would not have read the insurance contract and, thus, not have seen the explicit flood exclusions. Thus, a genuine issue of fact exists and summary judgment cannot be supported on this basis.

Reversed and remanded.

Judge JOHN concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

I would affirm summary judgment in favor of defendants. All parties in this transaction were burdened with certain duties. Defendants had a duty to make an application for the insurance coverage specifically requested by plaintiffs. Plaintiffs had a duty to read their insurance policy. Viewing the evidence in the light most favorable to plaintiffs, defendants satisfied their duty, and plaintiffs did not.

I. Agent's and Insurer's Duty

"An insurance agent has a duty to procure additional insurance for a policyholder at the request of the policyholder." *Phillips v. State Farm Mut. Auto Ins. Co.*, 129 N.C. App. 111, 113, 497 S.E.2d 325, 327 (1998) (citation omitted). "[This] duty does not, however, obligate the insurer or its agent to procure a policy for the insured which had not been requested." *Id.* (emphasis supplied) (citation omitted). Thus, the

insurance agent's duty to a policyholder is limited to the nature of the policyholder's request to the agent. *Id.*; *see also Bigger v. Vista Sales & Mktg., Inc.*, 131 N.C. App. 101, 505 S.E.2d 891 (1998) (holding that insurance agent who procured requested liability insurance was not liable for failing to recommend workers' compensation coverage despite a 28-year business relationship between insurance agent and insured).

Plaintiffs' evidence shows that Mrs. Baggett provided to Summerlin a copy of her existing insurance policy. Mrs. Baggett requested Summerlin to provide "the same coverage" at a cheaper rate. In response to that request, Summerlin quoted a premium and ordered an insurance policy with terms substantially similar to plaintiffs' existing policy. Both policies expressly excluded coverage for losses due to flood damage.

Plaintiffs' evidence reveals that Summerlin made no assertion to plaintiffs that their insurance policy included flood coverage. As the majority points out, Mrs. Baggett testified that plaintiffs never asked Summerlin to procure flood coverage. Summerlin never indicated to plaintiffs that the policy covered flood losses. The record is undisputed that Mrs. Baggett specifically requested and knew that Summerlin only replaced the existing coverage. It is equally undisputed that the prior policy also excluded coverage for flood losses.

Plaintiffs argue, and the majority holds, that because: (1) Summerlin knew the property was near the waterfront; and, (2) that he told plaintiffs they had "all risk" coverage, a genuine issue of material fact is raised whether Summerlin assumed an obligation to procure flood insurance. This Court rejected a similar argument in *Greenway v. N.C. Farm Bureau Mut. Ins. Co.*, 35 N.C. App. 308, 241 S.E.2d 339 (1978).

In *Greenway*, defendant-insurance company insured plaintiffs' rural home against loss by fire. Plaintiffs' insurance policy stated that the plaintiffs' home must be equipped with a telephone system for 100 percent coverage. Plaintiffs' home burned without a telephone. The insurance company paid 75 percent of the agreed value. Plaintiffs brought suit against the insurance agent and company to recover the balance allegedly due under the insurance policy. Plaintiffs alleged, *inter alia*, negligence and misrepresentation on the part of defendants.

> Plaintiff claimed he was never informed of the telephone requirement for full coverage and never discussed rates, but that defendant-agent told him he would have full coverage. The application he signed made no mention of the telephone requirement. Plaintiffs received their policy . . . but never read it . . . Defendant-Agent came to the house at least twice while it was under construction, [saw they had no telephone], and never mentioned anything about a telephone [requirement].

Greenway, 35 N.C. App. at 310, 241 S.E.2d at 340-41 (emphasis supplied). Plaintiffs argued that defendants waived the telephone requirement for full coverage. Plaintiffs asserted the insurance company, via its agent, misrepresented to plaintiffs that they had "full coverage," knew the dwelling did not contain a telephone, and accepted premium payments. *Id.* In rejecting these arguments, this Court wrote:

> There is conflicting testimony as to whether plaintiffs knew of the telephone requirement. This conflict, however, does not raise a material issue of fact. It is clearly not the duty of an insurer or its agent to inquire and inform an insured as to all parts of his policy:
>
> > We cannot approve the position that, in the absence of a request, it was the agent's legal duty to explain the meaning and effect of all the provisions in the policy, or that his failure to inquire . . . was a waiver of the requirement. *Hardin v. Ins. Co.*, 189 N.C. 423, 427, 127 S.E.2d 353, 355 (1925).

Greenway, 35 N.C. App. at 314, 241 S.E.2d at 343.

Summerlin assumed the duty to procure an insurance policy with the same or similar coverage as the plaintiffs' existing policy. Summerlin fulfilled that duty. The existing policy did not contain coverage for flood losses. Plaintiffs could not have reasonably expected Summerlin to procure flood insurance based on Mrs. Baggett's request to provide insurance in accordance with the existing policy. Moreover, both Summerlin and plaintiffs' previous insurance agent, McGlaughon, testified that they informed plaintiffs that neither policy contained coverage for flood losses. When the facts are viewed in a light most favorable to plaintiffs, there is no genuine issue of material fact whether Summerlin assumed responsibility to procure flood insurance.

II. Insured's Duty

There appears to be issues of fact: (1) whether Summerlin advised plaintiffs that they had no flood insurance, and (2) whether plaintiffs understood that "all risk" coverage excluded coverage against flooding. Resolving those factual disputes in plaintiffs' favor does not help plaintiffs' case.

The majority's opinion points out that policyholders in North Carolina are under a duty to read their insurance policies.

> '[A]n insurance agent is not required to affirmatively warn his customers of provisions contained in insurance policies.' 16C J. Appleman, *Insurance Law and Practice* § 9168 at 176 (1981). (citation omitted). Persons entering contracts of insurance, like other contracts, have a duty to read them and ordinarily are charged with knowledge of their contents. *Setzer v. Ins. Co.*, 257 N.C. 396, 401-02, 126 S.E.2d 135, 138-39 (1962).

Nationwide Mut. Ins. Co. v. Edwards, 67 N.C. App. 1, 7-8, 312 S.E.2d 656, 661 (1984). "[T]he receipt and retention of the policy by the insured has been held to preclude the right to a reformation." 43 Am. Jur. 2d *Insurance* § 371 (1982). Where a party has reasonable opportunity to read the instrument in question, and the language of the instrument is clear, unambiguous and easily understood, failure to read the instrument bars that party from asserting its belief that the policy contained provisions which it does not. *Setzer*, *supra*.

> The North Carolina Court has frequently said that where no trick or device had prevented a person from reading the paper which he has signed or has accepted as the contract prepared by the other party, his failure to read when he had the opportunity to do so will bar his right to reformation.

Setzer, 257 N.C. at 401, 126 S.E.2d at 139; *see also*, *Welch v. Ins. Co.*, 196 N.C. 546, 146 S.E. 216 (1928) (Insured was not entitled to relief for insurance agent's alleged misrepresentation as to policy coverage where insured had a copy of the policy for four months prior to the loss); *Gordon v. Fidelity and Casualty Company of N.Y.*, 238 S.C. 438, 120 S.E.2d 509 (1961) (Insured was not entitled to relief for fraud and deceit on the basis that the representations of the insurance agent were at variance with the actual policy terms, where insured had a copy of his policy for more than eight months, with full opportunity to learn the contents and coverage provided therein).

In this case, plaintiffs do not contend that the provisions were ambiguous or difficult to understand. However, plaintiffs contend that they were misled into believing they had flood coverage, and are excused from their failure to read the policy.

The majority's opinion cites *R-Anell Homes, Inc. v. Alexander & Alexander, Inc.*, 62 N.C. App. 653, 303 S.E.2d 573 (1983), to support the existence of a genuine issue of material fact of whether Summerlin negligently misled plaintiffs to believe they had flood insurance. In *R-Anell Homes*, plaintiff purchased a blanket building insurance policy and a building contents policy with defendant-insurance company. During renovations, plaintiff removed the Southern Bell telephone system from his building and installed his own telephone system. Plaintiff called defendant-insurance company and told him about the new telephone system and asked "about getting insurance coverage." *Id.* at 655, 303 S.E.2d at 575. According to plaintiff's evidence, an employee of the insurance company stated that the system was "part of the building and was covered under the blanket policy on the building" and that "defendant need not extend the coverage on the building contents policy." *Id.* The employee affirmatively represented that plaintiff had coverage for the new telephone system. This was incorrect advice, and directly contrary to the language of the insurance contract. Under these facts, this Court held that "a jury could find that plaintiff's reliance on defendant's presumably superior knowledge of the insurance business was reasonable, and defendant was not contributorily negligent." *Id.* at 659, 393 S.E.2d at 577.

In *Elam v. Smithdeal Realty Co.*, 182 N.C. 641, 109 S.E. 632 (1921), plaintiff purchased an automobile insurance policy through defendant insurance agency. The insurance agent affirmatively represented that plaintiff's policy contained automobile collision coverage. This advice was contrary to the express language of the policy. Plaintiff suffered an accident, and the insurance company denied coverage. The evidence showed that at the time of the accident the policy was one week old, and had not been delivered directly to the plaintiff. The Court held that these facts created a jury question as to whether defendant negligently misled plaintiff into believing coverage existed, and whether plaintiff had sufficient opportunity to discover the exclusions of his policy, excusing his failure to read the policy.

In the present case, plaintiffs contend that the label "all risk" on two insurance binders, and Summerlin's assertion that they had

"all-risk" coverage obligated Summerlin to procure flood insurance. The label "all risk" only appears on the 1993 and 1995 insurance binders. The binders expressly state that coverage under the binder is temporary, and that the binders are superceded upon issuance of the final insurance policy. The words "all risk" do not appear on any insurance policy. The flood exclusion is clearly set forth in the insurance policy.

Unlike the insurance agents in *R-Anell Homes* and *Elam*, Summerlin never affirmatively represented to plaintiffs that they had flood insurance. Mrs. Baggett testified that there was no discussion with Summerlin about flood insurance until shortly before Hurricane Bertha hit the North Carolina coast. Furthermore, plaintiffs had the policy in their possession, several years prior to the date of the loss. Summerlin did not have a duty to point out the exclusions in the written insurance policy where those exclusions did not negate a particular coverage specifically requested by plaintiffs. I would hold it unnecessary to look beyond the plain language of the insurance contract, which expressly excludes coverage for flood losses.

I would affirm the decision of the learned trial court. For these reasons, I respectfully dissent.

WILLIAM C. ALLEN, EMPLOYEE, PLAINTIFF v. ROBERTS ELECTRICAL CONTRACTORS, EMPLOYER, TRANSPORTATION INSURANCE CO., CARRIER, DEFENDANTS

No. COA00-354

(Filed 17 April 2001)

1. Workers' Compensation— disability—evidence and findings

Competent evidence supported the Industrial Commission's findings of fact in a workers' compensation action where the Commission, in the rightful exercise of its discretion, gave more credibility to the opinions of three doctors who testified that plaintiff suffered from a thoracolumbar strain, not fibromyalgia, and was able to return to work; the finding that plaintiff has not undergone a change of condition was supported by competent evidence because the only evidence of a change of condition was another doctor's testimony that plaintiff now has fibromyalgia; and the finding that plaintiff's job search was not reasonable was supported by competent evidence in that plaintiff testified that he

had gone to defendant-employer's job site without identifying himself and been told that defendant was not hiring, and had applied for work at about a dozen businesses during an eight-day span.

2. Workers' Compensation— disability—position refused—brief job search

The facts supported the Industrial Commission's conclusions and justified its award where a Form 21 agreement was approved, but the presumption of disability was rebutted because plaintiff was offered a light duty position which he unjustifiably refused, one doctor's opinion that plaintiff was unable to work was given less credibility by the Commission than the opinion of three other doctors, and plaintiff's unannounced visit to defendant's job site and an eight-day job search in a two-year period did not serve to meet his burden of supporting his claim of continuing disability. The burden of proof never shifted back to defendant.

3. Workers' Compensation— testimony—consideration by Commission—no findings

The Industrial Commission did not err in a workers' compensation proceeding where plaintiff contended that the Commission disregarded the testimony of three of his witnesses, but there was no proof that the Commission disregarded the testimony; rather, the Commission considered and evaluated the testimony and chose not to make exhaustive findings and mention the testimony in its opinion and award. It is not necessary for the Commission to make exhaustive findings as to each statement by a witness or to make findings rejecting specific evidence that may be contrary to the evidence accepted by the Commission. Here, plaintiff's witnesses were not physicians and the Commission had before it the opinions and diagnoses of four doctors, only one of which supported the claims of plaintiff's witnesses.

4. Workers' Compensation— additional evidence—repetitive

The Industrial Commission did not abuse its discretion in a workers' compensation action by denying plaintiff's motion for the taking of additional evidence where plaintiff sought to admit medical records and a diagnosis from another physician which would have been repetitive, unnecessary, cumulative, and not likely to produce a different result.

Appeal by plaintiff from an opinion and award entered 24 January 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 January 2001.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by Vickie L. Burge, for plaintiff-appellant.

Young Moore and Henderson P.A., by Jeffrey T. Linder, for defendant-appellees.

HUNTER, Judge.

William C. Allen ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ("Commission"). In its opinion and award, the Commission ordered Roberts Electrical Contractors ("defendant-employer") and Transportation Insurance Company (collectively "defendants") to pay plaintiff temporary total disability compensation for three weeks, permanent partial disability compensation for nine weeks—but not additional compensation for a continuing disability as contended by plaintiff, and to provide only conservative medical treatment that is limited to the use of non-addictive pain medications. The opinion and award also denied plaintiff's request for approval of a change in his treating physician and his motion for taking of additional evidence. On appeal, plaintiff assigns error to (1) the Commission's findings of fact, conclusions of law, and award, (2) the Commission's alleged disregard of the testimony of three of his witnesses, and (3) the Commission's alleged failure to exercise discretion, or alleged manifest abuse of discretion, in denying his motion for taking of additional evidence. After a careful review of the record and briefs, the opinion and award of the Commission is affirmed.

On 19 May 1994, plaintiff was employed by defendant-employer as an electrician. On that date, plaintiff, in the course of his employment, was walking backwards directing a backhoe driver when he stepped into a ditch, fell, and injured his back and arm. Subsequently, the parties entered into a Form 21 agreement for disability compensation, which was approved on 29 August 1994.

Plaintiff was seen by Dr. Bruce P. Jaufmann who diagnosed plaintiff as having sustained a thoracolumbar strain. On 9 September 1994, Dr. Jaufmann released plaintiff to return to light duty work for up to six weeks and full duty work after six weeks. Plaintiff sought a second medical opinion regarding his injury, and upon the advice of counsel, he visited Dr. Glenn A. McCain. Dr. McCain diagnosed

plaintiff as having sustained chronic pain syndrome, and he recommended plaintiff "be afforded the opportunity of enrollment in a rehabilitation program aimed at restoring his function . . . ."

Defendant-employer offered plaintiff a light duty position to begin on 7 October 1994, but plaintiff never returned to work. A Form 24 informal hearing was held, and plaintiff's benefits were terminated as of 7 October 1994. Plaintiff requested a hearing, which was held on 20 April 1995 before Deputy Commissioner Douglas E. Berger. On 29 September 1995, Deputy Commissioner Berger filed his opinion and award affirming the Form 24 application to stop temporary total disability payments to plaintiff and concluding that plaintiff's refusal to accept light duty work was not justified. In his decision, Deputy Commissioner Berger found that plaintiff had sustained chronic pain syndrome, and he ordered plaintiff to participate in an inpatient chronic pain management program selected and paid for by defendants. Plaintiff did not appeal this first opinion and award.

Initially, defendants provided plaintiff the opportunity to participate in an outpatient pain management program at Cape Fear Valley Medical Center in Fayetteville, North Carolina. However, plaintiff refused to participate in this program because it did not involve inpatient treatment as ordered by Deputy Commissioner Berger. After a conference call with Deputy Commissioner Berger, the parties agreed to send plaintiff to the Spine Center at Bowman Gray Baptist Hospital in Winston-Salem, North Carolina. At the Spine Center, plaintiff attended a three-week functional restoration program from 8 July to 26 July 1996. Upon completion of the program, Dr. Walter Davis diagnosed plaintiff as having a partial permanent impairment rating of three percent (3%) for thoracolumbar strain, and he released plaintiff to return to work in a medium physical demand classification with a lifting restriction.

Upon discharge, plaintiff went to a job site of defendant-employer unannounced and asked a person, whom he believed to be the foreman, if defendant-employer was hiring. The person responded no, and plaintiff departed without identifying himself. In an eight-day span from 13 August to 20 August 1996, plaintiff also applied for work with about a dozen businesses of varying types, but he did not obtain employment.

On plaintiff's attorney's request, plaintiff was re-examined by Dr. McCain on or about 19 August 1996. At that time, Dr. McCain changed his initial diagnosis of plaintiff, and he diagnosed plaintiff as having

fibromyalgia and concluded that plaintiff was unable to return to work in any occupation. In a letter to plaintiff's attorney, Dr. McCain contradicted his earlier diagnosis and recommendation, and reported that he "would not have recommended a Functional Restoration Program for [plaintiff] since there is no available medical evidence that this kind of an approach really works for fibromyalgia." Later in 1996, plaintiff relocated to the state of Maryland.

Plaintiff requested a second hearing with the Commission seeking additional benefits and approval of a change in treating physician to Dr. McCain. A second hearing before Deputy Commissioner Berger was held on 18 November 1997. Deputy Commissioner Berger ordered plaintiff to undergo an independent medical examination by Dr. Scott S. Sanitate. During his medical examination, Dr. Sanitate performed a series of tests on plaintiff. From the tests, Dr. Sanitate concluded that plaintiff did not suffer from fibromyalgia and plaintiff's reports of pain were not a reliable source for determining the extent of his injury.

On 30 September 1998, Deputy Commissioner Berger filed his second opinion and award in this matter. In this decision, he found that plaintiff did not have fibromyalgia and plaintiff was intentionally exaggerating the extent of his pain. Moreover, Deputy Commissioner Berger gave greater weight to the opinions of Dr. Sanitate than to those of Dr. McCain. Additionally, Deputy Commissioner Berger concluded that plaintiff failed to meet his burden of proof showing that he had been disabled for any time period following his termination of benefits on 7 October 1994, except for the three-week period in 1996 that he was at the Spine Center. Consequently, Deputy Commissioner Berger denied plaintiff's request that Dr. McCain be approved as his treating physician, and he ordered defendants to pay plaintiff temporary disability compensation at a rate of $240.00 for the three-week period that he was at the Spine Center, permanent partial disability compensation at a rate of $240.00 for nine weeks for the permanent partial disability to his back, and for conservative treatment that is limited to the use of non-addictive pain medications.

Plaintiff appealed Deputy Commissioner Berger's second opinion and award to the Full Commission. On or about 12 March 1999, plaintiff also filed a motion for taking of additional evidence seeking the admission of medical records and diagnosis from plaintiff's Maryland physician. The Full Commission reviewed the matter and filed its opinion and award, with detailed findings and conclusions, on 24 January 2000. In its decision, the Full Commission affirmed the sec-

ond opinion and award of Deputy Commissioner Berger and denied plaintiff's motion for taking of additional evidence. Significantly in its opinion and award, the Commission concluded:

> Plaintiff did not appeal Deputy Commissioner Berger's Opinion and Award, filed 29 September 1995, affirming the Form 24 Application to Terminate or Suspend Payment of Compensation decision, which was filed 23 November 1994. Plaintiff has the burden of proving that he has been disabled for any time period following this termination of benefits on 7 October 1994. Plaintiff has failed to show by the greater weight of the evidence that he was disabled during the time period beginning 7 October 1994 to the date of the hearing before the Deputy Commissioner, with the exception of the time period that plaintiff was in the program at the Bowman Gray Baptist Hospital Spine Center. . . .

Plaintiff now appeals to this Court.

[1] First, plaintiff assigns error to the Commission's findings of fact, conclusions of law, and award. After a careful review of the record, we find that competent evidence supports the Commission's findings, and the Commission's findings support its conclusions and award. Therefore, we reject this assignment of error.

"The standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). Furthermore, "[t]he facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *disc. review denied*, 350 N.C. 310, 534 S.E.2d 596, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). In other words, " '[t]he findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)).

Specifically, plaintiff challenges the Commission's findings: (1) giving greater weight to the opinions of Dr. Sanitate than those of Dr.

McCain, (2) that Dr. McCain recommended a program aimed at functional restoration, and that plaintiff (3) did not have fibromyalgia, (4) intentionally exaggerated his pain, (5) is physically able to return to work, (6) reached maximum medical improvement with regards to his back and arm injury as of the date of his release from the Spine Center in 1996, (7) only needed conservative care that includes non-addictive pain medications, (8) had not undergone a change of condition since his first examination by Dr. McCain in 1994, and (9) had not conducted a reasonable job search since being released from the Spine Center.

We stress that " '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Dolbow v. Holland Industrial*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "Thus, the Commission may assign more weight and credibility to certain testimony than other." *Dolbow*, 64 N.C. App. at 697, 308 S.E.2d at 336.

At bar, three doctors, Drs. Jaufmann, Davis, and Sanitate (the independent examiner), opined that plaintiff suffered from a thoracolumbar strain, not fibromyalgia, and was able to return to work. Furthermore, after performing a series of tests on plaintiff, Dr. Sanitate found no anatomical relationship between plaintiff's reports of pain and his performance on these tests. Consequently, Dr. Sanitate concluded that plaintiff had no organic source for his pain and was not being truthful regarding his pain. While there is contrary evidence to the Commission's findings regarding these doctors' opinions and diagnosis, primarily in the form of Dr. McCain's opinions and diagnosis, the Commission, in a rightful exercise of its discretion, gave more weight and credibility to the opinions of Drs. Jauffman, Davis, and Sanitate. As to Dr. McCain's recommendation that plaintiff participate in a functional restoration program, evidence of this recommendation is found in the record in a letter that Dr. McCain wrote dated 15 December 1994. Thus, competent evidence in the record supports the Commission's findings giving more weight to the opinions of Dr. Sanitate, that Dr. McCain recommended a program aimed at functional restoration, plaintiff did not have fibromyalgia, plaintiff intentionally exaggerated his pain, plaintiff reached maximum medical improvement as of the date of his release from the Spine Center, and plaintiff only needed conservative care that included non-addictive pain medications.

Despite the fact that the Commission found that plaintiff had not undergone a change of condition since his first examination by Dr. McCain in 1994, plaintiff argues that he did undergo a change of condition pursuant to N.C. Gen. Stat. § 97-47. Importantly, a " 'change in condition' can consist of either a change in the claimant's physical condition that impacts his earning capacity, a change in the claimant's earning capacity even though claimant's physical condition remains unchanged, or a change in the degree of disability even though claimant's physical condition remains unchanged." *Blair v. American Television & Communications Corp.*, 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996) (citations omitted). "In all instances the burden is on the party seeking the modification to prove the existence of the new condition and that it is causally related to the injury that is the basis of the award the party seeks to modify." *Id.*

Significantly, "[a] mere change of the doctor's opinion with respect to claimant's preexisting condition does not constitute a change of condition required by G.S. 97-47." *Shuler v. Talon Div. of Textron*, 30 N.C. App. 570, 577, 227 S.E.2d 627, 631 (1976), *overruled on other grounds, Hyler v. GTE Products Co.*, 333 N.C. 258, 425 S.E.2d 698 (1993). The only evidence that plaintiff presents to show a change of condition is the change of his doctor's (Dr. McCain) opinion that plaintiff had chronic pain syndrome and now has fibromyalgia. Therefore, competent evidence in the record supports the Commission's finding that plaintiff had not undergone a change of condition.

As to the Commission's finding that plaintiff had not conducted a reasonable job search since being released from the Spine Center in 1996, the Commission only had the testimony of plaintiff as to his actual job search. Plaintiff admits that during this job search, he continued to utilize his cane. Again, competent evidence supports the Commission's finding that plaintiff's job search, consisting of his going to defendant-employer's job site unannounced seeking employment and an eight-day period in a span of two years, was not a reasonable job search. Therefore, we hold that competent evidence supports the entirety of the Commission's findings of fact, and thus, those findings are conclusive on appeal.

[2] Next, plaintiff challenges the conclusions of law made by the Commission. In particular, plaintiff argues that the Commission erred (1) in concluding that he failed to meet his burden of proof showing that he had been disabled for any time period following his termination of benefits on 7 October 1994, and (2) in failing to shift the bur-

den of proof to defendant-employer after he allegedly satisfied his burden of proving a continuing disability. Again, we disagree with plaintiff.

As mentioned *supra*, the Commission concluded:

> Plaintiff did not appeal Deputy Commissioner Berger's Opinion and Award, filed 29 September 1995, affirming the Form 24 Application to Terminate or Suspend Payment of Compensation decision, which was filed 23 November 1994. Plaintiff has the burden of proving that he has been disabled for any time period following this termination of benefits on 7 October 1994. . . .

Therefore, as plaintiff did not appeal the first opinion and award of Deputy Commissioner Berger, the burden of proving a continuing disability shifted to plaintiff. *See Brown v. S & N Communications, Inc.*, 124 N.C. App. 320, 331, 477 S.E.2d 197, 203 (1996).

"The Industrial Commission's conclusions of law are reviewable *de novo* by this Court." *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000). We note that the approval of a Form 21 agreement establishes a presumption that the employee is disabled, and the disability is considered to continue until the employer shows that suitable jobs are available and that plaintiff is capable of getting one of those jobs. *See McCoy v. Oxford Janitorial Service Co.*, 122 N.C. App. 730, 732-33, 471 S.E.2d 662, 664 (1996). However, if an employer presents evidence showing an employee has unjustifiably refused suitable employment, the presumption of disability is rebutted. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 206, 472 S.E.2d 382, 386 (1996); N.C. Gen. Stat. § 97-32. "If the employer offers sufficient evidence to rebut the continuing presumption of disability, . . . [t]he burden then switches back to the employee to offer evidence in support of a continuing disability . . . ." *Brown*, 124 N.C. App. 320, 331, 477 S.E.2d 197, 203. "The employee can prove a continuing total disability by showing either that no jobs are available, no suitable jobs are available, or that he has unsuccessfully sought employment with the employer." *Id.*

Here, a Form 21 agreement for disability compensation was approved on 29 August 1994. The approval of the Form 21 agreement gave rise to the presumption that plaintiff was disabled and had a continuing disability. At the first hearing, defendant-employer presented evidence that plaintiff was offered a light duty position to begin on 7 October 1994, and plaintiff unjustifiably refused the posi-

tion. Thus, the deputy commissioner entered an order affirming the Form 24 application to stop temporary total disability payments to plaintiff. Since defendant-employer offered sufficient evidence to rebut the continuing presumption of disability, the burden switched back to plaintiff at the second hearing to offer evidence supporting his claim of a continuing disability. Dr. McCain's change of opinion, plaintiff's unannounced visit to defendant-employer's job site seeking employment, and an eight-day job search in a period of two years do not serve to meet his burden.

Plaintiff argues that he "satisfied his burden of disability by showing his incapacity to earn wages during his three week treatment at the Spine Center." We find plaintiff's claim flawed. Important to note, plaintiff never appealed the first opinion and award of the deputy commissioner. Thus, to prove a continuing disability after his release from the Spine Center, plaintiff "ha[d] the burden of proving both the existence of his disability and its degree." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). The only evidence that shows plaintiff may have suffered from a continuing disability and was unable to return to work in any capacity after his release from the Spine Center came in the form of the opinion and diagnosis of Dr. McCain—who was contradicting his earlier opinion and diagnosis. Nevertheless, the Commission gave more credibility and weight to the opinions and diagnoses of Drs. Jaufmann, Davis, and Sanitate—who concluded that plaintiff could return to work. From the evidence before us, it is clear that plaintiff never proved the existence and degree of any continuing disability after the termination of his benefits on 7 October 1994, or after his release from the Spine Center in 1996. Therefore, the burden of proof never shifted back to defendant-employer. Hence, we find that the Commission's conclusions of law in their entirety are supported by the findings of fact.

Finally, "[w]hen called upon to review the findings of fact, conclusions of law, and awards of the [Commission] in compensation cases, the courts determine as a matter of law whether the facts found support the Commission's conclusions, and whether they justify the awards." *McRae v. Wall*, 260 N.C. 576, 578, 133 S.E.2d 220, 222 (1963). Here, we find that as a matter of law the facts support the Commission's conclusions and justify the award. Thus, we affirm the Commission's findings of fact, conclusions of law, and award.

[3] Next, plaintiff assigns error to the Commission's alleged disregard of the testimony of three of his witnesses. At the hearing, the Commission heard plaintiff's sister and two brothers testify as to

their observations of plaintiff's pain and inactivity. However, the Commission did not mention the testimony in its opinion and award. After a review of this issue, we overrule this assignment.

We note that, "[i]t is not, however, necessary that the Full Commission make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence that may be contrary to the evidence accepted by the Full Commission." *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 62 (1998). At bar, plaintiff's three siblings testified before the Commission at the hearing, and the testimony is included in the record. There is no proof that the Commission disregarded this testimony; on the contrary, the Commission, in a proper exercise of its discretion, chose not to make exhaustive findings regarding the testimony of these lay witnesses who were not medical experts.

Plaintiff relies on this Court's decision in *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997), for the supposition that "before finding the facts, the Industrial Commission must consider and evaluate all of the evidence." *Lineback* is clearly distinguishable from the case *sub judice*. Significantly in *Lineback*, the Commission failed to consider the testimony of the plaintiff's orthopaedic surgeon. *See id.* Here, plaintiff's siblings were not treating physicians; they were lay witnesses, related to plaintiff, who were not competent to testify as to plaintiff's medical condition or any disability he may have. *See Click v. Freight Carriers*, 300 N.C. 164, 265 S.E.2d 389 (1980). The Commission considered and evaluated the testimony at issue and chose not to make exhaustive findings and mention the testimony in its opinion and award. Additionally, the Commission had before it the opinions and diagnoses of four doctors, one of which supported plaintiff's witnesses' claims. Therefore, we reject plaintiff's second assignment of error.

[4] Finally, plaintiff assigns error to the Commission's alleged failure to exercise discretion, or alleged manifest abuse of discretion, in denying his motion for taking of additional evidence. Plaintiff filed a motion for taking of additional evidence seeking the admission of medical records and diagnosis from plaintiff's Maryland physician, and the Commission denied the motion. After reviewing this argument, we affirm the Commission's denial of plaintiff's motion.

A plaintiff does not have a substantial right to require the Commission to hear additional evidence, and the duty to do so only

applies if good ground is shown. *See Eaton v. Klopman Mills, Inc.*, 2 N.C. App. 363, 163 S.E.2d 17 (1968). Furthermore, plaintiff concedes that, "[t]he question of whether to reopen a case for the taking of additional evidence is addressed to the sound discretion of the Commission, and its decision is not reviewable on appeal in the absence of a manifest abuse of that discretion." *Pickrell v. Motor Convoy, Inc.*, 82 N.C. App. 238, 243-44, 346 S.E.2d 164, 168 (1986), *rev'd on other grounds*, 322 N.C. 363, 368 S.E.2d 582 (1988).

Where, as here, "an issue has been fairly litigated, with proof offered by both parties upon an issue, a claimant should not be entitled to a further hearing to introduce cumulative evidence, unless its character or force be such that it would be likely to produce a different result." *Hall v. Chevrolet, Co.*, 263 N.C. 569, 577, 139 S.E.2d 857, 862 (1965). This Court in the past has held that the Commission did not abuse its discretion in denying a plaintiff's motion to present newly discovered evidence consisting of physician's evaluations since such conclusions by such physician were no different from conclusions of other physicians which were in evidence. *See Thompson v. Burlington Industries*, 59 N.C. App. 539, 543, 297 S.E.2d 122, 125 (1982). At bar, evidence of Dr. McCain's diagnosis of plaintiff as having fibromyalgia, plaintiff's alleged pain, and plaintiff's alleged inability to work due to pain was already before the Commission. Hence, the admission of the testimony of plaintiff's Maryland physician would be repetitive, unnecessary, cumulative evidence and would not likely produce a different result. Therefore, we hold that plaintiff did not show good grounds for the Commission to hear additional evidence, and the Commission did not abuse its discretion or commit a manifest abuse of discretion. Additionally, the due administration of justice did not require the taking of additional evidence in this matter. *See Tindall v. Furniture Co.*, 216 N.C. 306, 311, 4 S.E.2d 894, 897 (1939). Accordingly, we reject this assignment.

Thus, the Commission's opinion and award is

Affirmed.

Judges WALKER and CAMPBELL concur.

THOMAS M. ROUSE, SANDY ROUSE, AND FEDERAL INSURANCE COMPANY, PLAINTIFFS V. WILLIAMS REALTY BUILDING COMPANY, INCORPORATED, DEFENDANTS

No. COA00-209

(Filed 17 April 2001)

Insurance— fire—home under construction—full policy limits—ambiguity resolved in favor of insured

The trial court did not err by granting summary judgment in favor of the individual plaintiffs in an action to recover the full limit of liability of insurance proceeds of $2,369,000 with an offset for the $1,774,381 already paid for loss by fire to plaintiffs' home while it was under construction, because: (1) where policy language is reasonably susceptible to either construction by the parties, the ambiguity is resolved in favor of the insured and against the insurer; (2) the insurance company's construction of the policy paragraph entitled "amount of insurance" improperly substitutes the term "limit of liability" for "amount of insurance" since express language to this effect could have been used in the policy had the parties intended this construction; (3) plaintiffs' construction properly contends the "loss settlement" paragraph of the policy determines the amount payable in the event of a covered loss which is determined by whether the "amount of insurance" is more or less than 80% of the full replacement cost of the building; and (4) although the "actual amount of insurance at the time of loss is $1,774,381, that amount is only 75.4% of the replacement cost while the policy requires the greater amount of 80% or $2,353,960 to be paid in addition to the reasonable expenses for debris removal of $15,040 which brings the total amount due under the policy to the limit of liability of $2,369,000.

Judge THOMAS dissenting.

Appeal by cross-claim defendant Federal Insurance Company from order entered 25 October 1999 by Judge Ronald L. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 11 January 2001.

Everett Gaskins Hancock & Stevens, by E.D. Gaskins, Jr., for cross-claim plaintiffs-appellees Thomas M. and Sandy Rouse.

Brown, Crump, Vanore & Tierney, L.L.P., by Andrew A. Vanore, III, for cross-claim defendant-appellant Federal Insurance Company.

TIMMONS-GOODSON, Judge.

Federal Insurance Company ("Federal") appeals from an award of summary judgment for Thomas M. and Sandy Rouse ("plaintiffs" or "the Rouses") on the question of whether they were entitled to receive the full limit of liability under a policy insuring their residence against loss by fire while the home was under construction. Having found no error of law, we affirm the ruling of the trial court.

Plaintiffs contracted with Williams Realty & Building Company ("Williams Realty") for the construction of a residence at 2745 Lakeview Drive in Raleigh, North Carolina. Pursuant to the agreement, an insurance agent for Williams Realty procured Federal policy number 2911-95-15 on behalf of the Rouses to cover the residence against fire and other perils while it was under construction. The policy provided that the limit of liability for Coverage A, the type of coverage applicable to the residence, was $2,369,000. The initial term of the policy was from 15 November 1996 to 15 November 1997; however, on 3 October 1997, Federal renewed and extended the policy through 15 November 1998. It is undisputed that the Rouses paid all premiums due under the policy and that the policy was in full force and effect when plaintiffs' claim arose.

Williams Realty had nearly completed construction of the residence when it was totally destroyed by fire on the morning of 19 December 1997. A Federal claims adjuster investigated the damage and determined that plaintiffs suffered a total loss worth $2,406,809. Plaintiffs, therefore, demanded payment in the amount of $2,369,000, the limit of liability under the policy. However, citing the "AMOUNT OF INSURANCE" provision set forth in an endorsement to the policy, Federal claimed that the limit of liability was "provisional" and that the actual amount of coverage afforded plaintiffs at the time of the loss was $1,774,381, which amount Federal tendered.

The Rouses brought an action against Williams Realty for negligence, breach of contract, and breach of fiduciary duty in failing to procure adequate insurance coverage for the residence. The Rouses

also filed a cross-claim against Federal, who had been joined as a plaintiff in the original action, alleging breach of contract for failing to pay "the full amount due under the policy." Thereafter, plaintiffs voluntarily dismissed their claims against Williams Realty without prejudice. The Rouses and Federal then filed cross-motions for summary judgment, and following a hearing on the motions, the trial court entered judgment for plaintiffs. The court ordered Federal to pay plaintiffs "the amount of $2,369,000, the limit of liability under the insurance policy at issue in this action, with an offset for the $1,774,381 previously paid; making the total amount currently due $594,619, plus interest at the legal rate from March 17, 1998, until paid." Federal gave timely notice of appeal to this Court.

By its sole assignment of error, Federal contends that in awarding summary judgment for plaintiffs, the trial court erroneously construed the provisions of the policy. Federal argues that under the terms of the policy, the amount of coverage afforded plaintiffs for the loss of their residence was $1,744,381. Therefore, Federal maintains that having tendered the total amount due under the policy, Federal was entitled to summary judgment. We cannot agree.

Summary judgment is an appropriate disposition if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). The party moving for summary judgment has the burden of demonstrating the absence of any factual issue of consequence. *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 94 (2000). This can be done by: "(1) proving that an essential element of the opposing party's claim is nonexistent; (2) showing through discovery that the opposing party cannot produce evidence to support an essential element; or (3) showing that the opposing party cannot surmount an affirmative defense." *Id.* at 532, 530 S.E.2d at 94-95.

"An insurance policy is a contract between the parties, and the intention of the parties is the controlling guide in its interpretation." *Bank v. Insurance Co.*, 49 N.C. App. 365, 370, 271 S.E.2d 528, 531 (1980), *rev'd on other grounds*, 303 N.C. 203, 278 S.E.2d 507 (1981). The parties' intent may be derived from the language employed in the policy. *Kruger v. State Farm Mut. Auto. Ins. Co.*, 102 N.C. App. 788, 789, 403 S.E.2d 571, 572 (1991). Thus, when presented with policy language that is explicit, "[o]ur courts have a 'duty to construe and

enforce [the policy] as written, without rewriting the contract or disregarding the express language used. . . . The duty is a solemn one, for it seeks to preserve the fundamental right of freedom of contract.' " *Id.* (quoting *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380-81, 348 S.E.2d 794, 796 (1986) (citation omitted)). Judicial construction is appropriate "only where the language used in the policy is ambiguous and reasonably susceptible to more than one interpretation," *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 94, 518 S.E.2d 814, 816 (1999), *disc. review denied*, 351 N.C. 350, 342 S.E.2d 205 (2000), in which event, "this Court will resolve the ambiguity against the insurance company-drafter, and in favor of coverage," *Ledford v. Nationwide Mutual Ins. Co.*, 118 N.C. App. 44, 51, 453 S.E.2d 866, 869 (1995).

Moreover,

> "[w]hen the policy contains a definition of a term used in it, this is the meaning which must be given to that term wherever it appears in the policy, unless the context clearly requires otherwise. . . . In the absence of such definition, nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise. . . . If such a word has more than one meaning in its ordinary usage and if the context does not indicate clearly the one intended, it is to be given the meaning most favorable to the policyholder, or beneficiary, since the insurance company selected the word for use."

Kruger, 102 N.C. App. at 790, 403 S.E.2d at 572 (quoting *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970) (citations omitted)). In determining the meaning of a term,

> resort may be had to other portions of the policy and all clauses of it are to be construed, if possible, so as to bring them into harmony. Each word is deemed to have been put into the policy for a purpose and will be given effect, if that can be done by any reasonable construction in accordance with the foregoing principles [of construction].

Trust Co., 276 N.C. at 355, 172 S.E.2d at 522.

The policy at issue in the case *sub judice* contains the following relevant provision:

AMOUNT OF INSURANCE

The limit of liability stated in the declarations for Coverage A is provisional. The actual amount of insurance on any date while the policy is in force will be a percentage of the provisional amount. The percentage will be the proportion that the actual value of the property bears to the value at the date of completion.

. . . .

POLICY PROVISIONS

All other provisions of this policy apply.

Federal contends that this paragraph determines the maximum amount payable to plaintiffs under the policy. Focusing on the term "provisional," Federal takes the position that the stated limit of liability is "temporary" and fluctuates based on the percentage of the dwelling completed at the date of the loss. As Federal explains,

> In effect, the limit of liability represents Federal's maximum exposure under Coverage A for a loss. In the event of a loss, however, one does not automatically assume that the coverage is the provisional limit of liability shown on the declarations page. Rather, [the endorsement] provides clear and unambiguous instructions for determining the limit of liability "on any date while the Policy is in force."
>
> In the case at bar, that critical date is December 17 [sic], 1997, the date of the fire. In order to determine the actual limit of liability provided under Coverage A, the parties must determine the value of the dwelling property on the date in question. Next, they must determine the value that the dwelling property would have at the date of completion. These figures yield a percentage, which is then applied to the provisional limit of liability stated in the declarations page to determine the actual limit of liability for Coverage A on the particular date in question.
>
> . . . [T]he parties have stipulated that the actual value of the dwelling on December 19, 1997, was $2,353,960.00 and that the completed value would have been $3,141,244.00. These figures yield a percentage figure of 74.9%. Multiplying the provisional limit of liability found on the declarations page for Coverage A—Dwelling by 74.9%, in turn, yields a limit of liability in the amount of $1,774,381.00. (Emphasis added.)

We note that Federal's construction of the paragraph entitled "AMOUNT OF INSURANCE" substitutes the term "limit of liability" for "amount of insurance." Federal has thereby rewritten the second sentence of the paragraph to read as follows: "The actual ~~amount of insurance~~ [limit of liability] on any date while the policy is in force will be a percentage of the provisional amount." However, had the parties intended this construction, express language to this effect could have been used. We believe that by using the term "amount of insurance" as opposed to "limit of liability" in the above clause, the parties expressed their intent to accord different meanings to the terms. Therefore, we reject Federal's interpretation, inasmuch as it is repugnant to the plain language of the provision.

Plaintiffs propose a construction complementary to the policy language. Plaintiffs contend that as its title implies, the "Loss Settlement" paragraph of the policy determines the amount payable in the event of a covered loss. Pertinently, the provision states that:

> Covered property losses are settled as follows:
>
> . . . .
>
> b. Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:
>
> (1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:
>
> (a) the limit of liability under this policy that applies to the building;
>
> (b) the replacement cost of that part of the building damaged for like construction and use on the same premises; or
>
> (c) the necessary amount actually spent to repair or replace the damaged building.
>
> (2) If, at the time of loss, the amount of insurance in this policy on the damaged building is less than 80% of the full replacement cost of the building immediately before the loss, we will

pay the greater of the following amounts, but not more than the limit of liability under this policy that applies to the building:

(a) the actual cash value of that part of the building damaged; or

(b) that proportion of the cost to repair or replace, after application of deductible and without deduction for depreciation, that part of the building damaged, which the total amount of insurance in this policy on the damaged building bears to 80% of the replacement cost of the building. (Emphasis added.)

According to plaintiffs, the "amount of insurance" to which this provision refers is the sum calculated under the appropriately titled "AMOUNT OF INSURANCE" paragraph contained in the endorsement. Thus, the "actual amount of insurance" at the time of the loss is $1,774,381. Under the "Settlement Loss" provision, the payment amount is determined by whether the "amount of insurance" is more or less than 80% of the full replacement cost of the building. Here, the "amount of insurance," $1,774,381, is 75.4% of the replacement cost, which given these facts is $2,353,960. Therefore, section b(2) of the provision applies, and the insurer is required to pay the greater of the two amounts described in subsections b(2)(a) & (b), "but not more than the limit of liability." Under our facts, the greater amount is that to which subsection b(2)(a) refers—the actual cash value of the damaged dwelling, which is $2,353,960. Accordingly, the "Loss Settlement" due plaintiffs for the damage to their residence is $2,353,960.

The policy, however, also covers expenses for debris removal. Under the "OTHER COVERAGES" section of the policy, Federal agrees to "pay [the insureds'] reasonable expense for the removal of . . . debris of covered property if a Peril insured Against causes the loss." The provision further states that "[d]ebris removal expense is included in the limit of liability applying to the damaged property." Here, the cost to remove debris was $85,000. Thus, Federal is responsible for payment of $15,040 toward the debris removal, which brings the total amount due plaintiffs under the policy to the limit of liability, $2,369,000.

In sum, we conclude that under the plain language of the policy, plaintiffs are entitled to recover the full limit of liability. Notably, even

if we were to conclude that the policy language is reasonably susceptible to the interpretation offered by Federal, plaintiffs' construction, nonetheless, demonstrates an ambiguity, which would result in a construction against the insurance company. *See Ledford*, 118 N.C. App. at 51, 453 S.E.2d at 869 (stating that where policy language is reasonably susceptible to either construction by the parties, the ambiguity is resolved in favor of the insured and against the insurer). Accordingly, we hold that the trial court did not err in awarding summary judgment for plaintiffs and in ordering Federal to pay plaintiffs "the amount of $2,369,000, the limit of liability under the insurance policy . . ., with an offset for the $1,774,381 previously paid; making the total amount currently due $594,619, plus interest[.]" The decision of the trial court is affirmed.

Affirmed.

Judge MARTIN concurs.

Judge THOMAS dissents.

THOMAS, Judge, dissenting.

The endorsement denominated "Dwelling under Construction" appears to be controlling and exclusive in determining the liability of Federal Insurance Company (Federal). Therefore, I respectfully dissent.

An "endorsement" is defined as "[a]n amendment to a contract, such as an insurance policy, by which the original terms are changed." American Heritage College Dictionary 454 (3d ed. 1997). In the case at bar, the Dwelling Under Construction endorsement, clearly listed on the "Dwelling Fire Policy" cover page, establishes the amount of insurance available to plaintiffs Thomas and Sandy Rouse (the Rouses) at any given time during construction. As noted on the first page of endorsements, "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ CAREFULLY."

The Dwelling Under Construction endorsement reads as follows

> The limit of liability stated in the declarations for Coverage A is *provisional.* The *actual amount of insurance on any date while the policy is in force will be a percentage of the provisional*

amount. The percentage will be the proportion that the actual value of the property bears to the value at the date of completion.

Form DP 1143 (emphasis added).

When a provision in a contract "contains a definition of a term used in it, this is the meaning which *must* be given to that term wherever it appears in the policy, unless the context clearly requires otherwise. . . ." *Kruger v. State Farm Mut. Auto Ins. Co.*, 102 N.C. App. 788, 790, 403 S.E.2d 571, 572 (1991) (emphasis added). Here, the "Dwelling Under Construction" form is an endorsement to the policy, which necessarily alters it. Because endorsements are utilized to change or modify other provisions in the policy which ordinarily would be binding in establishing coverage or determining liability, anything else in the policy with which it conflicts becomes a nullity. *See generally Greenway v. North Carolina Farm Bureau Mutual Ins. Co.*, 35 N.C. App. 308, 313, 241 S.E.2d 339, 342-43 (1978).

As used, the distinction between "amount of insurance" and "actual limit of liability" is not meaningful. Further, the Rouses point to nothing in the contract, case law or the General Statutes that forbids Federal to use "amount of insurance" interchangeably with "limit of liability." It is common knowledge that the amount of insurance an insured has on property is the limit of liability for the insurer. This does not contravene the plain language meaning of the policy terms. Hence, there is no ambiguity. It is important to note that "the most fundamental rule [in interpreting insurance policies] is that the language of the policy controls. . . . [T]he court must enforce the policy as written and may not reconstruct [it] under the guise of interpreting an ambiguous provision." *Ledford v. Nationwide Mutual Insurance Company*, 118 N.C. App. 44, 50, 453 S.E.2d 866, 869 (1995) (quoting *Nationwide Mutual Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994). Thus, the provision stands as exclusive.

This is a "Builder's Risk" policy. *See generally Baldwin v. Lititz Mutual Insurance Company*, 99 N.C. App. 559, 393 S.E.2d 306 (1990). One of the crucial words in the endorsement is "provisional," which sets the amount of insurance available, or the liability assumed by Federal, to be a changing amount as construction proceeds. As the percentage of the construction increases, the amount of insurance on the property increases. This was the parties' bargain. It is logical for a dwelling under construction to have varying coverage limits as it comes closer to its completion. Accordingly, the "limit of liability" is provisional, or temporary.

Federal was concerned with the potential for suffering a large loss. Correspondence was introduced as part of Federal's summary judgment motion, showing that the company had expressed such concern to its agent, Gilliams, Barbour, Barefoot & Yancey, Inc., who forwarded notice of Federal's list of "critical recommendations" to the Rouses and defendant Williams Realty & Building Company in January 1997. The list included placing fire extinguishers on site and installing a fire alarm system to be utilized during construction. The recommendations also contained a section that explained "while on site it was noted that the property had been vandalized. In an attempt to discourage future vandals, it is recommended that a driveway gate be installed throughout construction." R. pp. 57 and 61. In the letter from the insurance agent to the Rouses, it was observed that "[t]he largest losses that Chubb [Federal's parent company] has had have occurred during construction. They recently had a $800,000 loss under a Builder's Risk." (Sic). R. p. 62. In the letter to the Rouses the agent said, "Chubb is the best company in the country for large homes like yours but they are very strict. They recently paid a $800,000 fire loss on a dwelling under construction." R. p. 63.

The house was destroyed by fire, set by vandals, on 19 December 1997.

If the insurance coverage had been increased, or if calculations had been for the building to necessarily remain in a lower state of completion for a longer period of time, it would have been reasonable to expect a proportionate increase in the safeguards demanded by Federal. The amount of the premium paid by the Rouses, likewise, was based on a set of expectations.

It is undisputed that the provisional limit of liability was $2,369,000. It was stipulated that the actual value of the house on 19 December 1997 was $2,353,960 with the estimated completed cost to be $3,141,244. The house was therefore 74.9% complete at the time of the fire and, accordingly, the amount of insurance was 74.9% of $2,369,000, which totals $1,774,381. That is the amount already paid by Federal to the Rouses.

Indeed, if the building had been completed within the cost expectations which formed the basis of the policy—that construction would be completed at a total cost of $2,369,000—the Rouses would have either moved in prior to the time of the vandalism and fire or, certainly, would have had a more secure structure with completion exceeding 99%.

For these reasons, I respectfully dissent and vote to reverse the trial court's denial of Federal's summary judgment motion and the grant of the Rouses' motion for summary judgment.

LINDA FARRIS, PETITIONER v. BURKE COUNTY BOARD OF EDUCATION, RESPONDENT

No. COA00-129

(Filed 17 April 2001)

1. **Schools and Education— career teacher—dismissal—notice of grounds**

A board of education was prohibited from basing the dismissal of a career teacher on grounds not stated in the N.C.G.S. § 115C-325(h)(2) notice provided to the teacher. The case manager correctly excluded evidence which was outside the basis asserted by the superintendent and the board improperly relied upon that evidence in making its decision.

2. **Schools and Education— career teacher—dismissal—copies of documentary evidence not provided**

A school board improperly relied upon pictures of a classroom and other documents in dismissing a career teacher where the teacher was not timely provided with copies and the case manager made no finding that the evidence was critical or that the evidence could not have been discovered prior to the hearing. The case manager properly excluded the evidence and the board, being bound by that determination under N.C.G.S. § 115C-325(j)(7), improperly relied upon that evidence.

3. **Schools and Education— career teacher—dismissal—case manager's findings—whole record review**

A school board was bound by a case manager's findings of fact involving the recommended dismissal of a career teacher and erred by making alternative findings where, viewing the whole record, there was substantial evidence to support the case manager's findings. The whole record review does not allow the board to replace the case manager's judgment in light of two reasonably conflicting views, but requires the board to determine the substantiality of the evidence by taking into account all of the evidence, both supporting and conflicting.

Appeal by petitioner from judgment dated 13 October 1999 by Judge Jesse B. Caldwell, III in Burke County Superior Court. Heard in the Court of Appeals 20 February 2001.

Elliot Pishko Gelbin & Morgan, P.A., by J. Griffin Morgan, for petitioner-appellant.

Patton, Starnes, Thompson, Aycock, Teele & Ballew, P.A., by Larry A. Ballew, for respondent-appellee.

Tharrington Smith, L.L.P., by Michael Crowell; and General Counsel Allison B. Schafer for North Carolina School Boards Association, amicus curiae.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by John W. Gresham; and Law Office of Thomas M. Stern, by Thomas M. Stern, for North Carolina Association of Educators, amicus curiae.

GREENE, Judge.

Linda Farris (Petitioner) appeals the Burke County Superior Court's judgment dated 13 October 1999 affirming the Burke County Board of Education's (Respondent) decision to terminate Petitioner's employment with the school system.

Petitioner was employed by the Burke County Public Schools (BCPS) for approximately 28 years beginning in 1970 and "attained tenure and career status as a teacher." In 1990, Petitioner began teaching at Morganton Junior High which later merged into Liberty Middle School. Petitioner taught educable mentally handicapped students in the sixth, seventh, and eighth grades, who had IQ ranges from 55-77. Petitioner taught her students in a manner to help make the academic skills they were learning functional. For example: Petitioner taught her students math, reading, and vocabulary skills by teaching them how to read recipes and cook.

On 12 June 1998, Dr. Tony M. Stewart (Stewart), superintendent of BCPS, wrote Petitioner a letter informing her that Charles R. Sherrill (Sherrill), Principal at Liberty Middle School, recommended that Petitioner not be rehired for the upcoming school year and that Stewart agreed with Sherrill's recommendation. Stewart also indicated in his 12 June letter that he would like to meet with Petitioner in his office on 16 June 1998 "to review . . . in detail the facts which substantiate" his decision to recommend Petitioner's termination.

Petitioner did not respond to Stewart's 12 June letter. Stewart contacted Petitioner again by letter dated 29 June 1998 informing her that because she had not attended the 16 June meeting, she had waived her opportunity to respond to Stewart concerning the charges. Stewart also informed Petitioner in his 29 June letter that Petitioner had 14 days after receipt of the 29 June letter to file "a written request for either (i) a hearing on the grounds for [Stewart's] proposed recommendation by a case manager, or (ii) a hearing within five (5) days before [Respondent] on [Stewart's] recommendation." In the 29 June letter, Stewart stated:

GROUNDS FOR DISMISSAL

The grounds for your dismissal are inadequate performance, insubordination, and neglect of duty, pursuant to N.C.G.S. § 115C-325(e)(1)(a), (c), and (d).

BASIS FOR THE CHARGES

Attached to this letter . . . is a summary of the factual basis for my recommendation that you not be rehired for the coming school year. You have repeatedly ignored direct orders from your principals both oral and written. You [have] created, and refused to correct, health and fire hazards, which endangered your students. You [have] refused to follow directives regarding curriculum, and you misrepresented the status of your plan book.

The administration has demonstrated a thoughtful, patient, persistent but unavailing effort to get you to recognize that you were not properly managing your classroom and to correct the situation. Any and all of the referenced acts constitute inadequate performance, insubordination[,] and neglect of duty.

Stewart included a 9 page attachment chronologically listing documents and correspondences that substantiated his decision to terminate Petitioner. On 10 July 1998, Petitioner responded to Stewart's letter and requested a hearing before a case manager.

In a letter dated 12 August 1998, Petitioner requested Stewart provide her with a copy of the documents described in Stewart's 9 page attachment to his 29 June letter; on 20 August 1998, Stewart forwarded copies of the requested documents to Petitioner. On 31 August 1998, Petitioner requested Stewart to further provide her with a list of witnesses, a brief summary of the witnesses' testimony, and a copy of any documents Stewart intended to present at the hearing

before the case manager. Stewart provided Petitioner with a list of his witnesses on 31 August 1998, indicating he would call: Stewart; former principal Betty Terrell (Terrell); former principal Sherrill; former assistant principal Melinda Bollinger (Bollinger); Director of Exceptional Children Joel Hastings (Hastings); Petitioner's teacher assistant Beth Wright (Wright); and former principal Robert Patton (Patton). Stewart informed Petitioner that each of the witnesses would testify "about the events that culminated in [Stewart's] decision to recommend to [Respondent] that [Petitioner's] contract not be renewed." Stewart also indicated that with regard to the documents he planned to introduce, he could "present any of the documents that [he] ha[d] previously provided to [Petitioner]" as well as "reports from the [F]ire [M]arshall and possibly the [H]ealth [D]epartment, neither of which [were] currently in [his] possession."

The case manager's hearing was held on 3 September 1998 and was continued until 8 October 1998. After the hearing, the case manager's report (the report) included a ruling sustaining Petitioner's objections, made during the hearing, to: pictures of Petitioner's classroom that were offered as evidence at the hearing but not provided to Petitioner prior to the hearing; three letters that were not contained in the 29 July 1998 notice to Petitioner;[1] testimony of Wright "regarding field trips, telephone calls[,] and descriptions on non-teaching activities"; documents regarding Exceptional Children records; and testimony of Hastings regarding Exceptional Children records and Petitioner's relationship with a particular student. In her findings of fact, the case manager found, in pertinent part:

> [O]ver the course of 28 years, [Petitioner] acquired a large and wide variety of teaching materials that accumulated in her classroom and office to accommodate her students and their special needs. That [Petitioner's] classroom was cluttered with these items.
>
> 7. That the clutter in [Petitioner's] classroom was of concern to her various principals over the last four years. That at various times and on various occasions, these principals, [Terrell, Bollinger, and Sherrill] encouraged and requested [Petitioner] to clean her classroom. On several occasions, [Petitioner] was directed to clean her classroom. . . .

1. Of the three letters not contained in the 29 July 1998 notice to Petitioner, only one is contained in the record to this Court. The letter included in the record, Exhibit 9, dated 27 February 1995, is a letter from Petitioner to Guy M. McBride concerning "Adaptive Behaviors."

6. [sic] . . . That [Terrell] sent [Petitioner] a letter in March[] 1996 simply documenting that a general cleaning of her room had not been accomplished. That [Terrell] did not warn [Petitioner] that her behavior was insubordinate.

7. [sic] . . . That [Bollinger] wrote [Petitioner] that failure to clean the classroom would constitute insubordination. That [Petitioner] complied with that directive on the same day she received [Bollinger's] letter and notified [Bollinger] in writing of her compliance with these clear and specific instructions. . . .

8. . . . That on September 8, 199[7], [Sherrill] gave [Petitioner] specific directions regarding the cleaning of her classroom. Two months later on November 10, 1997, [Sherrill] noted compliance of his instructions by [Petitioner].

9. On February 10, 1998, in response to a call from the health department[,] all the classrooms at North Liberty School were inspected. Items of outdated food were found in [Petitioner's] classroom or office.

10. [Petitioner] was not giv[en] a warning, a plan for improvement[,] or any written notification that [Sherrill] viewed her as being insubordinate or having neglected her duty as a result of the food items that were found in her classroom or office.

11. That despite the ongoing differences regarding the condition of her classroom between [Petitioner] and her principals, . . . [Petitioner] was evaluated by both [Terrell and Bollinger] as being above standard in every teaching function. . . . [Sherrill] evaluated [Petitioner] as being standard in two of the categories he observed and below standard in the other three categories he observed. [Petitioner] was again evaluated on May 4, 1998 by evaluators who did have some training and experience in special education and was found to be performing at standard in each category they observed which were the same categories evaluated by [Sherrill]. On June 2, 1998, [Sherrill] completed a Teacher Performance Appraisal Instrument for [Petitioner]. He rated her a[s] being standard in the three categories in which he had previously found her to be below standard. Then, although never having given her any documentation or warnings, he rated her as being below standard or unsatisfactory in three categories in which he had never previously evaluated her.

12. That on two occasions, [Sherrill] claimed that [Petitioner] was insubordinate because she failed to have lesson plans in a lesson plan book as she had been instructed. [Sherrill] offered into evidence blank pages of a lesson plan book. However, additional pages obtained by [Sherrill] consist of lengthy instructions written for substitute teachers which would not fit within a lesson plan book. [Sherrill] did not request the lesson plan book from [Petitioner]. [Petitioner] testified that she maintained a lesson plan [book]. On May 4, 1998, [Petitioner] was observed by assistant principal Susan Jones and by Jeannette N. Davis. The Formative Observation Data Analysis of this observation does not note the failure to maintain a lesson plan book. That a former principal and a teacher of the in-school suspension program (ISS) at Liberty Middle School, testified that anytime one of [Petitioner's] students was sent to [ISS] they always came with a lesson plan.

13. Two long term special education teachers testified that they reviewed the individualized educational plans of [Petitioner's] students and [Petitioner's] lesson plan book. Ms. Horn testified that formal lesson plans were not always necessary in a special education class like the one [Petitioner] taught. Both teachers testified that the individualized education plans for [Petitioner's] students were well thought out and appropriate[]. Further, both teachers confirmed that [Petitioner's] method of teaching, including the utilization of recipes and field trips, were effective methods of teaching middle school educationally mentally handicapped children and focused on appropriate lessons which would help these children in the future.

. . . .

16. Except for his approximately one hour observation of [Petitioner] on December 8, 1997, [Sherrill] spent no other time observing [Petitioner] or monitoring her teaching ability. [Sherrill] failed to make suggestions to [Petitioner] for professional improvement following his December 8, 1997 observation and evaluation of [Petitioner]. Following his December 8, 1997 observation of [Petitioner], [Sherrill] did not provide [Petitioner] any assistance in becoming a more effective teacher. He did not devise a professional growth plan. He did not request the assistance of other special education teachers or of [Hastings] . . . . [Sherrill] failed to document[] ways in which he had helped

[Petitioner] become a more effective professional at a time when he was recommending her dismissal.

17. There was a[n] evidentiary objection as to the maintenance of IEP folders by [Petitioner]. The only evidence introduced to show that [Petitioner] had not properly maintained the IEP folders was the testimony of [Hastings]. This evidence is outside the factual basis stated by [Stewart] as the basis for his decision to terminate [Petitioner].

18. Four parents of former students of [Petitioner] testified at the hearing. Each parent testified as to having observed [Petitioner] in the classroom or on field trips. Each parent testified that his/her child made progress in [Petitioner's] classroom. Each parent testified that if given the opportunity they would have [Petitioner] teach their child again.

19. [Petitioner] was not insubordinate and did not willfully disregard directions of her employer or refuse to obey a reasonable order.

20. [Petitioner's] teaching performance was not inadequate.

21. [Petitioner] did not neglect her duty.

Consistent with these findings of fact, the case manager recommended in the report that Stewart's grounds for Petitioner's dismissal were not substantiated.

On 9 November 1998, Stewart wrote Petitioner and informed her he intended to submit a written recommendation to Respondent that Petitioner be dismissed. In response, Petitioner requested a hearing before Respondent. In a letter dated 18 November 1998, Stewart recommended to Respondent the termination of Petitioner, stating:

> The grounds for my recommendation are inadequate performance, insubordination, and neglect of duty, pursuant to N.C.G.S. § 115C-325(e)(1)(a), (c)[,] and (d). [Petitioner] repeatedly ignored direct orders, both oral and written, from principals. [Petitioner] created, and refused to correct, health and fire hazards, including giving special education children seriously outdated food, all of which endangered her students. [Petitioner] refused to follow directives regarding curriculum, and she misrepresented the status of her [lesson] plan book.

> The administration has demonstrated a thoughtful, patient, persistent but unavailing effort to get [Petitioner] to recognize that she was not properly managing her classroom.

On 18 November 1998, Stewart forwarded to Respondent the entire record of the hearing held before the case manager, including a transcript of the hearing and all exhibits presented by either side.[2] No new evidence outside of the record of the hearing held before the case manager was presented before Respondent. Petitioner and Stewart were permitted to make oral arguments before Respondent in a closed session.

On 12 January 1998, Respondent "unanimously determined that the case manager's findings of fact were not supported by substantial evidence when the record was reviewed as a whole and therefore made . . . alternative findings of fact." The alternative findings of fact provided, in pertinent part:

> 44. At the case manager['s] hearing, [Wright], the teacher assistant in [Petitioner's] classroom for the previous two years[,] stated, and we find as fact, that [Petitioner] would spend as much as three to four hours per day on the telephone, leaving the kids to the assistant to teach. The telephone conversations were unrelated to the classroom and concerned with [Petitioner's] joint-venture in a flea market, her massage business, or the psychic hot-line.
>
> . . . .
>
> 48. [Petitioner] did not spend a complete day doing instruction to the children, during the two years that [Wright] was her assistant. The most time that [Petitioner] spent in one day actually teaching was two hours. [Petitioner] spent less than 10% of her time actually teaching the children in her care.
>
> . . . .
>
> 54. [Petitioner] took the class on a field trip to the Biltmore House in Asheville. The children's parents were told that the children would be back at 5:00 p.m. [Petitioner] did not have the children back until 8:00 p.m. and did not call anyone to say they would return late. The reason they were late returning is because [Petitioner] wanted to go shopping after the field trip.

2. In a letter dated 21 December 1998, Petitioner objected to Stewart forwarding to Respondent evidence which had been excluded by the case manager.

55. Pictures taken of [Petitioner's] classroom illustrated the testimony shown in the transcripts. The classroom was cluttered, old food was present throughout the room and the storage areas, roach droppings and a rat's nest were clearly visible.

56. In March of 1998, the Director for Exceptional Children, [Hastings], in a review of the Exceptional Children records in [Petitioner's] class were incomplete. [Hastings] directed [Petitioner] to make the necessary corrections. [Hastings'] testimony was that such incomplete records could have resulted in a loss of funding had they not be[en] corrected before an audit.

After making alternative findings of fact, Respondent determined Stewart's grounds for dismissal were substantiated and it thereby terminated Petitioner's employment with BCPS. Petitioner subsequently appealed to the Burke County Superior Court. The Burke County Superior Court affirmed Respondent's decision to terminate Petitioner concluding Respondent's decision was "supported by substantial evidence from the whole record."

The issues are whether: (I) evidence is admissible in a section 115C-325(j) or (j2) hearing when that evidence is outside the scope of the section 115C-325(h)(2) notice provided by the superintendent to the career teacher; (II) an exhibit is admissible in a section 115C-325(j) or (j2) hearing when the superintendent has not provided the career teacher a copy of the exhibit, pursuant to section 115C-325(j)(5); and (III) the findings of the case manager are supported by substantial evidence.

I

[1] Petitioner argues section 115C-325 prohibits Respondent from basing Petitioner's dismissal on grounds not stated in the section 115C-325(h)(2) notice provided to Petitioner. We agree.

Before a superintendent of public instruction for a county school system (the superintendent) may recommend to the board of education (the board) the dismissal of a career teacher, as defined within the meaning of N.C. Gen. Stat. § 115C-325(c)(1), the superintendent is required to give the career teacher "written notice of the charges against [her], an explanation of the basis for the charges, and an opportunity [for the career teacher] to respond." N.C.G.S. § 115C-325(h)(2) (1999). It follows that any evidence of-

fered outside the scope of this notice is not admissible in a section 115C-325(j) or (j2) hearing and, thus, cannot support dismissal of a career teacher. *See Baxter v. Poe*, 42 N.C. App. 404, 408-09, 257 S.E.2d 71, 74 (due process requirements are satisfied if dismissal procedures are followed and the teacher is given adequate notice), *disc. review denied*, 298 N.C. 293, 259 S.E.2d 298 (1979). The superintendent's notice shall also include a "statement to the effect that if the career [teacher] within 14 days after the date of receipt of the notice requests a review, [she] shall be entitled to have the grounds for the proposed recommendations of the superintendent reviewed by a case manager." N.C.G.S. § 115C-325(h)(2).

In this case, Stewart gave Petitioner, a career teacher, notice of the grounds for her dismissal and an explanation of the basis for her dismissal on 29 June 1998. The grounds asserted were: insubordination, inadequate performance, and neglect of duty. The factual basis for these grounds was that Petitioner: repeatedly ignored both oral and written direct orders from her principals; created, yet refused to correct, health and fire hazards; refused to follow directives regarding curriculum; and misrepresented the status of her lesson plan book. The evidence excluded by the case manager relating to Petitioner's field trips, telephone calls to a psychic hot-line, non-teaching activities, maintenance of Exceptional Children records, and relationship with a particular student, was simply outside the scope of the basis asserted by Stewart. Accordingly, the case manager correctly excluded this evidence and Respondent, being bound by that determination, improperly relied on this evidence in making its decision. *See* N.C.G.S. § 115C-325(j)(7) (1999) (case manager to decide questions of procedure and evidence); *see also* N.C.G.S. § 115C-325(j)(4) (1999) (rules of evidence do not apply).

II

[2] If the career teacher elects to have a hearing before the case manager, the superintendent, prior to the hearing before the case manager, shall provide to the career teacher: "a list of witnesses the superintendent intends to present[;] a brief statement of the nature of the testimony of each witness[;] and a copy of any documentary evidence the superintendent intends to present." N.C.G.S. § 115C-325(j)(5) (1999). Additional witnesses or documentary evidence not previously provided by the superintendent "may not be presented except upon a finding by the case manager that the new evidence is critical to the matter at issue and the party making the request could not, with rea-

sonable diligence, have discovered and produced the evidence according to the schedule provided" in section 115C-325(j). *Id.*

In this case, Stewart did not timely provide Petitioner with copies of pictures of her classroom or copies of documents concerning Exceptional Children records[3] and the case manager made no finding that the evidence was critical or that Stewart could not have discovered this evidence prior to the hearing. Accordingly, the case manager properly excluded this evidence and Respondent, being bound by that determination, improperly relied on this evidence. *See* N.C.G.S. § 115C-325(j)(7) (case manager to decide questions of procedure and evidence); *see also* N.C.G.S. § 115C-325(j)(4) (rules of evidence do not apply).

III

[3] "The board shall accept the case manager's findings of fact unless a majority of the board determines that the findings of fact are not supported by substantial evidence when reviewing the record as a whole." N.C.G.S. § 115C-325(j2)(7) (1999). If after reviewing the "whole record," the board determines the case manager's findings of fact are unsupported by substantial evidence, "the board shall make alternative findings of fact." *Id.* In conducting a "whole record" review, the board must review all the evidence that was admitted by the case manager. *See Taborn v. Hammonds*, 324 N.C. 546, 551, 380 S.E.2d 513, 516 (1989). A "whole record" review, however, does not allow the board to replace the case manager's judgment in light of two reasonably conflicting views, but requires the board to "determine the substantiality of the evidence by taking all the evidence, both supporting and conflicting, into account." *See Powell v. N.C. Dept. of Transp.*, 347 N.C. 614, 623, 499 S.E.2d 180, 185 (1998) (applied in the context of conducting a "whole record" review of an agency decision).

In this case, viewing the "whole record," there was substantial evidence to support the case manager's findings of fact. *See Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (substantial evidence is evidence "a reasonable mind might accept as adequate to support a conclusion") (citations omit-

3. Although the case manager sustained Petitioner's objection to three letters Stewart had not provided to Petitioner prior to the case manager hearing, only one of those letters is included in the record to this Court and there is no indication that Respondent relied on this letter in its alternative findings of fact. Accordingly, we do not address whether this letter could form a basis for Petitioner's dismissal.

ted). Respondent was bound by the findings of the case manager and, therefore, erred in making alternative findings of fact.

Accordingly, the decision of the Burke County Superior Court is reversed and this case is remanded to that court for further remand to Respondent for it to either reject Stewart's recommendation or "accept or modify the recommendation and dismiss, demote, reinstate, or suspend" Petitioner. N.C.G.S. § 115C-325(j1)(5) (1999). Respondent's decision must be based on the findings made by the case manager.

Reversed and remanded.

Judges McCULLOUGH and HUDSON concur.

SOUTHLAND AMUSEMENTS AND VENDING, INC., PLAINTIFF v. J.M. ROURK, D/B/A MIKE'S WINDJAMMER, DEFENDANT

No. COA00-543

(Filed 17 April 2001)

1. **Discovery— request for admissions—failure to timely respond—no waiver by waiting for answer—withdrawal or amendment prejudicial**

The trial court did not err by denying defendant's oral motion to withdraw its deemed admissions in an action for the alleged breach of an operator agreement for amusement game machines, because: (1) defendant did not serve his answers to plaintiff's request for admissions within the thirty-day time limit set out in N.C.G.S. § 1A-1, Rule 36; (2) a plaintiff does not waive his right to deemed admissions by waiting until after a defendant has answered the request for admissions; and (3) the withdrawal or amendment of the deemed admissions would prejudice plaintiff in maintaining its action on the merits.

2. **Contracts— breach—operator agreement—failure to timely respond to request for admissions—summary judgment proper**

The trial court did not err by granting plaintiff's summary judgment motion in an action for the alleged breach of an operator agreement for amusement game machines, because the exist-

ence of the parties' agreement and the authenticity of defendant's signature on the agreement have already been judicially established by defendant's failure to timely respond to plaintiff's requests for admissions.

3. Costs— attorney fees—breach of operator agreement— award limited to fifteen percent of outstanding balance

The trial court erred in an action for the alleged breach of an operator agreement for amusement game machines by granting plaintiff attorney fees in the amount of $3,300.00 upon a verdict of $10,199.49 even though the operator agreement falls within N.C.G.S. § 6-21.2 allowing for an award of plaintiff's attorney fees, because: (1) the damage amount awarded became the outstanding balance due on the agreement or the amount recoverable on the instrument; and (2) the trial court was bound to make fifteen percent of the actual damage award for the attorney fee since the amount of an attorney fee a party is entitled to recover under the statute is limited by the outstanding balance owed.

Appeal by defendant from judgments entered 4 December 1998 by Judge Shelly S. Holt, and 3 December 1999 by Judge J.H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 5 February 2001.

Womble Carlyle Sandridge & Rice, P.L.L.C., by John F. Morrow, Jr., for plaintiff-appellee.

Stephen E. Culbreth for defendant-appellant.

HUNTER, Judge.

J.M. Rourk d/b/a Mike's Windjammer ("defendant") appeals the trial court's judgments denying defendant's request to withdraw his deemed admissions; finding, as a result of those admissions, that there are no genuine issues of material fact so that summary judgment was proper as a matter of law, and; granting Southland Amusements and Vending, Inc. ("plaintiff") an attorney's fee. We hold the trial court judgment as to the deemed admissions and summary judgment are proper; however, we find the trial court's award of an attorney's fee to be in excess of the allowable statutory amount. Thus, we affirm in part and reverse and remand in part.

The pertinent facts are as follows: In its complaint filed 3 December 1997, plaintiff alleged that on or about 9 November 1995, it

entered into a business arrangement with defendant in which plaintiff would place amusement game machines in defendant's place of business. The agreement ("operator agreement") provided in pertinent part:

> 1. . . . [Defendant] hereby grants to [plaintiff] the exclusive right, concession and privilege to install and maintain coin operated game devices of any kind . . . .
>
> . . .
>
> 3. Term.
>
> a. . . . The term of this Agreement shall be for a period of 36 months, commencing as of 11-9-95 . . . .
>
> b. . . . The initial term of this Agreement shall automatically continue for one additional term of five (5) years, unless . . . [plaintiff] shall give written notice of termination . . . .
>
> . . .
>
> 9. . . . [Plaintiff] has the sole and exclusive right and license to install and operate coin-operated game devices of any kind at [defendant's place of business], and [defendant] agrees that it will not rent, purchase, install, permit to be installed or to be used at [its place of business] coin-operated game devices of itself or any other person, firm or corporation during the term of this Agreement or any renewal thereof.
>
> . . .
>
> 12. . . . If [defendant] breaches any provision of this Agreement, then [plaintiff] shall be entitled to recover as damages all of the profits which it would have otherwise earned during the term remaining . . . . If legal action shall be instituted by [plaintiff] to enforce the terms or conditions contained herein, then [plaintiff] shall be entitled to recover from [defendant] the reasonable attorney's fees and costs incurred . . . .

Plaintiff alleged in its complaint that:

> Upon information and belief, in the summer of 1997, in breach of the agreement between the parties, defendant disconnected the machines provided by [plaintiff].

> [Furthermore,] in breach of the agreement between the parties defendant installed or allowed to be installed machines owned and operated by a competing vendor.

In response, on 2 January 1998, defendant filed a *pro se* answer claiming that it "never entered into an agreement with [plaintiff and that . . . plaintiff's r]epresentative . . . knows that he never presented a contract to [defendant]. The only signature [it] gave was for accepting delivery of equipment."

Shortly thereafter on 28 January 1998, plaintiff served defendant (who was still *pro se*) with a "Request for Admissions," one of which was an admission that [defendant] entered into and subsequently breached the operator agreement. However, although defendant retained counsel on 4 February 1998, defendant failed to respond to the Request for Admissions until 20 September 1998—some eight months after being served. Then on 19 November 1998, plaintiff filed its motion for summary judgment arguing its appropriateness based on

> the depositions, interrogatories and admissions on file, together with affidavits submitted in support of this Motion, [which] show that there is no genuine issue as to any material fact, and that [plaintiff] is entitled to a judgment as a matter of law on the question of the defendant's liability to [plaintiff].

The trial court agreed and, on 4 December 1998, issued its judgment which read in part:

> There are no genuine issues of material fact, and judgment is appropriate as a matter of law.
>
> At the hearing on summary judgment, counsel for defendant contended an issue of material fact with respect to contract formation existed because the defendant, at deposition, denied signing the Operator Agreement upon which plaintiff has sued. *The genuineness of the agreement and the genuineness of defendant's signature on it, however, is a fact that has been conclusively established by virtue of deemed admissions to which the defendant failed to timely respond as required by N.C.R. Civ. P. 36.* Plaintiff served the requests on defendant . . . on January 28, 1998 and filed them with the court. More than thirty days elapsed, and the defendant failed to respond. At the hearing on summary judgment, counsel for the defendant orally requested that the court withdraw the deemed admissions. . . . [P]ursuant to N.C.R.

> Civ. P. 36, the court has been satisfied that withdrawal or amendment of the deemed admissions would prejudice plaintiff in maintaining his action on the merits. Accordingly, the deemed admissions shall not be withdrawn.

(Emphasis added.) Thus, the trial court ordered that judgment be entered against defendant on the question of liability. Then, on 3 December 1999, the trial court issued its judgment as to damages, awarding plaintiff liquidated damages in the amount of $10,199.49, and a reasonable attorney's fee in the amount of $3,300.00 plus costs including filing fees and deposition expenses. From the foregoing two judgments mentioned, defendant appeals.

[1] Defendant first assigns error to the trial court's denying defendant's oral motion to withdraw its deemed admissions. It is defendant's argument that because "plaintiff [knew] from the time the defendant filed [its] *pro-se* answer to the complaint, that the defendant denied that [it] had ever signed a contract," its motion to withdraw the deemed admissions should have been granted. We find no merit in defendant's argument.

It is undisputed that, pursuant to Rule 36 of the North Carolina Rules of Civil Procedure, plaintiff had the right to and did, in fact, serve upon defendant a written request for admissions. The record reveals that, as required, plaintiff separately set out each matter of which an admission was requested. Therefore, according to the statute, any matter properly set forth

> is admitted *unless, within 30 days after service of the request,* or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney . . . .
>
> . . .
>
> *If the court determines that an answer does not comply with the requirements of this rule, it may order . . . that the matter is admitted* . . . .
>
> *(b) . . . Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.* . . . [T]he court *may* permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the

> admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. . . .

N.C. Gen. Stat. § 1A-1, Rule 36(a), (b) (1999) (emphasis added).

In the case at bar, defendant does not dispute the fact that he did not serve his answers to plaintiff's Request for Admissions within the thirty day time limit set out in Rule 36. Instead, by comparing the deemed admissions to a default judgment, defendant argues that plaintiff waived entitlement to defendant's deemed admissions "by waiting until after an untimely answer ha[d] been filed." However, defendant offers no case law, and we have found none, to support his argument that a plaintiff waives his right to deemed admissions by waiting until after a defendant has answered the request for admissions. On the contrary, where the plaintiff in *Rahim v. Truck Air of the Carolinas*, 123 N.C. App. 609, 473 S.E.2d 688 (1996) filed its response to Request for Admissions (regarding whether it had submitted a prior formal claim to defendant) some six months late, this Court held that "plaintiff's failure to answer within the allowed time period established it had submitted no formal claim to defendant within the 270 days permitted by Carmack and required by defendant's waybill." *Id.* at 615, 473 S.E.2d at 691. Thus, plaintiff Rahim's deemed admissions became judicially established.

Likewise, we find *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 394 S.E.2d 698 (1990) controlling. Like defendant at bar, defendants Burchette were served Requests for Admissions "on the issue of [the property's lack of] record means of egress or ingress." *Id.* at 162, 394 S.E.2d at 701. Because defendants Burchette failed to respond "within 30 days after service," this Court held that "[b]y failing to respond to plaintiff's request for admissions, defendants [Burchette] allowed the lack of access to be judicially established." *Id.* "Litigants in this state are required to respond to pleadings, interrogatories and requests for admission with timely, good faith answers." *WXQR Marine Broadcasting Corp. v. JAI, Inc.*, 83 N.C. App. 520, 521, 350 S.E.2d 912, 913 (1986). Therefore, we conclude that the present plaintiff did not waive its right to the deemed admissions, and the trial court properly concluded that "withdrawal or amendment of the deemed admissions would prejudice plaintiff in maintaining [its] action on the merits."

[2] Defendant next assigns error to the trial court's grant of plaintiff's summary judgment motion on the grounds that there were genuine

issues of material fact. We disagree. Defendant is correct when it states in its brief to this Court that summary judgment is "an extreme and drastic remedy . . . ." "Summary judgment is not to be used when matters of credibility and the weight of the evidence exists." However, it has long been established law in North Carolina that where no genuine issue of material fact exists, or where a plaintiff fails to present evidence of each and every element necessary to meet its *prima facie* burden of proof, summary judgment is proper as a matter of law. *Goins v. Puleo*, 350 N.C. 277, 512 S.E.2d 748 (1999). Furthermore, in granting or denying a motion for summary judgment, there is no room for a trial court to exercise discretion. *Id.* at 281, 512 S.E.2d at 751.

In the case at bar, the only element of plaintiff's *prima facie* case with which defendant takes issue is the existence of an agreement between the parties and whether defendant signed it. Since, by defendant's failure to timely respond to plaintiff's requests for admissions, the existence of the parties' agreement and the authenticity of defendant's signature on that agreement has already been judicially established, there exists no issue of material fact. Thus, summary judgment in favor of plaintiff is proper *as a matter of law*, and the trial court did not err in granting it. *Id.*

[3] Finally, defendant's third assignment of error is that the trial court erred in granting plaintiff "attorney's fees in an amount of $3,300.00 upon a verdict of $10,199.49[.]" It is true that

> "[t]he jurisprudence of North Carolina traditionally has frowned upon contractual obligations for attorney's fees as part of the costs of an action." . . . Thus the general rule has long obtained that a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, *unless such a recovery is expressly authorized by statute. Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (197[3]).

Enterprises, Inc. v. Equipment Co., 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980) (emphasis added) (quoting *Supply, Inc. v. Allen*, 30 N.C. App. 272, 276, 227 S.E.2d 120, 123 (1976)). However, N.C. Gen. Stat. § 6-21.2 provides that:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, . . . shall be valid and enforceable . . . .
>
> . . .

> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C. Gen. Stat. § 6-21.2(2) (1999). Further, our Supreme Court has held that "[t]he statute, being remedial, 'should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.' " *Enterprises*, 300 N.C. at 293, 266 S.E.2d at 817 (quoting *Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973)). Thus, the Court has gone on to opine that the statute's

> ". . . provisions indicate, either explicitly or implicitly, that an evidence of indebtedness . . . is a writing which acknowledges a debt or obligation and which is executed by the party obligated thereby." More specifically, we hold that the term "evidence of indebtedness" as used in G.S. 6-21.2 has reference to *any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money*. . . .

Enterprises, 300 N.C. at 294, 266 S.E.2d at 817 (emphasis omitted and emphasis added) (quoting *Supply, Inc. v. Allen*, 30 N.C. App. at 276, 227 S.E.2d at 124). Applying the Supreme Court's definition of "evidence of indebtedness" to the operator agreement at issue, we do not believe it can be disputed that the operator agreement falls within the statute and thus, allows for an award of plaintiff's attorney's fee. *Id.* Pursuant to its "Breach of Agreement" paragraph, the operator agreement clearly states:

> If [defendant] breaches any provision of this Agreement, then [plaintiff] shall be entitled to recover as damages all of the profits which it would have otherwise earned during the term remaining as of the date of such breach . . . . If legal action shall be instituted by [plaintiff] to enforce the terms or conditions contained herein, then [plaintiff] shall be entitled to recover from [defendant] the reasonable attorney's fees and costs incurred by [plaintiff].

Thus, as a writing which evidences a "legally enforceable obligation to pay money" and is signed by defendant, the "Breach of Agreement"

provisions of the operator's agreement clearly bring the contract under the statute's coverage. *Enterprises*, 300 N.C. at 294, 266 S.E.2d at 817. *See also Supply*, 30 N.C. App. at 276-77, 227 S.E.2d at 124.

We note that defendant does not argue that plaintiff was not entitled to an attorney's fee at all if the operators agreement is found to come under the statute, but contends only that "[s]ince the contract in the instant case does not specify a specific percentage . . . N.C.G.S. Section 6-21.2(2) . . . control[s] . . ." and plaintiff was entitled only to an attorney's fee in the amount of fifteen percent (15%) of the "amount recoverable on the instrument." Therefore, defendant argues that the trial court erred in awarding plaintiff an attorney's fee which "exceeds thirty-two (32%) percent of the recovery allowed and is clearly excessive and not permissible under the statute." We agree.

In its judgment, the trial court found that the operator's agreement at issue

> had an initial term of three years during which neither party could unilaterally terminate the agreement.
>
> 5. *The Agreement [also] had an extended term (after the initial term) of five years* during which only Plaintiff had a unilateral right of termination.

(Emphasis added.) The trial court further found that there were fifty-one weeks remaining in the agreement's initial three year term at the time of defendant's breach. The trial court only awarded plaintiff liquidated damages in the amount of $10,199.49 for the fifty-one weeks remaining in the initial term—not the remainder of the eight years total. Neither party argues that the liquidated damage award was error, nor do we find it to be. However, once the trial court decided on the amount of the damage award, we believe that amount became the "outstanding balance due" on the agreement (or the "amount recoverable on the instrument") and thus, that amount is what the court was bound by in making the fifteen percent (15%) attorney's fee award pursuant to § 6-21.2. Thus, it was error for the trial court to award an attorney's fee of $3,300.00 which is more than fifteen percent (15%) of the actual damage award since the amount of an attorney's fee a party may recover is limited by the " 'outstanding balance' ow[ed,]" N.C. Gen. Stat. § 6-21.2(2).

This Court has held that N.C. Gen. Stat. § 6-21.2 "subdivision (2) *has predetermined that 15% is a reasonable amount in our case.*" *RC Associates v. Regency Ventures, Inc.*, 111 N.C. App. 367, 373, 432

S.E.2d 394, 397 (1993) (emphasis added). Thus, although the record before us shows that the trial court properly considered plaintiff's counsel's experience, hourly rate, time spent, and difficulty of the issues presented, and awarded on that basis (despite the fact that plaintiff's actual attorney's fee was in excess of $11,000.00), we hold that because the trial court's $3,300.00 attorney's fee award exceeded fifteen percent (15%) ($1,529.92) of its $10,199.49 liquidated damages award, the trial court exceeded its statutory authority in making the attorney's fee award.

The trial court's order allowing defendant's deemed admissions and granting plaintiff's summary judgment motion are affirmed. However, the trial court's order regarding the payment of plaintiff's attorney's fee is reversed and this case is remanded to the trial court for a new order to be issued with regard to the attorney's fee not inconsistent with this opinion.

Affirmed in part, reversed and remanded in part.

Judges WALKER and CAMPBELL concur.

DATA GENERAL CORPORATION, PLAINTIFF-APPELLEE v. COUNTY OF DURHAM, DEFENDANT-APPELLANT

No. COA00-202

(Filed 17 April 2001)

1. Appeal and Error— appealability—sovereign immunity—personal and subject matter jurisdiction

Defendant's assignment of error to the trial court's failure to grant a Rule 12(b)(6) dismissal for lack of personal jurisdiction on the grounds of sovereign immunity was immediately appealable, while the denial of defendant's Rule 12(b)(6) motion for dismissal for lack of subject matter jurisdiction on the grounds of sovereign immunity was not immediately appealable.

2. Jurisdiction— personal—motion to dismiss—matters outside pleadings

The trial court did not err when considering a motion to dismiss for lack of personal jurisdiction due to sovereign immunity

by considering affidavits from defendant. The trial court did not make findings because neither party requested them; the Court of Appeals was therefore required to determine the sufficiency of the evidence to support the trial court's presumed finding that defendant waived its sovereign immunity either by purchasing liability insurance or by entering a valid contract. Although consideration of matters outside the pleadings converts a Rule 12(b)(6) motion into a motion for summary judgment, there is no similar restriction on a motion to dismiss for lack of jurisdiction under Rule 12(b)(2).

3. Counties— contract—sovereign immunity—preaudit certificate

The trial court did not have personal jurisdiction over defendant county for a breach of contract claim regarding leased computer equipment where plaintiff alleged that defendant waived sovereign immunity by entering the lease agreement, but plaintiff did not show that the preaudit certificate required by N.C.G.S. § 159-28(a) existed. There is no valid contract with a county where a plaintiff fails to show that the requirements of N.C.G.S. § 159-28(a) were met and defendant therefore did not waive sovereign immunity on these grounds.

4. Counties— leased equipment—no preaudit certificate—no recovery under quantum meruit or estoppel

A plaintiff in an action involving leased computer equipment could not recover from a county under theories of quantum meruit or estoppel where there was no valid contract. The preaudit requirement of N.C.G.S. § 159-28(a) is a matter of public record and parties contracting with a county are presumed to be aware of the requirements.

5. Immunity— governmental—lease agreement—proprietary activity

Defendant county was not entitled to governmental immunity against a tort claim for negligent misrepresentation arising from leased equipment because the activity was commercial or chiefly for the advantage of the county.

Appeal by defendant from order entered 19 November 1999 by Judge Knox Jenkins in Superior Court, Durham County. Heard in the Court of Appeals 21 February 2001.

Durham County Attorney S.C. Kitchen and Assistant Durham County Attorney Curtis Massey for the defendant-appellant.

Poyner & Spruill, L.L.P., by Donald R. Teeter, for the plaintiff-appellee.

WYNN, Judge.

This appeal arises from an arrangement for the lease of certain computer equipment by the County of Durham from Data General Corporation. According to the complaint, Data General and certain officials of Durham County negotiated in early 1993 for the lease of computer hardware and software. The final lease agreement was reduced to a writing, dated 3 June 1993, and was signed by representatives of both parties.

The lease agreement provided for annual lease payments during its four-year term. The lease agreement also provided that, at the expiration of the lease term, Durham County would have the option to purchase the leased equipment. According to the complaint, Durham County made the required annual payments during the term of the lease, but failed to exercise the purchase option. The complaint further alleged that Durham County kept and used the leased equipment for close to two years following the expiration of the lease term, without making any further payments to Data General.

Data General filed suit on 29 July 1999, asserting causes of action for breach of contract, *quantum meruit*, estoppel, and negligent misrepresentation. On 16 August 1999, Durham County filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and (2), asserting a lack of subject matter and personal jurisdiction on grounds of sovereign immunity. Durham County also filed several sworn affidavits in support of its motion to dismiss. Following a hearing, Superior Court Judge Knox Jenkins entered an order dated 20 November 1999 denying the motion. From that order, Durham County appeals.

[1] Durham County asserts two assignments of error on appeal. In its first assignment of error, Durham County contends that the trial court erred in denying the motion to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction, as the evidence in support of the motion demonstrated that Durham County did not waive its sovereign immunity and no grounds for jurisdiction existed. Durham County also assigns as error the trial court's denial of the motion to dismiss pur-

suant to Rule 12(b)(1) for lack of subject matter jurisdiction on grounds of sovereign immunity.

At the outset, we note that the denial of a motion to dismiss is interlocutory and ordinarily is not immediately appealable; nonetheless, this Court has held that an appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable. *See* N.C. Gen. Stat. § 1-277 (1996); *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 133-34, 360 S.E.2d 115, 116 (1987). On the other hand, the denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable. *See* N.C. Gen. Stat. § 1-277(a); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982). We therefore consider Durham County's first assignment of error, but decline to consider the second assignment of error, as it is not properly before us.

It is a fundamental rule that sovereign immunity renders this state, including counties and municipal corporations herein, immune from suit absent express consent to be sued or waiver of the right of sovereign immunity. *See Coastland Corp. v. N.C. Wildlife Resources Comm'n*, 134 N.C. App. 343, 346, 517 S.E.2d 661, 663 (1999); *Great American Ins. Co. v. Gold*, 254 N.C. 168, 118 S.E.2d 792 (1961); *EEE-ZZZ Lay Drain Co. v. N.C. Dep't of Hum. Res.*, 108 N.C. App. 24, 422 S.E.2d 338 (1992). Furthermore, counties and municipal corporations within this state enjoy governmental immunity from suit for activities that are governmental, and not proprietary, in nature. *Robinson v. Nash County*, 43 N.C. App. 33, 35, 257 S.E.2d 679, 680 (1979). Nonetheless, a governmental entity may waive its governmental immunity, for instance, where the entity purchases liability insurance. *See EEE-ZZZ Lay Drain*, 108 N.C. App. at 27, 422 S.E.2d at 340. Additionally, where the entity enters into a valid contract, the entity "implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976).

[2] We first consider the standards by which we must review the record before us. In ruling on a motion, the trial court is not required to make findings of fact absent a request by one of the parties. Where no such request is made by either party, and thus no such findings are made by the trial court, "it will be presumed that the judge, upon proper evidence, found facts sufficient to support his ruling." *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d 111,

114 (1986) (citing *J.M. Thompson Co. v. Doral Mfg. Co.*, 72 N.C. App. 419, 424, 324 S.E.2d 909, 912-13 (1985)); *see Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 532 S.E.2d 215 (2000). Where such presumed findings are supported by competent evidence, they are deemed conclusive on appeal, despite the existence of evidence to the contrary. *Cameron Brown Co.*, 83 N.C. App. at 285, 350 S.E.2d at 114.

In the instant case, neither party requested the trial court to make findings of fact, and the trial court made no such findings. We must therefore determine the sufficiency of the evidence to support the trial court's presumed findings. *Id.* In the absence of an express waiver of sovereign immunity by Durham County, we must determine whether there was sufficient evidence to support the presumed finding by the trial court that the county waived its sovereign immunity as to Data General's contract claims either by the purchase of liability insurance or by entering a valid contract.

Other than the unverified complaint, the record on appeal contains the following sources of evidence submitted by Durham County pertaining to the presence or lack of personal jurisdiction: (1) Sworn affidavit of Catherine C. Whisenhunt, the Risk Manager for Durham County; (2) Sworn affidavit of Sandra Phillips, the Purchasing Director for Durham County; (3) Sworn affidavit of Garry Umstead, the Clerk to the Board of Commissioners of Durham County; (4) Sworn affidavit of Perry Dixon, the Information Technology Director for Durham County; (5) Official Minutes of the Board of Commissioners for Durham County for 14 September 1992, pertaining to the prospective lease between Durham County and Data General; and (6) Data General's response to Durham County's request for a written statement of monetary relief sought.

"Where unverified allegations in the complaint meet plaintiff's 'initial burden of proving the existence of jurisdiction . . . and defendant[s] . . . d[o] not contradict plaintiff's allegations [],' such allegations are accepted as true and deemed controlling." *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998) (quoting *Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41, 45, 306 S.E.2d 562, 565 (1983)). However, to the extent the defendant offers evidence to counter the plaintiff's allegations, those allegations may no longer be accepted as controlling, and the plaintiff can no longer rest on such allegations in the complaint. *See Bruggeman*, 138 N.C. App. at 615-16, 532 S.E.2d at 218. The plaintiff may nonetheless satisfy the burden of establishing a *prima facie* basis for personal

jurisdiction "if some form of evidence in the record supports the exercise of personal jurisdiction." *Id.* at 616, 532 S.E.2d at 218. That is, we must "look to the uncontroverted allegations in the complaint and the uncontroverted facts" asserted by Durham County for evidence supporting the trial court's presumed findings. *Id.*

We reject the initial contention by Data General that, as a general matter, the sworn affidavits submitted by Durham County should not have been considered by the trial court in ruling on Durham County's motion, and should not be considered by this Court in reviewing the trial court's denial of that motion. Rule 12(b) provides that a motion to dismiss for failure to state a claim under Rule 12(b)(6) "shall be treated as one for summary judgment and disposed of as provided in Rule 56" where the trial court considers matters outside the pleadings in ruling on the motion. N.C. Gen. Stat. § 1A-1, Rule 12(b). Rule 12(b) imposes no similar requirement or restriction upon the trial court in considering matters outside the pleadings in ruling on a motion to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction, and we decline to do so.

[3] The complaint alleges that, by entering the lease agreement with Data General, Durham County waived any sovereign immunity it may have enjoyed and consented to being sued for damages in the event it breached the lease agreement. *See Smith*, 289 N.C. at 320, 222 S.E.2d at 424. Durham County contends on appeal that the materials submitted in support of its motion to dismiss establish that the lease agreement was not a valid contract enforceable against Durham County, and that Durham County did not, therefore, consent to be sued for breach of such contract.

In *Smith*, our Supreme Court held that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a *valid* contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Id.* at 320, 222 S.E.2d at 423-24 (Emphasis added.) That is, in the absence of a valid contract, a state entity may not be subjected to contractual liability. *See id.* at 310, 222 S.E.2d at 417 (citing 72 Am. Jur. 2d *States, Etc.* § 88 (1974)).

"N.C. Gen. Stat. § 159-28(a) sets forth the requirements and obligations that must be met before a county may incur contractual obligations." *Cincinnati Thermal Spray, Inc. v. Pender County*, 101 N.C. App. 405, 407, 399 S.E.2d 758, 759 (1991); N.C. Gen. Stat. § 159-28 (1994). N.C. Gen. Stat. § 159-28(a) requires in part that for any county

obligation "evidenced by a contract or agreement requiring the payment of money . . . for supplies and materials," such contract or agreement "shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection." N.C. Gen. Stat. § 159-28(a). The statute further provides a form certificate with which the required preaudit certificate must substantially conform, and states that "[a]n obligation incurred in violation of this subsection is invalid and may not be enforced." *Id.* Where a plaintiff fails to show that the requirements of N.C. Gen. Stat. § 159-28(a) have been met, there is no valid contract, and any claim by plaintiff based upon such contract must fail. *See Cincinnati Thermal Spray*, 101 N.C. App. at 408, 399 S.E.2d at 759.

In the instant case, Data General has failed to make a showing that the required preaudit certificate exists, and none is evidenced in the record. Furthermore, Durham County has argued that no such certificate exists. As there is insufficient evidence in the record that the requirements of N.C. Gen. Stat. § 159-28(a) have been met, we conclude that no valid contract was formed between Data General and Durham County, and Durham County therefore has not waived its sovereign immunity to be sued (and Data General may not maintain a suit) for contract damages. *See id.; L & S Leasing, Inc. v. City of Winston-Salem*, 122 N.C. App. 619, 622-23, 471 S.E.2d 118, 121 (1996). The trial court was therefore without personal jurisdiction over Durham County with respect to Data General's first claim for breach of contract. *Zimmer*, 87 N.C. App. at 133-34, 360 S.E.2d at 116.

[4] We next consider whether Durham County is entitled to governmental immunity with respect to Data General's claims based on *quantum meruit* and estoppel. *Quantum meruit* operates as an equitable remedy based upon a quasi contract or a contract implied in law, such that a party may recover for the reasonable value of materials and services rendered in order to prevent unjust enrichment. *See Potter v. Homestead Preservation Ass'n*, 330 N.C. 569, 578, 412 S.E.2d 1, 7 (1992). In *Whitfield v. Gilchrist*, 348 N.C. 39, 497 S.E.2d 412 (1998), our Supreme Court declined to imply a contract in law in derogation of sovereign immunity to allow a party to recover under a theory of *quantum meruit*, and we decline to do so here. *See id.* at 43, 497 S.E.2d at 415 (holding that a plaintiff may proceed with a claim against the State for breach of contract only where the State implicitly waives its sovereign immunity by "*expressly* entering into a *valid* contract through an agent of the State expressly authorized by law to enter into such contract").

On this same basis, we conclude that Data General may not defeat a claim of sovereign or governmental immunity upon a theory of estoppel. The complaint asserts that Durham County should be "estopped to deny the legality of the" lease agreement, and that "the County had the sole responsibility to determine that its actions were in compliance with" North Carolina law. On both related points, we disagree.

We have concluded, *supra*, that the lease agreement entered between the parties was not a valid contract sufficient to bind Durham County as it failed to comply with the statutory requirements in N.C. Gen. Stat. § 159-28(a). Data General may not recover under an equitable theory such as estoppel for breach of contract where Durham County has not expressly entered a valid contract. *See id.* Furthermore, parties dealing with governmental organizations are charged with notice of all limitations upon the organizations' authority, as the scope of such authority is a matter of public record. *L & S Leasing*, 122 N.C. App. at 622, 471 S.E.2d at 120. Likewise, the preaudit certificate requirement is a matter of public record, N.C. Gen. Stat. § 159-28(a), and parties contracting with a county within this state are presumed to be aware of, and may not rely upon estoppel to circumvent, such requirements. *See, e.g., id.* (holding that a party may not rely upon an estoppel defense against a governmental entity to support a breach of contract claim based upon an assertion of apparent authority of the agent signing the alleged contract on behalf of the entity); *Nello L. Teer Co. v. N.C. State Highway Comm'n*, 265 N.C. 1, 10, 143 S.E.2d 247, 254 (1965) (parties dealing with public entities are presumed to know the law applicable to such agencies, including that the officials and agents of such entities may not waive the entity's sovereign immunity or act in violation of statutory requirements, and such parties act at their peril) (citations omitted). As Durham County enjoys immunity with respect to these claims, the trial court was therefore without personal jurisdiction over Durham County as to Data General's claims based on *quantum meruit* and estoppel.

[5] Durham County next contends that it did not waive its sovereign immunity with respect to Data General's tort claim for negligent misrepresentation by purchasing liability insurance. As previously noted, counties within this State enjoy governmental immunity from suit for the performance of governmental functions. *Robinson*, 43 N.C. App. at 35, 257 S.E.2d at 680; *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). However, counties do not enjoy governmental immunity when they are performing ministerial or proprietary functions. *Messick*, 110 N.C. App. at 714, 431 S.E.2d at 493; *Herring ex rel. Marshall v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461, *disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000). The test for distinguishing between governmental and proprietary functions was stated in *Britt v. City of Wilmington*, 236 N.C. 446, 73 S.E.2d 289 (1952) as follows:

> If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and "private" when any corporation, individual, or group of individuals could do the same thing.

Id. at 451, 73 S.E.2d at 293; *see Herring*, 137 N.C. App. at 683, 529 S.E.2d at 461.

In the instant case, Data General asserts claims against Durham County for negligent misrepresentation arising out of representations made by or on behalf of Durham County in entering the lease agreement with Data General. Based on the test articulated above, we conclude that this activity is proprietary rather than governmental in nature, as it was "commercial or chiefly for the private advantage" of the county. *Britt*, 236 N.C. at 450, 73 S.E.2d at 293. As such, the county is not entitled to governmental immunity from tort claims arising out of the performance of this activity.

In summation, as there was no valid contract between the parties, the trial court was without personal jurisdiction over Durham County with respect to Data General's claims for breach of contract, *quantum meruit* and estoppel. However, Durham County has no governmental immunity for tort claims arising out of its performance of proprietary, rather than governmental, functions, and the trial court therefore has personal jurisdiction over Durham County with respect to Data General's tort claim for negligent misrepresentation. Accordingly, the trial court's 19 November 1999 order denying Durham County's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction is,

Reversed in part, affirmed and remanded in part.

Judges McGEE and THOMAS concur.

ROBERT WILLIS, PLAINTIFF v. TOWN OF BEAUFORT, A NORTH CAROLINA MUNICIPAL CORPORATION AND JIM LYNCH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF THE BEAUFORT FIRE DEPARTMENT, DEFENDANTS

No. COA00-371

(Filed 17 April 2001)

1. **Cities and Towns— public duty doctrine—no longer applicable for fire protection services**

The trial court erred in a negligence case by granting summary judgment in favor of defendant town because the public duty doctrine no longer applies as a defense for the municipal provision of fire protection services.

2. **Immunity— governmental—waived to extent of liability insurance**

Defendant town waived its governmental immunity defense from civil tort liability to the extent of the liability insurance coverage it purchased.

3. **Public Officers and Employees— fire chief—public official—public duty doctrine—governmental immunity**

The trial court erred in a negligence case by granting summary judgment in favor of defendant fire chief sued in his official and individual capacity because: (1) the public duty doctrine is no longer available as a defense for a fire chief sued in his official capacity; (2) defendant's governmental immunity defense in his official capacity is waived to the extent of insurance coverage purchased by the town; and (3) although a fire chief as defined by N.C.G.S. § 160A-292 is categorized as a public official meaning he cannot be held individually liable for damages caused by mere negligence in the performance of his governmental or discretionary duties, there is a genuine issue of material fact as to the issue of gross negligence on the part of defendant individually.

Appeal by plaintiff from an order entered 28 December 1999 by Judge James E. Ragan, III in Carteret County Superior Court. Heard in the Court of Appeals 26 January 2001.

Davis, Murrelle & Lumsden, P.A., by Edward L. Murrelle, for plaintiff-appellant.

Crossley McIntosh Prior & Collier, by H. Mark Hamlet and Brian E. Edes, for defendant-appellees.

HUNTER, Judge.

Robert Willis ("plaintiff") appeals from an order granting summary judgment dismissing his claims of negligence in favor of defendants Town of Beaufort ("Town") and Jim Lynch. On appeal, plaintiff's two assignments of error are (1) the trial court erred in granting summary judgment in favor of the Town as the public duty doctrine no longer applies as a defense for the municipal provision of fire protection services after the North Carolina Supreme Court's holding in *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652, *reh'g denied*, 352 N.C. 157, 544 S.E.2d 225 (2000), and (2) the trial court similarly erred in granting summary judgment in favor of defendant Lynch, in his official capacity and individually, as the public duty doctrine is not available as a defense for a fire chief following *Lovelace*. We agree with plaintiff, and therefore reverse the trial court.

The relevant allegations of plaintiff's complaint show that on 14 October 1998, plaintiff was attempting to repair the fuel tanks on board his shrimping vessel known as the DEL-ANN, which was docked at the Homer Smith Seafood House in the Town of Beaufort, North Carolina. Sparks from a welding machine subsequently ignited a fire aboard the vessel, and plaintiff unsuccessfully attempted to extinguish the fire. 9-1-1 was called, and the Beaufort Fire Department was notified.

At all times relevant to this action, defendant Lynch was Chief of the Beaufort Fire Department. The Beaufort Fire Department arrived on the scene of the fire within four minutes of first being contacted. Upon arrival of the fire department, plaintiff was still on board the burning vessel attempting to extinguish the fire, and defendant Lynch ordered plaintiff off the vessel. When plaintiff did not comply, defendant Lynch repeated his order two additional times; defendant Lynch also notified plaintiff that he would have him arrested if he continued to disregard the order. Consequently, plaintiff left the vessel.

Defendant Lynch then requested assistance from several additional fire departments, and shortly thereafter fire departments from Morehead City, Otway, Atlantic Beach, Marshallberg, and the United States Coast Guard arrived. Initially, the Beaufort Fire Department assumed jurisdiction, and water was used in an attempt to extinguish the fire. After some time passed, defendant Lynch ordered all fire fighting efforts to cease. At this point, defendant Lynch allegedly forbade other fire fighters from using foam to extinguish the fire, as well as refused to adhere to any recommendations, suggestions, alterna-

tives, or advice from any other trained professional on the scene. After approximately two hours passed, defendant Lynch allowed foam to be applied to the fire. The fire was extinguished, but the interior of the vessel was destroyed.

On 1 February 1999, plaintiff filed a complaint against the Town alleging negligence on the part of the Beaufort Fire Department in their handling of the fire. Subsequently on 20 October 1999, plaintiff filed an amended complaint to add defendant Lynch as a named defendant, both in his official capacity as Fire Chief and individually, alleging gross negligence on his part arising from the events of 14 October 1998. The Town and defendant Lynch filed a motion for summary judgment, and a hearing was held on 13 December 1999 in Carteret County Superior Court before the Honorable James E. Ragan, III. By order filed on 28 December 1999, Judge Ragan allowed defendants' motion for summary judgment. Plaintiff appeals.

[1] In his first assignment of error, plaintiff claims that the trial court erred in granting summary judgment in favor of the Town when it is clear that the public duty doctrine no longer applies as a defense for the municipal provision of fire protection services after the North Carolina Supreme Court's holding in *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652. We agree.

"At the outset, we note that the standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Furthermore, "the evidence presented by the parties must be viewed in the light most favorable to the nonmovant." *Id.* Therefore, summary judgment is only 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. Gen. Stat. § 1A-1, Rule 56(c) (1999). Summary judgment "is an extreme remedy and should be awarded only where the truth is quite clear." *Lee v. Shor*, 10 N.C. App. 231, 233, 178 S.E.2d 101, 103 (1970).

"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." *Braswell v. Braswell*, 330 N.C. 363, 370, 410 S.E.2d 897, 901 (1991). The public duty doctrine

was first adopted in North Carolina by our Supreme Court in *Braswell*. *Id.* "As originally applied and adopted, the doctrine operated to shield a governmental entity from liability for the failure of the government and its law enforcement agents to furnish police protection to specific individuals." *Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 761, 529 S.E.2d 693, 695 (2000).

Since *Braswell*, "[t]he [public duty] doctrine has . . . been extended by this Court to shield municipalities and their agents from liability for negligence in providing fire protection services, *Davis v. Messer*, 119 N.C. App. 44, 457 S.E.2d 902 (1995) . . . ." *Hargrove*, 137 N.C. App. 759, 761-62, 529 S.E.2d 693, 694-95 (*Hargrove*, which lists the services the public duty doctrine had been extended to shield, was decided by this Court after the Supreme Court's decision in *Lovelace*). However, in *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652, the North Carolina Supreme Court held that the public duty doctrine does not insulate a city from liability for the alleged negligence of a city 9-1-1 operator in causing a death by failing to timely dispatch the fire department after receiving a call reporting a fire. Significantly, our Supreme Court held:

> While this Court has extended the public duty doctrine to state agencies required by statute to conduct inspections for the public's general protection, we have never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public . . . . Thus, the public duty doctrine, as it applies to local government, is limited to the facts of *Braswell*.

Id. at 461, 526 S.E.2d at 654 (citations omitted).

Hence, this Court's holding in *Davis* extending the public duty doctrine to the municipal provision of fire protection services has been overruled by our Supreme Court's holding in *Lovelace*. The Town of Beaufort, therefore, may not utilize the public duty doctrine as a defense for the alleged negligence on the part of its fire department. Accordingly, we reverse the trial court's grant of summary judgment in favor of the Town.

[2] In regards to the Town's governmental immunity defense, we recognize that "[t]he organization and operation of a fire department is a governmental . . . function." *Insurance Co. v. Johnson, Comr. of Revenue*, 257 N.C. 367, 370, 126 S.E.2d 92, 94 (1962). "Under the doc-

trine of governmental immunity, a municipality is not liable for the torts of its officers and employees if the torts are committed while they are performing a governmental function . . . ." *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993). However, "[a]ny city may . . . waive its immunity from civil tort liability by purchasing liability insurance." *Id.*; *see also* N.C. Gen. Stat. § 160A-485. "Immunity is waived only to the extent that the city or town is indemnified by the insurance contract from liability for the acts alleged." *Combs v. Town of Belhaven*, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992).

Here, the Town purchased North Carolina League of Municipalities liability insurance covering itself and its agents. Consequently, the Town is deemed to have waived its governmental immunity defense to the extent of its coverage.

[3] In his second assignment of error, plaintiff contends that the trial court erred in granting summary judgment in favor of defendant Lynch, in his official capacity and individually, as the public duty doctrine is not available as a defense for a fire chief following the Supreme Court's decision in *Lovelace*. Again, we agree.

On 20 October 1999, plaintiff amended his complaint to add Jim Lynch as a defendant, both in his official capacity as Fire Chief of the Beaufort Fire Department and individually, alleging gross negligence on his part. We note that, "official-capacity suits are merely another way of pleading an action against the governmental entity." *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 725 (1998). Therefore, the claim against defendant Lynch in his official capacity is effectively a claim against the Town. As the public duty doctrine no longer applies as a defense for the municipal provision of fire protection services, the doctrine is similarly not available to a fire chief sued in his official capacity. Thus, defendant Lynch, in his official capacity, cannot avail himself of the public duty doctrine.

We now turn our focus to plaintiff's cause of action against defendant Lynch. In doing so, we must address the question of whether defendant Lynch, as a fire chief, is properly categorized as a public official or a public employee. The significance being, "[p]ublic officials cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties; public employees can." *Meyer v. Walls*, 347 N.C. 97, 112, 489 S.E.2d 880, 888 (1997).

The test for differentiating between a public official and a public employee is:

> (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties. . . .

Isenhour v. Hutto, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999); *see also Meyer*, 347 N.C. at 113, 489 S.E.2d at 889. ". . . 'Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Jensen v. S.C. Dept. of Social Services*, 297 S.C. 323, [322,] 377 S.E.2d 102[, 107] (1988)[, *aff'd*, 304 S.C. 195, 403 S.E.2d 615 (1991)].' " *Meyer*, 347 N.C. at 113-14, 489 S.E.2d at 889.

N.C. Gen. Stat. § 160A-292 recognizes the position of "fire chief" and gives the fire chief the duty and responsibility to

> preserve and care for fire apparatus, have charge of fighting and extinguishing fires and training the fire department, seek out and have corrected all places and conditions dangerous to the safety of the city and its citizens from fire, and make annual reports to the council concerning these duties. . . .

N.C. Gen. Stat. § 160A-292 (1999). We find these duties provide for a fire chief to exercise some portion of the sovereign power of the State. Furthermore, under N.C. Gen. Stat. § 160A-292, a fire chief performs discretionary acts, rather than ministerial duties. Thus, we conclude that a fire chief is a public official. This conclusion is consistent with prior decisions of this Court and our Supreme Court finding the State Commissioner of Motor Vehicles, a Division of Motor Vehicles inspector, school trustees, park commissioners, chief building inspectors, the State Banking Commissioner, the chief of police, and police officers, among others, to be public officials. *Thompson Cadillac-Oldsmobile, Inc. v. Silk Hope Automobile, Inc.*, 87 N.C. App. 467, 471-72, 361 S.E.2d 418, 421 (1987).

Having found the public duty doctrine inapplicable as a defense for defendant Lynch and that a fire chief is a public official, we must next address the liability of defendant Lynch in his official capacity. Generally, "[g]overnmental immunity protects the governmental entity and its officers or employees sued in their 'official capacity.' "

Taylor v. Ashburn, 112 N.C. App. at 607, 436 S.E.2d at 279. "Under the doctrine of governmental immunity, . . . [a municipality's] officers or employees sued in their official capacities are immune from suit for torts committed while the officers or employees are performing a governmental function." *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 504, 451 S.E.2d 650, 657 (1995). Nevertheless, where a municipality waives its immunity by purchasing liability insurance, "public officers [or employees] are not entitled to the defense of governmental immunity, at least as to the extent of coverage purchased by the municipality." *Moore v. Evans*, 124 N.C. App. 35, 41, 476 S.E.2d 415, 421 (1996). Thus, defendant Lynch's governmental immunity defense, in his official capacity, is waived to the extent of insurance coverage purchased by the Town. However, this does not subject defendant Lynch as a public official to individual liability for ordinary negligence as hereinafter discussed. Further, since the Town is deemed to have waived its immunity to the extent of its insurance coverage, the Town is therefore liable for the negligent acts of its public officials to the extent it has waived its immunity by purchasing insurance.

We next examine defendant Lynch's liability individually. Under the public officers' immunity doctrine, " 'a public official is [generally] immune from personal [or individual] liability for mere negligence in the performance of his duties, but he is not shielded from liability if his alleged actions were corrupt or malicious or if he acted outside and beyond the scope of his duties.' " *Schlossberg v. Goins*, 141 N.C. App. 436, 445, 540 S.E.2d 49, 56 (2000) (quoting *Slade v. Vernon*, 110 N.C. App. 422, 428, 429 S.E.2d 744, 747 (1993)). In other words,

> a public official sued individually is not liable for "mere negligence"—because such negligence *standing alone*, is insufficient to support the "piercing" . . . of the cloak of official immunity. *Locus* [*v. Fayetteville State University*], 102 N.C. App. [522,] 526, 402 S.E.2d [862,] 865 [1991]; *Reid* [*v. Roberts*], 112 N.C. App. [222,] 224, 435 S.E.2d [116,] 119 [1993].

Epps v. Duke University, 122 N.C. App. 198, 207, 468 S.E.2d 846, 853 (1996) (emphasis in original). As defendant Lynch was the Fire Chief of the Beaufort Fire Department at all times relevant to this action, defendant Lynch, a public official, was immune from individual liability for mere negligence in the performance of his duties under public officers' immunity. *See Schlossberg*, 141 N.C. App. at 445, 540 S.E.2d at 55.

Plaintiff alleged that defendant Lynch was grossly negligent and his "directives to withhold foam and other appropriate fire fighting methods from the burning [vessel] for two hours were willful, wanton, wrongful, reckless, and without just cause." As a result, defendant Lynch, a public official, can be held individually liable if it is " '. . . proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties . . . .' " *Meyer*, 347 N.C. at 112, 489 S.E.2d at 888 (quoting *Smith v. Hefner*, 235 N.C. at 7, 68 S.E.2d at 787 (citations omitted)). The record does not clearly reflect if the trial court made a ruling on whether there remained a question of material fact regarding defendant Lynch's alleged "willful, wanton, wrongful, reckless" conduct which would result in gross negligence. Therefore, we reverse and remand for the trial court to determine whether a material fact remained as to the issue of gross negligence on the part of defendant Lynch individually.

In summary, we hold that pursuant to our Supreme Court's holding in *Lovelace*, the public duty doctrine is no longer available as a defense for the municipal provision of fire protection services, nor is it available to a fire chief. Thus, the Town of Beaufort, by having waived its immunity, is liable for the negligent acts of its public officials to the extent it has waived its immunity by purchasing insurance. We hereby reverse the trial court's grant of summary judgment in favor of the Town and defendant Lynch, in his official capacity as Fire Chief of the Beaufort Fire Department; we also reverse and remand for the trial court to determine whether a material fact remained as to the issue of gross negligence on the part of defendant Lynch, individually.

Reversed and remanded.

Judges WALKER and CAMPBELL concur.

STATE OF NORTH CAROLINA v. ROY LEE HARDISON, DEFENDANT

No. COA00-50

(Filed 17 April 2001)

1. Evidence— hearsay—unavailable witness—untrustworthy

The trial court did not err in a prosecution for first-degree burglary and second-degree kidnapping by excluding hearsay statements allegedly made by defendant's now deceased counsel to show that defendant's guilty pleas were involuntary and uninformed even though the trial court failed to make complete findings of fact and conclusions of law, because the alleged hearsay statements lacked the requisite guarantees of trustworthiness under the N.C.G.S. § 8C-1, Rule 804(b)(5) inquiry.

2. Appeal and Error— preservation of issues—failure to raise at trial

Although defendant argues that his now deceased counsel's out-of-court statements should have been admitted as non-hearsay statements based on the fact that they were offered to explain why defendant pled guilty, defendant did not preserve this issue for review since he only argued that the statements should be admitted under N.C.G.S. § 8C-1, Rule 804(b)(5) in his notice of intent and at the hearing on his motion for appropriate relief.

3. Constitutional Law— effective assistance of counsel—denial of motion for appropriate relief—no showing of prejudice or adversely affected

The trial court did not abuse its discretion in a prosecution for first-degree burglary and second-degree kidnapping by denying defendant's motion for appropriate relief based on an alleged ineffective assistance of counsel when defense counsel stated he had been personal friends with the victims for fifty years, because: (1) defendant failed to offer evidence of how he was prejudiced or adversely affected in any manner by any friendship or acquaintance that defense counsel may have had with the victims; (2) defense counsel offered a statement in mitigation of defendant's culpability after stating that counsel had known the victims; and (3) defendant admitted his guilt of the offenses.

On writ of certiorari to review order entered 31 October 1997 by Judge W. Russell Duke, Jr., in Martin County Superior Court. Heard in the Court of Appeals 22 February 2001.

Attorney General Michael F. Easley, by Assistant Attorney General T. Brooks Skinner, Jr., for the State.

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

MARTIN, Judge.

Defendant was indicted on charges of first degree burglary, felonious larceny, felonious possession of stolen goods, and second degree kidnapping arising from a burglary of the Robersonville residence of Mr. and Mrs. A.P. Barnhill, an elderly couple, on 21 April 1990. During the burglary, the Barnhill's caretaker, Ms. Josephine Lawrence, was restrained by one of the perpetrators. Attorney Robert Cowan was appointed to represent defendant. Mr. Cowan, however, became ill and his law partner, Clarence Griffin, assumed defendant's representation. On 29 April 1992, defendant pled guilty to first degree burglary and second degree kidnapping; the State dismissed the charges of felonious larceny and felonious possession of stolen goods. In his remarks to the trial court at defendant's sentencing hearing, Mr. Griffin included the following statement:

> This is sort of an awkward position for me in view of the fact that I'm pitch hitting for my friend Bob Cowan and the fact because I have been personal friends with Mr. and Mrs. Barnhill for probably fifty years, at least that long.

At the conclusion of the sentencing hearing, the trial court found factors in aggravation and mitigation of punishment, found that matters in aggravation outweighed those in mitigation, and sentenced defendant to life imprisonment for first degree burglary and twenty years for second degree kidnaping, the sentences to run consecutively.

On 15 September 1994, defendant filed a motion for appropriate relief requesting that the court set aside his guilty pleas because: (1) Mr. Griffin's friendship with the Barnhills created a conflict of interest and he was therefore prejudiced by ineffective assistance of counsel, and (2) his guilty plea was not voluntary. Defendant alleged that he entered his guilty plea on the belief that Mr. Griffin had negotiated a plea agreement capping his sentence at twenty years in prison. By

order filed 2 February 1995, the motion for appropriate relief was denied without an evidentiary hearing. This Court allowed defendant's *pro se* petition for writ of certiorari to review the order and, by opinion filed 15 April 1997, remanded the matter to the superior court for an evidentiary hearing. *State v. Hardison*, 126 N.C. App. 52, 483 S.E.2d 459 (1997).

Mr. Griffin died prior to the evidentiary hearing. On 18 June 1997, defendant filed a notice of his intent to offer hearsay statements of Mr. Griffin pursuant to N.C.R. Evid. 804(b)(5). The notice referred to the following statements purportedly made by Mr. Griffin: (1) he advised defendant to plead guilty to both charges; (2) he told defendant that he would negotiate a plea agreement that would cap defendant's sentence at twenty years; (3) he advised defendant that a jury trial would result in a life sentence and asked whether defendant would plead guilty if the sentence would be twenty years; (4) he told defendant that it was unnecessary to note the plea agreement on the transcript of the plea; (5) he instructed defendant to answer "yes" when the court asked defendant if the dismissal of the larceny and possession charges constituted the full extent of his plea agreement; (6) he stated he was in an awkward position because he had been personal friends of the victims for at least fifty years, and (7) after defendant was sentenced, he told defendant that there was a misunderstanding and that he would straighten it out.

An evidentiary hearing was held on 31 July 1997. The court denied defendant's motion to admit the hearsay statements. Defendant testified, as did his former girlfriend, Cynthia Silverthorne. Defendant testified that he told his attorney and the prosecutor he would plead guilty only if they guaranteed he would not receive a sentence of life imprisonment. He also testified that Griffin stopped him from objecting when the court sentenced him to life in prison. Ms. Silverthorne testified that she heard Agent Kent Inscoe of the State Bureau of Investigation tell defendant that his sentence would be capped at twenty years if he pled guilty.

The State offered the testimony of Frank Bradsher, the assistant district attorney who negotiated defendant's plea agreement, Agent Inscoe, and Regina Moore, an attorney who represented a co-defendant and was present at the sentencing hearing. Mr. Bradsher and Agent Inscoe testified that no offer or agreement was made with respect to defendant's sentence. Ms. Moore testified that no sentencing offers were made with respect to the co-defendant she represented, and that she was present at counsel table during defendant's

sentencing hearing and observed nothing unusual happen between defendant and Mr. Griffin.

On 31 October 1997, the trial court entered an order denying defendant's motion for appropriate relief. The court made detailed findings of fact and concluded that: (1) "any acquaintance of the defendant's lawyer with the victim[s] of defendant's crime standing alone is not sufficient to warrant setting aside defendant's plea of guilty," (2) defendant failed to show he was prejudiced by any relationship between his counsel and the victims, (3) defendant was not induced to plead guilty, and (4) defendant's guilty plea was voluntarily made with full knowledge of its consequences. Defendant's petition for writ of certiorari to review the trial court's order was allowed on 9 October 1998.

I.

[1] Defendant assigns error to the trial court's exclusion of the hearsay statements allegedly made by Mr. Griffin. He contends the erroneous exclusion of that evidence precluded him from showing that his guilty pleas were involuntary and uninformed and he is therefore entitled to a new hearing on his motion for appropriate relief. He argues that the court should have admitted the statements 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 set out a six-part inquiry for the trial court to use before admitting or excluding hearsay evidence pursuant to N.C.R. Evid. 804(b)(5). Through this inquiry, the court must determine: (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 Court specified which portions of the inquiry required the trial judge to make findings of fact and conclusions of law, and which portions required the judge only to state his conclusion of law. *Id.*

In the present case, the trial court made no findings of fact or conclusions of law before denying defendant's motion to admit the hearsay testimony, and defendant argues that its error in failing to do so requires that we award a new hearing on his motion for appropriate relief. We cannot agree. In *Phillips & Jordan Inv. Corp. v. Ashblue Co.*, 86 N.C. App. 186, 191, 357 S.E.2d 1, 3-4, *disc. review denied*, 320 N.C. 633, 360 S.E.2d 92 (1987), this Court stated:

> The six-part inquiry is very useful when an appellate court reviews the *admission* of hearsay under Rule 804(b)(5) or 803(24). However, its utility is diminished when an appellate court reviews the *exclusion* of hearsay. Common sense dictates that if proffered evidence fails to meet the requirements of one of the inquiry steps, the trial judge's findings concerning the preceding steps are unnecessary (emphasis added).

In *Phillips*, the defendant requested that the trial court make the six-part inquiry; instead, the judge responded "he could do that quickly because the proffered testimony related to the corporate records which would be the best evidence of 'all these things.' " 86 N.C. App. at 190, 357 S.E.2d at 3. This Court noted that the "trial court essentially determined that the proffered testimony did not meet the requirements of step (5) of the inquiry," and held that although the trial court erred by not making the specific findings for each step of the inquiry, the error was not prejudicial because the evidence would have still been excluded. *Id.* at 191, 357 S.E.2d at 3-4. Similarly, in *State v. Harris*, 139 N.C. App. 153, 532 S.E.2d 850, *disc. review denied*, 353 N.C. 271, 546 S.E.2d 121 (2000), we held that a trial court's failure to make the requisite findings in denying a motion to admit hearsay evidence pursuant to 804(b)(5) was not prejudicial where "[t]he trial transcript shows that the trial court found the hearsay [evidence] at issue to be untrustworthy under step (3) of the required analysis." *Id.* at 159, 532 S.E.2d at 854.

In this case, as in *Harris*, we can ascertain from the trial transcript that the court excluded the evidence of Mr. Griffin's alleged hearsay statements because it found the evidence untrustworthy. At the hearing, the State reviewed the requisite inquiry for the court in an 804(b)(5) determination, and highlighted the particular inquiry required for courts in assessing the equivalent circumstantial guarantees of trustworthiness. After argument by defendant's counsel, the trial court made the following inquiry:

COURT: What witness would offer these statements?

MR. KILCOYNE: Mr. Hardison will offer them, and also at least one would be offered by Cynthia Silverthorne, who also would be available to testify.

COURT: And who is Cynthia Silverthorne?

MR. KILCOYNE: She at the time of this incident was the Defendant's girlfriend. She no longer is and hasn't been for several years.

COURT: Which statement was she on?

MR. KILCOYNE: On the Notice of Intent, with particulars would be number three, number four . . . .

The court then sustained the State's objection to the evidence. From the court's inquiry, we can ascertain that it denied the motion to admit the evidence because it found the evidence lacked the requisite guarantees of trustworthiness. Thus, while the court erred in failing to make the complete findings of fact and conclusions of law required by *Triplett*, the error does not require a new hearing because it is clear from the record that the court would have excluded the evidence as untrustworthy. Accordingly, defendant is not entitled to a new hearing on his motion for appropriate relief.

[2] Defendant attempts to argue, in addition, that the statements should have been admitted as non-hearsay statements because they were offered to explain why defendant pled guilty, not for the truth of the matter asserted in the statement. However, in his notice of intent and at the hearing on his motion for appropriate relief, defendant argued only that Mr. Griffin's alleged statements should be admitted pursuant to Rule 804(b)(5). His argument to this Court, therefore, that the statements are admissible non-hearsay is not properly before us. "[W]here a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount.' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E.2d 836, 838 (1934)).

II.

[3] Defendant next assigns error to the order denying his motion for appropriate relief and argues that his guilty plea should have been set

aside because Mr. Griffin had an undisclosed and prejudicial conflict of interest which denied him effective assistance of counsel at the plea and sentencing hearing. A criminal defendant has a constitutional right to effective assistance of counsel, which includes the " 'right to representation that is free from conflicts of interest.' " *State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (quoting *Wood v. Georgia*, 450 U.S. 261, 271, 67 L. Ed. 2d 220, 230 (1981)). However, "[i]n order to establish a violation of this right, 'a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.' " *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 64 L. Ed. 2d 333, 346-47 (1980)).

Defendant had the burden at the hearing on his motion for appropriate relief "of establishing the facts essential to his claim by a preponderance of the evidence." *State v. Pait*, 81 N.C. App. 286, 288, 343 S.E.2d 573, 575 (1986); N.C. Gen. Stat. § 15A-1420(c)(5). The findings of the court "are binding if they are supported by any competent evidence." *Id.* (citation omitted).

Although defendant's assignment of error directed generally to all of the trial court's findings and conclusion is broadside and therefore in violation of N.C.R. App. P. 10(c)(1), *see Riverview Property Owners Ass'n, Inc. v. Hewett*, 90 N.C. App. 753, 370 S.E.2d 53 (1988), we nevertheless exercise our discretion under N.C.R. App. P. 2 and consider the argument in his brief that the following findings of fact are unsupported by the evidence:

> 21. That although Mr. Clarence Griffin, defendant's attorney at sentencing, stated that he had been personal friends with the victims for fifty (50) years, there has been no showing that this acquaintance prejudiced the defendant in any way or that any such acquaintance created a conflict of interest or the appearance of a conflict of interest.
>
> 22. That the defendant admitted under oath that he was guilty of the offenses to which he had pled guilty on 4/29/92 and that he had no defense to those crimes.

Defendant offered no evidence at the hearing on his motion for appropriate relief to show that he was prejudiced or adversely affected in any manner by any friendship or acquaintanceship which Mr. Griffin may have had with Mr. and Mrs. Barnhill. Indeed, the transcript of

defendant's sentencing hearing reveals that after stating that he had known the Barnhills, Mr. Griffin went on to offer a statement in mitigation of defendant's culpability. Moreover, the same transcript directly supports the trial court's finding that defendant admitted his guilt of the offenses. The transcript reflects that defendant acknowledged under oath that he had discussed his case with Mr. Griffin and was satisfied with him; that defendant understood the charges and the minimum and maximum sentences to which he was exposed; that defendant knew he had the right to plead not guilty; that by pleading guilty he understood that he was giving up his right to a jury trial, including the right to confront and cross-examine witnesses; and that defendant was in fact guilty of the charges. Defendant also testified at his sentencing hearing and admitted that he had committed the offenses.

When a trial court's findings are supported by competent evidence, a court's "ruling . . . may be disturbed only when there has been a manifest abuse of discretion, or when it is based on an error of law." *Pait*, 81 N.C. App. at 288-89, 343 S.E.2d at 575 (citation omitted). After the hearing on defendant's motion for appropriate relief, the court concluded:

> 1. That any acquaintance of the defendant's lawyer with the victim of defendant's crime standing alone is not sufficient to warrant setting aside the defendant's plea of guilty.
>
> 2. There has been no showing that an acquaintance between the defendant's lawyer and the victim of the defendant's crime prejudiced the defendant.

We find neither error of law nor abuse of discretion in the trial court's ruling; we consequently affirm the trial court's order denying defendant's motion for appropriate relief.

Affirmed.

Judges TIMMONS-GOODSON and TYSON concur.

HOWARD, STALLINGS, FROM & HUTSON, P.A., PLAINTIFF v.
FRANK DOUGLAS, DEFENDANT

No. COA00-462

(Filed 17 April 2001)

Judgments— default—appearance—letter by counsel

The trial court erred by failing to set aside an entry of default and default judgment where plaintiff filed a complaint against defendant for unpaid legal fees on 10 November 1999; summons was issued but returned unserved; defendant's attorney submitted a letter to plaintiff regarding the fee dispute on 17 November; an alias and pluries summons was issued and defendant received service on 30 November; and the clerk entered default and default judgment on 4 January. Defendant's letter constituted an appearance for purposes of N.C.G.S. § 1A-1, Rule 55(b)(2)(a) which entitled him to 3 days' notice before entry of default judgment. There is no requirement that defendant be aware of the complaint or the action, only that the appearance be made after the complaint is filed.

Judge TIMMONS-GOODSON dissenting.

Appeal by defendant from order filed 2 March 2000 by Judge Paul G. Gessner in Wake County District Court. Heard in the Court of Appeals 30 January 2001.

Howard, Stallings, From & Hutson, P.A., by E. Cader Howard and Christopher K. Behm, for plaintiff-appellee.

Rudolf Maher Widenhouse & Fialko, by Thomas K. Maher, for defendant-appellant.

GREENE, Judge.

Frank Douglas (Defendant) appeals a 2 March 2000 order in favor of Howard, Stallings, From & Hutson, P.A. (Plaintiff) denying Defendant's motion to set aside entry of default and entry of default judgment.

Plaintiff filed a complaint against Defendant on 10 November 1999 alleging Defendant owed Plaintiff $51,274.26 for unpaid legal services and expenses. On 10 November 1999, a summons was issued informing Defendant a suit had been initiated against him, however,

the summons was returned unserved. On 17 November 1999, Thomas K. Maher (Maher), Defendant's attorney, submitted a letter (the letter) to Plaintiff regarding the fee disputes between Plaintiff and Defendant. The letter stated that "the most equitable resolution is that both parties consider the matter closed, and that neither side initiate litigation or pursue claims for damages or fees." On 29 November 1999, "an Alias and Pluries Summons was issued, and Defendant received and accepted the Alias and Pluries Summons and Complaint via Certified Mail" on 30 November 1999.

In December 1999, Defendant met with Maher and presented him with Plaintiff's complaint, but failed to inform Maher of the date upon which he was served with the complaint. On 4 January 2000, the period for Defendant to respond to Plaintiff's complaint expired. Defendant had neither sought nor obtained an extension of time to file an answer. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 55, Plaintiff moved for an entry of default and an entry of default judgment against Defendant. On 4 January 2000, the Clerk of Wake County Superior Court granted Plaintiff's motion and entered default and default judgment against Defendant. Defendant filed his answer and counterclaim to Plaintiff's complaint on 10 January 2000.

On 7 January 2000, Defendant filed a motion to set aside entry of default and entry of default judgment. In his motion, Defendant argued:

> 1. [Maher] received a copy of the complaint in December 1999. [Maher] prepared an answer and counterclaim and filed same by mail on January 7, 2000. Prior to filing an answer, but after the suit was filed, [D]efendant communicated with . . . [Plaintiff] by letter. Such communication constitutes an appearance and requires that [P]laintiff provide notice to [D]efendant before default is entered. Notice was not provided. . . .

After a hearing on Defendant's motion, the trial court denied Defendant's motion and concluded:

> The . . . letter from Defendant's counsel was not responsive to . . . Plaintiff's Complaint, because Defendant was not served with . . . Plaintiff's Complaint and Alias and Pluries Summons until November 30, 1999. Because the . . . letter was not written in response to . . . Plaintiff's Complaint, it cannot constitute an "appearance" sufficient to trigger the notice requirement of Rule 55(b)(2) of the North Carolina Rules of Civil Procedure. Since

there is no other evidence of an "appearance" by Defendant's counsel, Defendant was not entitled to three (3) days notice under North Carolina Rule of Civil Procedure Rule 55(b)(2) prior to the clerk's entry of default and entry of default judgment.

The dispositive issue is whether the letter, sent after Plaintiff filed its complaint but prior to service of the complaint, constitutes an appearance.

Defendant argues the letter constitutes an appearance for purposes of N.C. Gen. Stat. § 1A-1, Rule 55(b)(2), thus, entitling him to notice prior to entry of default judgment.[1] We agree.

A party, against whom default judgment is sought, is entitled to "be served with written notice of the application for judgment at least three days prior to the hearing on such application" if that party has appeared in the action. N.C.G.S. § 1A-1, Rule 55(b)(2)(a) (1999). An appearance "need not be a direct response to the complaint; there may be an appearance whenever a defendant 'takes, seeks or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff.' " *Williams v. Jennette*, 77 N.C. App. 283, 289, 335 S.E.2d 191, 195 (1985) (quoting *Roland v. W & L Motor Lines, Inc.*, 32 N.C. App. 288, 289, 231 S.E.2d 685, 687 (1977)). "Additionally, it has been held that negotiations for settlements or continuances[,] whether by letter or by meeting, after the complaint is filed, constitute appearances within the meaning of Rule 55(b)(2)." *Stanaland v. Stanaland*, 89 N.C. App. 111, 113, 365 S.E.2d 170, 171 (1988) (citing *N.C.N.B. v. McKee*, 63 N.C. App. 58, 303 S.E.2d 842 (1983); *Webb v. James*, 46 N.C. App. 551, 265 S.E.2d 642 (1980); *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E.2d 806 (1975), *disc. review denied*, 289 N.C. 619, 223 S.E.2d 396 (1976)). An appearance in an action, however, cannot be made "prior to" the filing of a complaint. *See Highfill v. Williamson*, 19 N.C. App. 523, 532, 199 S.E.2d 469, 474 (1973) (appearance cannot be made "prior to the institution of [an] action").[2]

In this case, Defendant failed to file an answer within 30 days from the date of service; however, Defendant sent his letter to

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1. In his brief to this court, Defendant argues the trial court erred in finding Defendant was not entitled to notice prior to entry of default. Rule 55(a), providing for entry of default, however, does not require notice be given to the non-moving party prior to the entry of default.

2. An action is instituted or commenced "by filing a complaint with the [trial] court." N.C.G.S. § 1A-1, Rule 3(a) (1999).

Plaintiff after Plaintiff's complaint had been filed, but prior to service of the complaint. Defendant was seeking to prevent Plaintiff from pursuing its claims for damages and fees, and instead, consider the matter closed. In this regard, Defendant's letter constituted a "step" in the proceedings (negotiations with Plaintiff not to pursue its claim) which would have been beneficial to Defendant. Although the complaint had not been served on Defendant, there is no requirement that Defendant be aware of either the complaint or of Plaintiff's action against him, only that the appearance be made after the complaint is filed. Accordingly, once Defendant sent his letter to Plaintiff, he made an appearance for purposes of N.C. Gen. Stat. § 1A-1, Rule 55(b)(2)(a), and, thus, was entitled to three days notice before entry of default judgment. The trial court, therefore, erred in failing to set aside the order of the clerk of Wake County Superior Court entering default judgment against Defendant without the proper notice to Defendant.[3]

Reversed and remanded.

Judge TYSON concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

I agree with the majority today that "[t]he dispositive issue is whether the letter, sent after Plaintiff filed its complaint but prior to service of the complaint, constitutes an appearance." Disagreeing with the conclusion of the majority that the letter constitutes an appearance, however, I respectfully dissent.

An "appearance" is defined as a "coming into court as party to a suit, either in person or by attorney, whether as plaintiff or defendant[;] [t]he formal proceeding by which a defendant submits himself to the jurisdiction of the court[;] [and t]he voluntary submission to a court's jurisdiction." *Black's Law Dictionary* 89 (5th ed. 1979). In the context of North Carolina's default statute, N.C. Gen. Stat. § 1A-1,

3. In order to set aside an entry of default a party must show "good cause." N.C.G.S. § 1A-1, Rule 55(d) (1999). In his brief to this Court, Defendant, however, presents no argument in support of "good cause" to set aside the entry of default. Defendant's assignment of error concerning the trial court's denial to set aside entry of default is, therefore, deemed abandoned and we do not address this issue. *See* N.C.R. App. P. Rule 28(b)(5).

Rule 55(b)(2)(a) (1999), the meaning of "appearance" has been somewhat broadened.

> As a general rule, an 'appearance' in an action involves some presentation or submission to the court. . . . However, it has been stated that a defendant does not have to respond directly to a complaint in order for his actions to constitute an appearance. . . . In fact, an appearance may arise by implication when a defendant takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff.

Roland v. Motor Lines, 32 N.C. App 288, 289, 231 S.E.2d 685, 687 (1977).

In looking at the abovementioned conclusions of *Roland*, the facts of the case must be considered. In *Roland*, the defendant, after summons and complaint had been received, sent a letter to the plaintiff's attorney and to the clerk of court, specifically mentioning the complaint and the file number, referencing the lease agreement involved in the case, and outlining various other aspects specifically related to the pending case. While this did not constitute an answer to the complaint, the Court held the letter to be an appearance sufficient to bar a default judgment without the requisite three days' notice.

The facts of the case at bar must be distinguished from the facts of *Roland*. Here, defendant's attorney sent a letter to plaintiff's attorney before he received a summons or complaint. The letter did not mention the case, as, presumably, the defendant did not have knowledge that there was a case pending. In fact the letter, a portion of which the parties agree reads, "the most equitable resolution is that both parties consider the matter closed and that neither side initiate litigation or pursue claims for damages or fees," is more clearly interpreted as posturing by a party that knows nothing of litigation having been initiated, not as "some step in the proceedings." *Id.*

The other two cases that the majority relies on also have factual scenarios that caution against the conclusion reached today by the majority. In quoting *Roland*, the case of *Williams v. Jennette*, 77 N.C. App. 283, 335 S.E.2d 191 (1985), is also cited by the majority to stand for the proposition that to make an appearance, one does not necessarily need to directly respond to the complaint; it may be sufficient where a defendant "takes, seeks, or agrees to some step in the proceedings." *Id.* at 289, 335 S.E.2d at 195. Again, the factual context is important. In *Williams*, it was *after* the filing of a complaint and *after*

the receipt of the summons and complaint, that the defendant filed a motion for an extension of time to plead. As filing a motion for an extension of time to plead involves "some step in the proceedings," indeed it involves submission to the Court's authority and recognition of a pending case, the Court ruled this an appearance. *Id.*

The final case relied on by the majority further fleshes out what is considered an appearance for purposes of N.C.G.S. § 1A-1, Rule 55(b)(2)(a), and it does not support the conclusion of the majority. In *Stanaland v. Stanaland*, 89 N.C. App. 111, 365 S.E.2d 170 (1988), the defendant, after being served but without making a responsive pleading, agreed to attend meetings with the plaintiff and the plaintiff's attorney in order to discuss issues pertinent to the pending case. The Court ruled this also to be an appearance as it constituted a "step in the proceedings." *Williams*, 77 N.C. App. at 289, 335 S.E.2d at 195.

No case cited by the majority has found an appearance to have been made by a defendant before the receipt of a summons. While it has been clearly held that an appearance *cannot* be made "prior to the institution of [an] action," *Highfill v. Williamson*, 19 N.C. App. 523, 532, 199 S.E.2d 469, 474 (1973), there is no precedent for holding that an appearance can be made prior to a defendant's knowledge that an action has been initiated, or even prior to an actual receipt of summons or complaint. It is my contention in dissenting today that the holding that an appearance cannot be made "prior to the institution of [an] action," *id.*, has been improperly collapsed into the notion that any communication after the initiation of an action is an appearance.[4]

A letter, of course, by itself, can be sufficient to constitute an appearance, but where the letter merely mentions that "the most equi-

4. It should be noted that until 1967, former North Carolina General Statutes section 1-14 and 1-88 combined to identify the commencement of an action as the date of the issuance of the summons. N.C.G.S. § 1A-1, Rule 3 official commentary (1999). The General Statutes Commission altered the commencement of action statute in order to comport with the parallel federal rule, in order to "take away the special consideration then accorded out-of-state defendants," and in order to "remove a potential trap for an unwary plaintiff in a North Carolina federal court." *Id.* Previous to 1967, it had been held that a defendant is not compelled to plead until the complaint is served on him, and no default judgment may be had until the complaint is served. *Braswell v. R.R.*, 233 N.C. 640, 65 S.E.2d 226 (1951). Today, North Carolina General Statutes section 1A-1, Rule 3(a) provides for circumstances in which an action is considered commenced by the issuance of a summons, and within the context of those circumstances, it has been specifically ruled that the defendant still need not plead until the complaint is served. *Hasty v. Carpenter*, 40 N.C. App. 261, 252 S.E.2d 274 (1979).

table resolution is that both parties consider the matter closed and that neither side initiate litigation or pursue claims for damages or fees," there is no reason to believe that any indication has been made that the attorney is representing the client in the action or that the defendant is aware that there is an action. *Roland*, after all, held that an appearance need not be a *direct* response to the complaint, but it did not hold that it need not be a response to the complaint at all. *Roland*, 32 N.C. App. 288, 231 S.E.2d 685. *Roland* also held that there may be an appearance when a defendant "takes, seeks, or agrees to some step in the *proceedings*," but it did not hold that there may be an appearance when a defendant takes, seeks or agrees to some step in the *disagreement*. *Id.* (emphasis added). It should follow that a response to a complaint, even if not direct, requires some knowledge of a complaint, and that a "step in the proceedings," which is tautologically more than a mere disagreement, requires some knowledge of the existence of a proceeding in which one might take a step.

In formulating this dissent, I note that neither the record nor either of the briefs contains a copy of the letter at issue in this case. The quote from the letter and the idea that the disputed attorney's fees were unreasonably high are the only information about the letter contained in the record and the parties' briefs. From this information, I am not able to conclude that the letter constitutes an appearance.

Because I believe that the trial court properly denied defendant's motion to set aside the order of default judgment, it cannot be said that the court abused its discretion. I would affirm the trial court's order.

STATE OF NORTH CAROLINA v. GILES BRANTLEY FLOYD, DEFENDANT

No. COA00-291

(Filed 17 April 2001)

1. Evidence— offense committed by others—speculative

The trial court did not err in the first-degree murder prosecution of defendant for killing his wife by excluding evidence that his girlfriend's sons might have committed the murder. Evidence that the defendant's girlfriend's sons were hostile to his wife and were not in school on the day of the murder does no more than

arouse suspicion that they had motive and opportunity and does not link them directly to the murder. Moreover, the evidence has no bearing on whether defendant committed the murder because, assuming that it established that the two sons were involved, it is perfectly conceivable that defendant and the two sons were together responsible for the murder.

2. Criminal Law— defendant's argument—suggestion that others not investigated

The trial court did not abuse its discretion in a first-degree murder prosecution by sustaining the State's objection during defendant's closing argument to the expression of an opinion that there was sufficient evidence to implicate others. The evidence had been properly excluded and, assuming error, there was not a reasonable possibility of a different result without the error.

3. Homicide— first-degree murder—short-form indictment— constitutionality

The short-form indictment for first-degree murder is constitutional.

Appeal by defendant from judgment entered 2 March 1998 by Judge Gregory A. Weeks in Columbus County Superior Court. Heard in the Court of Appeals 13 March 2001.

Michael F. Easley, Attorney General, by Celia Grasty Lata, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Dowling-Sendor, Assistant Appellate Defender, for defendant-appellant.

HUDSON, Judge.

Defendant was tried and convicted on one count of first-degree murder and sentenced to life imprisonment without parole. The evidence at trial tended to show the following. Linda Gore Floyd (Linda), defendant's wife of twenty-nine years, was killed on 24 April 1996. She was found dead in a utility workshop located outside the home in which she and defendant lived. Her death resulted from multiple blows to her head with a blunt instrument.

On the morning of 24 April 1996, Linda's daughter, Crystal Floyd Gore (Crystal), who lived about ten miles from her parents, spoke on

the phone with Linda. During the conversation, Linda told her daughter that defendant had "just left." Later in the conversation, Crystal heard the phone drop and then silence. Crystal tried calling back but the line was busy. Crystal drove to her parents' house, calling her grandfather Ralph Gore (Ralph) on her cell phone, as well as 911. Ralph went to the home and found Linda dead, lying face down in the utility shop in a pool of blood. Crystal arrived after Ralph, and defendant returned home at approximately 11:00 a.m.

The State's expert witness in forensic serology and blood spatter testified that the boots and jeans which defendant had been wearing on the day of the murder had blood spatter stains on them. The State's expert in DNA analysis testified that Linda's DNA matched the DNA taken from defendant's jeans and boots, that the DNA from the jeans and boots came from a single person, and that the DNA did not match defendant's DNA. Defendant's expert in DNA analysis testified that DNA taken from defendant's boots matched Linda's DNA. Defendant's expert in crime scene analysis, although critical of some procedures that had been used in collecting samples from the jeans, testified that the source of the blood on defendant's boots was Linda.

Defendant had been involved with another woman, Karen Fowler (Karen), for several years prior to Linda's death. At various times during the affair with Karen, defendant separated from Linda to live with Karen. Linda had filed a divorce complaint against defendant on 12 March 1996. Thereafter, defendant and Linda apparently reconciled, and on 20 March 1996, they entered into a consent order filed with the district court. The order provided that if Linda suspected defendant of an extramarital affair, defendant would have to immediately vacate the home, taking only his personal effects, and defendant would have to begin paying Linda $500.00 per month in alimony until she remarried. Defendant then moved back in with Linda.

The State presented an abundance of circumstantial evidence regarding defendant's motive for the murder. For example, a neighbor of defendant testified that about two weeks before the murder, he overheard defendant say, "You don't know what's in my mind. You don't know what I'm thinking. But you'll read about it in a couple of weeks in the paper." A friend of defendant testified that about a month before Linda's murder, defendant stated that he had ended a relationship with another woman, and that he missed having sex with her and dreamed about it. A second neighbor testified that after defendant moved back in with Linda, defendant told him that he still

loved Karen. Karen testified that when defendant was initially served with the divorce complaint, he told Karen that "he'd rather go to jail before he paid [Linda] any money." Karen also testified that defendant once stated to her that he "thought about either killing [Linda] or [having] her killed." Telephone records were introduced showing twelve calls made from defendant and Linda's home to Karen's home between 15 April 1996 and 22 April 1996, as well as five calls made to Karen's home after Linda's death. After Linda's death, defendant filed claims for two life insurance policies, including one for $50,000.00.

Defendant attempted to present evidence to establish that Karen and her two teenage sons had a motive for killing Linda. Some of this evidence was admitted at trial, including: a tape of a harassing message left by Karen on defendant and Linda's home answering machine in early spring of 1996; evidence that Linda had taken out a restraining order against Karen and her sons; and testimony that Karen had dumped clothing in the front yard of defendant and Linda's home on one occasion. As we discuss in further detail below, other evidence offered by defendant to establish motive and opportunity on the part of Karen's two sons was excluded by the trial court.

[1] Defendant timely appealed from the judgment against him. On appeal, defendant raises five assignments of error. Defendant's first argument, encompassing three assignments of error, is that the trial court committed reversible error on three occasions in excluding evidence offered by defendant to show that Karen's two sons might have killed Linda. First, defendant sought to admit testimony by an investigating officer that during an interview with Karen's two sons, they admitted they had not been in school on the morning of 24 April 1996, the day Linda was murdered. The trial court sustained the State's objection to this evidence. Second, Crystal was asked a question regarding the feelings Linda had expressed about the harassing answering machine message left by Karen. In response, Crystal was apparently prepared to testify that Linda had told her that on one occasion while she was driving her car, Karen's two sons had pulled up beside her at a stop light, had yelled obscenities at her, and had given her the finger. The trial court interrupted Crystal, without an objection by the State, and instructed her to restrict her answers to the scope of the question asked. Third, defense counsel sought to elicit Crystal's testimony that she had told the investigating officer about Linda's statements to Crystal regarding the stop light incident. The State objected, and during *voir dire* in the absence of the jury, defense counsel argued the testimony should be admitted in order to

explain why the investigating officer had interviewed Karen's two sons. The trial court sustained the State's objection.

The rule applicable to the admission of evidence of third-party guilt is well-established:

> Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* be inconsistent with the guilt of the defendant.

State v. Cotton, 318 N.C. 663, 667, 351 S.E.2d 277, 279-80 (1987) (emphasis in original). Defendant contends that the evidence in question should have been admitted pursuant to the holding in *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988). In *McElrath*, the defendant was convicted of the first-degree murder of his son-in-law based solely upon circumstantial evidence. On appeal, the Court held that it was error for the trial judge to refuse to admit a map found among the victim's personal papers showing the area surrounding the defendant's summer home, with notations indicating that the victim, with others, planned a larceny. *Id.* at 12, 366 S.E.2d at 448. Citing Rule 401, the Court found that the map and notations, together with other evidence offered, could indicate that the victim suffered a falling out with his co-conspirators which resulted in his death at their hands and not at the hands of the defendant. *Id.* at 12-14, 366 S.E.2d at 448-49. Here, defendant claims that the evidence in question tends to show that Karen's two sons had motive and opportunity for the murder, and that this evidence was therefore relevant and should have been admitted at trial. We disagree.

In *McElrath*, the excluded evidence arguably established the possibility that other individuals, involved in a larceny scheme with the victim to rob the defendant's house, had killed the victim. This theory was inconsistent with the theory that defendant committed the murder, since no evidence was presented that defendant had any connection to anyone involved in the possible larceny scheme, and since it would be unlikely for the defendant to be involved in a larceny scheme to rob his own house. Thus, the evidence in *McElrath* served to inculpate other individuals, and at the same time served to exculpate the defendant as the perpetrator of the murder. Here, the evidence in question was not relevant because it neither implicated Karen's sons in the murder, nor exculpated defendant.

In *State v. Hester*, 343 N.C. 266, 470 S.E.2d 25 (1996), the defendant assigned as error the trial court's exclusion of the testimony of a witness which suggested that the victim's husband, rather than the defendant, might have murdered the victim. At trial, the defendant called the witness to testify about the victim's relationship with her husband. The witness testified on *voir dire* that the victim's husband was a member of Hell's Angels and was nicknamed "Cowboy," that the victim and her husband did not get along very well, that the husband physically abused the victim and her children from a former marriage, and that the victim often hid from her husband by spending the night at the home of the witness. The witness further testified that the victim had said that her husband had threatened several times to kill her. On appeal, the Court stated:

> [I]t is well settled that "to be both relevant and admissible, evidence tending to show the guilt of one other than the defendant must point directly to the guilt of a specific person or persons." It must do more than create mere conjecture of another's guilt. The proffered evidence did no more than arouse suspicion as to Randall's guilt on the basis that he might have had a motive to murder the victim. There was no evidence linking him directly to the crime, and the evidence was not inconsistent with defendant's guilt. The trial court thus properly excluded the evidence.

Id. at 271, 470 S.E.2d at 28 (citations omitted). Similarly, the evidence here, showing that Karen's two sons were hostile toward Linda and were not in school on the day of the murder, does no more than arouse suspicion that Karen's sons had motive and opportunity to murder Linda. This evidence does not directly link Karen's sons to the murder.

Nor does the evidence exculpate defendant. In *State v. Rose*, 339 N.C. 172, 451 S.E.2d 211 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995), the defendant was convicted of two counts of first-degree murder and two counts of armed robbery. The defendant on appeal contended that the trial court had erred by not allowing him to ask the investigating detective if he had an opinion about the number of people involved in the murders. During an offer of proof, the detective stated that immediately after investigating the murders he believed there was a strong possibility that a particular individual named Harvey, an acquaintance of defendant who was also in the area at the time of the murders, had knowledge of, and might have been

involved in, the murders. The defendant argued that this testimony should have been admitted because it was relevant evidence which showed that someone else might have committed the murders. The Court held that the evidence amounted to mere conjecture that Harvey was involved in the murders, and did not show that defendant did not commit them. *Id.* at 191, 451 S.E.2d at 222. The Court also expressly distinguished the case from *McElrath*, explaining that the evidence in *McElrath* not only inculpated another, but also exculpated the defendant, while the evidence in *Rose* was not necessarily inconsistent with defendant's guilt. *Id.*

Here, the evidence in question does not have any bearing on whether defendant committed the murder. This is because even assuming *arguendo* that the evidence in question established that Karen's two sons were involved in the murder, such evidence would not establish that defendant did not commit the murder, since it is perfectly conceivable that defendant and Karen's sons were, together, responsible for the murder. "Evidence which tends to show nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense *and that therefore the defendant did not do so*, is too remote to be relevant and should be excluded." *State v. Britt*, 42 N.C. App. 637, 641, 257 S.E.2d 468, 471 (1979) (emphasis added). In sum, the evidence in question was not relevant because it neither inculpated Karen's sons in Linda's murder, nor served to exculpate defendant. The trial court properly excluded this evidence, and defendant's first three assignments of error are overruled.

[2] Defendant next contends that the trial court erred in sustaining the State's objection to a comment made by counsel for defendant during closing argument. Counsel stated:

> Now, Karen Fowler denied the threats but you all heard the tape. And you're going to hear it again in a minute. And the threats are in there. "I'm going to f--- you up. I'm your worst f'ing nightmare." Now, she denied doing that when she took the witness stand and testified. But they're there. And it makes you wonder why she and her family haven't been investigated in this case.

The State objected to this last comment, which objection was sustained by the trial court.

> It is well-settled that in North Carolina counsel is granted wide latitude to argue the case to the jury. Counsel is permitted to

> argue the facts that have been presented as well as the reasonable inferences which can be drawn therefrom. However, counsel may not argue matters to the jury which are incompetent and prejudicial by injecting his own knowledge, beliefs, or personal opinions or matters which are not supported by the evidence. Ordinarily, the control of jury arguments is left to the sound discretion of the trial court and the trial court's rulings thereon will not be disturbed on appeal absent a showing of abuse of discretion.

State v. Jones, 339 N.C. 114, 158-59, 451 S.E.2d 826, 850 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995) (citations omitted). The comment in question appears to have been an attempt by counsel to express to the jury his opinion that the evidence presented was sufficient to implicate Karen's sons in the murder of Linda. We can only assume that the trial court found this comment to be prejudicial and not supported by the evidence, and we are not persuaded that this conclusion constituted an abuse of discretion. As we have stated, the evidence purportedly implicating Karen's sons in the murder was properly excluded by the trial court because, in fact, it did no more than create mere conjecture, and did not directly link Karen's sons to the murder. Thus, the statement by counsel during closing argument sought to present an inference that could not reasonably be drawn from the evidence. Moreover, even assuming *arguendo* that sustaining the objection was error, such error standing alone would be insufficient to require a new trial. The trial lasted a total of seven days, excluding many days of jury selection and pre-trial hearings. The transcript of the trial comprises over 5,000 pages. Defendant has not shown a reasonable possibility that there would have been a different result if the State's objection to this one statement had been overruled. *See State v. Rosier*, 322 N.C. 826, 829-30, 370 S.E.2d 359, 361 (1988). This assignment of error is overruled.

[3] Defendant lastly contends that the "short form" murder indictment employed in this case violated his constitutional rights and deprived the trial court of jurisdiction to try him for the indicted charge of first-degree murder. Defendant acknowledges that he has raised this issue "for preservation purposes to permit further review in federal court, if necessary," and defendant readily concedes that this issue has previously been considered and rejected by our Supreme Court in *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). Pursuant to the holding in *Wallace*, this assignment of error is overruled.

No error.

Judges GREENE and McCULLOUGH concur.

THE TOWN OF AYDEN, PLAINTIFF v. THE TOWN OF WINTERVILLE, DEFENDANT

No. COA99-1595

(Filed 17 April 2001)

Cities and Towns— annexation—lack of standing—no justiciable controversy

The trial court did not err in a voluntary annexation case by granting defendant town's motion to dismiss based on plaintiff neighboring town's lack of standing, because: (1) N.C.G.S. § 160A-31 does not identify categories of plaintiffs other than owners of land in the subject area who are authorized to challenge an annexation under this statute; (2) plaintiff did not own property in this area and both towns were not simultaneously attempting to annex controverted property so that there would be a justiciable issue; and (3) there is no statutory authority that would give plaintiff the power to challenge the annexation ordinance if it were seeking to exercise extraterritorial jurisdiction over the area in controversy.

Appeal by plaintiff from judgment entered 30 September 2000 by Judge Richard B. Allsbrook in Pitt County Superior Court. Heard in the Court of Appeals 14 February 2001.

The Brough Law Firm by Robert E. Hornik, Jr. and Michael B. Brough, and Lewis & Associates, by Christopher P. Edwards, for plaintiff-appellant.

Poyner & Spruill, L.L.P., by Robin Tatum Morris, and Law Offices of E. Keen Lassiter, by E. Keen Lassiter, for defendant-appellee.

BIGGS, Judge.

This appeal arises out of the trial court's dismissal of plaintiff's action, on the basis that plaintiff lacked standing. We affirm the dismissal by the trial court.

In March of 1999, the Town of Ayden (plaintiff) filed suit against the Town of Winterville (defendant). Ayden's complaint challenged Winterville's 1997 voluntary annexation of an adjoining neighborhood, South Ridge Subdivision, and of land adjacent to South Ridge. Ayden alleged that Winterville had failed to comply with certain requirements of N.C.G.S. § 160A-31 (1999), the statute governing voluntary annexations. The suit also claimed that the purportedly defective annexation may restrict Ayden's future exercise of its statutory right under N.C.G.S. § 160A-360(a) (1999) to regulate zoning and development up to a mile beyond its city limits. Ayden sought a declaratory judgment invalidating Winterville's adoption of the annexation ordinance.

Defendant moved for dismissal pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) (1999), arguing that Ayden lacked standing to challenge Winterville's annexation. Subsequently, both parties moved for summary judgment. Following a hearing on these motions, the trial court granted defendant's motion for dismissal, based on plaintiff's lack of standing. Plaintiff appeals from this order. For the reasons that follow, we affirm the trial court's ruling on the issue of standing. We also hold that at the time this action was commenced, there was no justiciable controversy between the parties that would have given the trial court jurisdiction to render a declaratory judgment on the validity of Winterville's 1997 annexation of South Ridge Subdivision.

Ayden and Winterville are neighboring towns in Pitt County, North Carolina. In recent years, development on the margins of both towns, and along North Carolina State Road 11, has brought the developed areas outside the towns closer together. In early 1997, approximately two miles of unincorporated land separated the two. In August, 1997, Winterville annexed a neighborhood located between Ayden and Winterville, the South Ridge Subdivision, and adjoining land associated with South Ridge. After the annexation was complete, the corporate limits of Ayden and Winterville were approximately one mile apart.

The area was annexed pursuant to the voluntary annexation procedure authorized by G.S. § 160A-31, "Annexation by Petition," a form of annexation that is predicated on a request by petition of the real property owners in the area to be annexed, followed by the enactment of an ordinance extending the corporate limits of the municipality. G.S. § 160A-31 provides in pertinent part:

> (a) The governing board of any municipality may annex by ordinance any area contiguous to its boundaries upon presentation to the governing board of a petition signed by the owners of all the real property located within such area. The petition shall be signed by each owner of real property in the area and shall contain the address of each such owner. . . . (d) . . . Upon a finding that the petition meets the requirements of this section, the governing board shall have authority to pass an ordinance annexing the territory described in the petition.

G.S. § 160A-31(a) and (d).

Under G.S. § 160A-360, a municipality may exercise zoning and regulatory powers beyond it's corporate limits. The statutory authorization specifies that:

> [a]ll of the powers granted by this Article may be exercised by any city within its corporate limits. In addition, any city may exercise these powers within a defined area extending not more than one mile beyond its limits. . . . The boundaries of the city's extraterritorial jurisdiction shall be the same for all powers conferred in this Article.

G.S. 160A-360(a).

Thus, the enlargement of a municipality's corporate limits also expands the area over which it may regulate development and adopt zoning ordinances beyond its corporate limits. In the present case, Winterville's annexation of South Ridge Subdivision augmented its potential zone of extraterritorial jurisdiction so that it overlaps with Ayden's potential area of extraterritorial jurisdiction. Ayden argues that this potential area of overlap gives it standing to challenge the underlying annexation that allowed Winterville to expand. A review of the law persuades us that this potential for conflict neither confers standing on Ayden, nor does it constitute a justiciable controversy.

In passing on the validity of an annexation or zoning ordinance, one of the court's first concerns is whether the plaintiff has standing to bring the action. *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E.2d 576, (1976). The plaintiffs in *Taylor* had challenged certain annexation and zoning ordinances which had resulted in the city's seeking a sewer easement through their properties. However, the plaintiffs did not own property within the annexed area. The North Carolina Supreme Court held that, without actual ownership of annexed property, the plaintiffs lacked standing to challenge the annexation ordi-

nance, notwithstanding any injury to them occasioned by the proposed sewer easement. *Taylor* relied in part on an earlier case, *Gaskill v. Costlow*, 270 N.C. 686, 155 S.E.2d 148 (1967), which had held that challenges by private individuals to annexations generally are limited to plaintiffs with specific statutory authority to bring suit (*e.g.*, owners of real property within an area to be annexed). The *Gaskill* Court stated that:

> [U]nless an annexation ordinance be absolutely void (*e.g.*, on the ground of lack of legislative authority for its enactment), in the absence of specific statutory authority to do so, private individuals may not attack, collaterally or directly, the validity of proceedings extending the corporate limits of a municipality. *Such an action is to be prosecuted only by the State through its proper officers.* (emphasis added).

Taylor, 290 N.C. at 617-18, 227 S.E.2d at 581-82.

Subsequent cases of this Court also have adhered to the principle that absent statutory authorization, a plaintiff will lack standing to contest a facially valid annexation enacted pursuant to statute. In *Town of Seven Devils v. Village of Sugar Mountain*, 125 N.C. App. 692, 482 S.E.2d 39, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997), Seven Devils sought a declaratory judgment voiding annexations by Sugar Mountain on the basis that a portion of the annexed area was closer to its corporate limits than to those of Sugar Mountain, and thus that it was an "interested" party in the meaning of the Declaratory Judgment Act. This Court ruled that Seven Devils lacked standing to bring the action. Citing *Taylor*, the Court held that "[b]ecause there is no statutory authority granting plaintiff standing to challenge the questioned annexations, the trial court correctly dismissed the complaint." *Id.* at 693, 482 S.E.2d at 40. Similarly, in *Joyner v. Town of Weaverville*, 94 N.C. App. 588, 380 S.E.2d 536 (1989), this Court held that only the owners of property in an annexed area have standing to challenge an annexation ordinance. In *McKenzie v. City of High Point*, 61 N.C. App. 393, 301 S.E.2d 129, *disc. review denied*, 308 N.C. 544, 302 S.E.2d 885 (1983), plaintiffs challenged an annexation of areas contiguous to High Point, alleging that the annexed area would not have been contiguous were it not for an earlier, allegedly defective, annexation of another area. This Court noted that "petitioners failed to show that they had standing (residency in the area) to attack the earlier annexation." *Id.* at 401, 301 S.E.2d at 131.

The annexation statute upon which Winterville based its annexation of South Ridge, G.S. § 160A-31, does not identify categories of plaintiffs other than owners of land in the subject area, who are authorized to challenge an annexation pursuant to the statute. The statute describes a *voluntary* annexation undertaken at the request of land owners; specifically, the statute does not authorize suit by neighboring municipalities. Nonetheless, plaintiffs have argued that irregularities in Winterville's annexation render its annexation of South Ridge "absolutely void," obviating the need for standing. We disagree.

Plaintiff asserts that (1) not all the property owners had signed the petition, as required under G.S. § 160A-31(a), and that (2) the land in question did not meet the requirement that it be contiguous with the previous corporate limits of Winterville. These questions are not properly before this Court. As stated by the court in *Burlington Industries, Inc. v. Edelman*, 666 F. Supp. 799 (M.D.N.C. 1987):

> "Standing" to sue means simply that the party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Sierra Club v. Morton*, 405 U.S. 727, 31 L.Ed.2d 636 (1972). Standing is a jurisdictional issue[,] . . . [and] does not generally concern the ultimate merits of a lawsuit.

Id. at 804.

In *Davis v. City of Archdale*, 81 N.C. App. 505, 344 S.E.2d 369, (1986), the plaintiff asserted that an annexation was void for failure to follow statutory procedures. However, having determined that the plaintiff lacked standing, this Court did not address the merits of his claim, noting that standing is jurisdictional in nature. Thus, even if the alleged irregularities would, if proved, render the annexation voidable by an appropriate plaintiff, this does not eliminate the requirement that plaintiff have standing.

The lack of standing is a sufficient ground upon which to affirm the trial court's dismissal of plaintiff's suit. However, our decision rests equally on the lack of a justiciable controversy between the parties at the time that the action was commenced. A justiciable controversy is a prerequisite to a court's obtaining jurisdiction. "An actual controversy between the parties must exist at the time the complaint is filed in order for the court to have jurisdiction to render a declaratory judgment." *Town of Pine Knoll Shores v. Carolina Water Service*, 128 N.C. App. 321, 494 S.E.2d 618 (1998) (justiciable contro-

versy not shown by plaintiff's stated intention to violate restrictive covenant at some point in the future).

The existence of a "justiciable controversy" requires more than a simple disagreement between parties. "[T]o satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable." *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 589, 347 S.E.2d 25, 32 (1986) (quoting *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984)). The controversy must exist at the time the complaint is filed. This Court consistently has held that "future or anticipated action of a litigant does not give subject matter jurisdiction to our courts under the Declaratory Judgment Act." *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 628, 518 S.E.2d 205, 207, *disc. review denied*, 351 N.C. 186, 541 S.E.2d 709 (1999). In *Richmond Co. v. N.C. Low-Level Radioactive Waste Mgmt. Auth.*, 335 N.C. 77, 436 S.E.2d 113 (1993), plaintiffs challenged the site selection process employed to determine the location for a waste treatment facility. The Court held that until the site selection was complete and a final siting decision had been made, there would be no actual justiciable controversy between the parties. *See also City of Raleigh v. R.R. Co.*, 275 N.C. 454, 168 S.E.2d 389 (1969) (no justiciable controversy where parties sought construction of proposed city ordinance that had not yet been passed at the time suit was filed). In contrast, where municipalities are actively competing to annex or zone a given area, a justiciable controversy may exist. *See, e.g., Town of Spencer v. Town of East Spencer*, 351 N.C. 124, 522 S.E.2d 297 (1999) (justiciable controversy created when adjoining towns both file competing resolutions of intent to annex an overlapping area).

In the present case, Ayden alleges that if Winterville's extraterritorial jurisdiction is extended, it "will encroach upon or come perilously close to the corporate limits of the Town of Ayden and will effectually prevent the Town of Ayden from extending its own extraterritorial jurisdiction one mile beyond its corporate limits." Ayden further claims that the planned extension of Winterville's extraterritorial jurisdiction will potentially adversely affect its ability to grow, regulate development to its north, and extend its extraterritorial jurisdiction. Ayden does not own any property in the subject area; nor had Ayden, at the time that it brought this action, sought to annex any of the property either in the annexed area or in the area over which Winterville could seek to exercise extraterritorial jurisdiction. Only if Ayden owned property in the annexed area, or if both

towns were simultaneously attempting to annex controverted property, could there be a justiciable controversy, giving Ayden standing to contest the annexation by Winterville. *See Town of Spencer*, 351 N.C. 124, 522 S.E.2d 297 (1999). Furthermore, we find no authority that would give Ayden the power to challenge the annexation ordinance if it were seeking, not to annex, but to exercise extraterritorial jurisdiction over any of the area in controversy.

Finally, N.C.G.S. § 160A-360(c) (1999) provides that, if the areas of extraterritorial jurisdiction of two municipalities overlap, a boundary shall be drawn midway through the overlapping area. Therefore, even if Ayden exercises its extraterritorial jurisdiction over the area of overlap with Winterville's extraterritorial jurisdiction, litigation still would not be "inevitable," in view of a statutory scheme for resolving such potential conflicts.

For the reasons stated above, we find that Ayden lacks standing to contest a voluntary annexation by its neighbor, Winterville, and further find that at the time the action was commenced there was no justiciable controversy between the parties. Accordingly, the trial court's dismissal of plaintiff's suit is affirmed.

Affirmed.

Judges WALKER and SMITH concur.

PERRY TILLY, EMPLOYEE, PLAINTIFF-APPELLEE v. HIGH POINT SPRINKLER, EMPLOYER, AND AETNA INSURANCE COMPANY, CARRIER, DEFENDANTS-APPELLANTS

No. COA00-387

(Filed 17 April 2001)

Workers' Compensation— jurisdiction—untimely filing of claim—no actual notice

The Industrial Commission lacked jurisdiction to hear a workers' compensation claim arising from an accident on 19 October 1992 where plaintiff was first injured on 8 April 1991; a second work-related accident occurred on 19 October 1992; plaintiff filed a claim on 28 October 1992 for neurological difficulties arising from the first accident which did not mention the second

accident; and plaintiff filed a claim for that 19 October 1992 accident on 1 July 1996. Although plaintiff contends that his answers to interrogatories, his medical records, and his testimony were sufficient notice to the Commission that he intended to claim benefits from the 19 October accident, those actions only informed the Commission of the accident and that plaintiff was treated, released, and returned to work the same or the next day. Plaintiff's request for a hearing was limited to the 8 April injury and the claim filed on 1 July 1996 was beyond the two-year limit set forth in N.C.G.S. § 97-24(a).

Appeal by defendants from opinions and awards entered 8 April 1997, 10 June 1997 and 20 October 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 February 2001.

Elliot Pishko Gelbin & Morgan, P.A., by J. Griffin Morgan, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Edward L. Eatman, Jr., Allen C. Smith and C.J. Childers, for defendants-appellants.

WALKER, Judge.

Defendants appeal from an opinion and award of the Industrial Commission (Commission) ordering them to pay plaintiff compensation for temporary total disability, medical expenses and a reasonable attorney's fee.

While working for defendant as a pipefitter, plaintiff was injured on 8 April 1991 when a pipe fell from the scaffolding above and struck his head. Defendant filed an "Employer's Report of Injury to Employee" to inform the Commission he suffered a work-related accident (Form 19). The Commission approved a Form 21, "Agreement for Compensation for Disability" on 20 March 1992. The plaintiff was out of work on disability from the injury from 29 May 1991 until 8 July 1991. The plaintiff was released to return to work on 26 June 1991; however, he elected to use vacation time to extend his absence until 8 July 1991.

A second work-related accident occurred on 19 October 1992, when plaintiff fell from a ladder and sustained injuries to his head and wrists. Plaintiff was treated but released and returned to work the

same or next day. Plaintiff continued to work until November, 1992 and has not returned to work since. On 28 October 1992, plaintiff filed a "Notice of Accident to Employer (G.S. 97-22) and Claim of Employee or His Personal Representative or Dependents (G.S. 97-24)" (Form 18) with the Commission seeking benefits on the ground that he suffered "neurological difficulties" from the 8 April 1991 injury. On the claim form, plaintiff indicated his disability from this injury caused him to be out of work from 29 May 1991 until 8 July 1991. This claim form did not mention plaintiff's intervening work-related accident which had occurred nine days earlier on 19 October 1992. On 10 March 1993, plaintiff filed a Form 33, "Request that Claim Be Assigned for Hearing" which referred only to his injury on 8 April 1991. On 26 March 1993, defendants filed a Form 33R, "Response to Request that Claim be Assigned for Hearing" which was later amended to assert plaintiff's "claims for further treatment or disability are not due to the injury by accident of April 8, 1991 but rather due to preexisting conditions."

Deputy Commissioner William L. Haigh (Commissioner Haigh) thereafter held hearings on 1 and 2 December 1993 regarding the claim for the 8 April 1991 injury. On 13 March 1996, Commissioner Haigh filed an opinion and award which denied plaintiff's claim for benefits beyond the period of time he was disabled from the 8 April 1991 injury. In the opinion and award, Commissioner Haigh found the following:

> 23. . . . Whatever claim, if any, that plaintiff has filed with the [Commission] concerning the October 19, 1992 accident is *not before the undersigned in the instant case which only involves a claim for incapacity to earn wages due to the April 8, 1991 injury* by accident. With the exception of the period from May 29, 1991 to June 27, 1991, the credible lay and medical evidence fails to establish that, as a result of the injury by accident of April 8, 1991, plaintiff was unable to earn any wages or diminished wages in the same or other employment.

(emphasis added). Commissioner Haigh also concluded that before the second injury occurring on 19 October 1992, plaintiff "sustained no diminution in earning capacity by reason of the [first] accident of April 8, 1991." In addition, Commissioner Haigh stated, "[f]ollowing the accident on October 19, 1992 . . . *but for which no claim is pending in the instant case*, [plaintiff] sustained some period of diminished wage earning capacity, the nature and extent of

which are undeterminable from the credible evidence of record." (emphasis added).

On 25 March 1996, plaintiff gave notice of appeal to the Commission from the opinion and award entered by Commissioner Haigh. Thereafter, on 1 July 1996, plaintiff filed a Form 18 pertaining to his work-related injury which occurred on 19 October 1992, when he indicated that his disability began. On 2 July 1996, plaintiff filed a motion requesting that the Commission find that Form 18 was timely filed, or, in the alternative, that "defendants are estopped from raising the time limitations of N.C. Gen. Stat. § 97-24 to bar plaintiff's claim[.]"

On 20 October 1999, the Commission issued an opinion and award reversing the opinion and award of Commissioner Haigh based upon the following findings:

> 12. Defendants *were on actual notice* of this accident, defendant-employer having filed a Form 19 in connection therewith, and defendants having received written notice of it in plaintiff's answer to interrogatories. Defendants *were not prejudiced* in any way in their investigation of the incident on 19 October 1992.
>
> . . .
>
> 21. Plaintiff's inability to return to work was *caused by his 8 April 1991 injury by accident, and was exacerbated by the October 1992 injury* by accident.
>
> 22. As the result of the 8 April 1991 injury by accident and the 19 October 1992 injury by accident, plaintiff has been incapable of earning wages in his former position with defendant-employer or in any other employment from November 1992 through the present.

(emphasis added). Plaintiff was therefore awarded temporary total benefits in addition to past and future medical expenses and reasonable attorney's fees.

In their first assignment of error, defendants contend the Commission erred by hearing plaintiff's claim arising from his 19 October 1992 accident since it had no jurisdiction. Defendants thereby assert plaintiff did not file a claim for the 19 October 1992 accident until 1 July 1996, which was after the two-year filing period mandated by statute had elapsed.

At the outset, we note that when a party challenges the Commission's jurisdiction to hear a claim, the findings relating to jurisdiction are not conclusive and the reviewing court may consider all of the evidence in the record and make its own determination on jurisdiction. *Craver v. Dixie Furniture Co.*, 115 N.C. App. 570, 447 S.E.2d 789 (1994); *Lucas v. Stores*, 289 N.C. 212, 221 S.E.2d 257 (1976). Otherwise, the standard of appellate review is limited to a determination of (1) whether the Commission's findings are supported by any competent evidence of record, and (2) whether the findings justify the Commission's legal conclusions. *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 426 S.E.2d 424 (1993).

Jurisdiction over workers' compensation claims is controlled by N.C. Gen. Stat. § 97-24(a), which provides in part that the right to workers' compensation shall be "forever barred" unless a claim is filed with the Industrial Commission "within two years after the accident." N.C. Gen. Stat. § 97-24(a) (1999). "The requirement of filing a claim within two years of the accident is not a statute of limitation, but a condition precedent to the right to compensation." *Perdue v. Daniel International*, 59 N.C. App. 517, 518, 296 S.E.2d 845, 846 (1982), *cert. denied*, 307 N.C. 577, 299 S.E.2d 647 (1983), *citing Barham v. Hosiery Co.*, 15 N.C. App. 519, 190 S.E.2d 306 (1972). *See also Letterlough v. Atkins*, 258 N.C. 166, 128 S.E.2d 215 (1962) (holding the jurisdiction of the Commission is limited by statute).

In the instant case, plaintiff was familiar with the procedure of having to file a claim to receive benefits by virtue of his having filed a Form 18 claim on 28 October 1992 for the 8 April 1991 work-related injury. This claim did not mention the 19 October 1992 injury even though this second injury had occurred nine days prior to the date the claim was filed.

This Court has held that the employment report of an injury on Form 19 is insufficient to invoke jurisdiction where the claim has not been reported by the filing of a Form 18 within two years after the accident. *Perdue*, 59 N.C. App. at 518, 296 S.E.2d at 846. In *Perdue*, this Court relied on *our Supreme Court's decision in Montgomery v. Fire Department*, 265 N.C. 553, 144 S.E.2d 586 (1965), about which this Court stated:

> [T]he decedent died on 16 August 1962, immediately after his fire truck was in a collision. Six days later, the fire department filed

Form 19 with the Industrial Commission. The Commission twice wrote to plaintiff's attorneys asking that they file a form requesting a hearing. This was not done. The Supreme Court held that since a claim was not filed, the proceedings were properly dismissed.

Perdue, 59 N.C. App. at 518, 296 S.E.2d at 846.

In *Reinhardt v. Women's Pavilion*, 102 N.C. App. 83, 401 S.E.2d 138 (1991), this Court held that a letter from a workers' compensation insurer to the Commission, which merely inquired as to claimant's physical progress and medical charges but made no demand for compensation or request a hearing, did not satisfy the statutory requirement that a "claim" be filed within two years of the accident pursuant to N.C. Gen. Stat. § 97-24(a). *See also Gantt v. Edmos. Corporation*, 56 N.C. App. 408, 289 S.E.2d 75 (1982).

In *Abels v. Renfro Corp.*, 100 N.C. App. 186, 394 S.E.2d 658 (1990), the defendants paid plaintiff's medical bills incurred as a result of a work-related injury. *Id.* at 187, 394 S.E.2d at 658. However, plaintiff did not file a claim for benefits within two years of the accident. *Id.* This Court affirmed the Commission's denial of a claim and held the defendants were not estopped from contesting the claim. *Id.* at 187, 394 S.E.2d at 658-59. Moreover, our Supreme Court has held that the lack of the Commission's jurisdiction over a workers' compensation claim "cannot be obtained by consent of the parties, waiver, or estoppel." *Hart v. Motors*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956) (citation omitted). *See also Clodfelter v. Furniture* Co., 38 N.C. App. 45, 247 S.E.2d 263 (1978); *Barham*, 15 N.C. App. 519, 190 S.E.2d 306.

In support of his contention that the claim for the 19 October 1992 injury was timely filed, plaintiff cites *Cross v. Fieldcrest Mills*, 19 N.C. App. 29, 198 S.E.2d 110 (1973). In *Cross*, this Court upheld the Commission's determination that a letter written within two years of the accident constituted a sufficient claim for an injury. *Id.* at 31, 198 S.E.2d at 112. The letter referred to plaintiff's two injuries resulting from accidents and requested that a hearing be held to address both injuries, since "[t]here may be some question about aggravation of the pre-existing injury . . . ." *Id.* at 30-31, 198 S.E.2d at 112. In addition, the letter asked the Commission to check its records to see if it had any record of the first injury. *Id.* at 31, 198 S.E.2d at 112. The Commission held that the letter constituted a sufficient claim and therefore com-

plied with N.C. Gen. Stat. § 97-24 to vest jurisdiction over the first injury. *Id.* This Court agreed and stated "[a]lthough the letter constitutes a rather minimal compliance with the statute with respect to filing a claim with the Commission, it nevertheless specifically requests a hearing upon the alleged [first] injury." *Id.*

Plaintiff contends his actions adequately informed the Commission of his 19 October 1992 injury and "went far beyond" the plaintiff's actions in *Cross*. He asserts that his answers to interrogatories, his medical records filed with the Commission and his testimony before Commissioner Haigh are sufficient notice to the Commission that he intended to claim benefits arising out of the accident on 19 October 1992. We disagree. The record reveals these actions by plaintiff only informed the Commission that he was involved in an accident on 19 October 1992 for which he was treated, released and returned to work the same or next day. Plaintiff's request for a hearing was limited to the 8 April 1991 injury.

We conclude that plaintiff failed to file a separate claim for the benefits from the 19 October 1992 accident and that the claim filed on 1 July 1996 was beyond the two-year statutory requirement. Therefore, the Commission lacked jurisdiction to hear a claim based on any injury arising out of the 19 October 1992 accident.

The Commission concluded that "plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer on April 8, 1991." Therefore, we remand the matter to the Commission to determine whether plaintiff is entitled to further benefits for the injury occurring on 8 April 1991.

Reversed and remanded.

Judges BIGGS and SMITH concur.

REGINALD L. HUBBARD, WILLODENE C. SANDERS, ROBERT A. GROOMS, JOHN TYNDALL, RONALD L. STARLING, GLORIA FREDERICK, JAMES E. McLAURIN, JOSEPH F. HERMAN, AND CRAIG HART, PLAINTIFFS V. COUNTY OF CUMBERLAND, NORTH CAROLINA, AND EARL BUTLER, SHERIFF OF CUMBERLAND COUNTY, DEFENDANTS

No. COA00-401

(Filed 17 April 2001)

1. Appeal and Error— appealability—denial of summary judgment—sovereign immunity

The denial of summary judgment was immediately appealable where defendants asserted a claim of governmental immunity.

2. Immunity— sovereign—law enforcement salaries—statutory duty

Defendant-county was not protected by sovereign immunity from an action by Sheriff's Department personnel alleging that a pay plan had been manipulated so that they were deprived of rightfully earned compensation. Defendant had a statutory duty to provide the salaries to which it had committed itself in the enacted budget ordinance and those salaries provided the necessary consideration for the formation of employment contracts between the sheriff and his deputies; having availed itself of the services provided by the law enforcement officers, defendant could not claim sovereign immunity as a defense to its statutory and contractual commitment.

3. Counties— sheriff's department pay plan—continuing approval—issue of fact

The trial court correctly denied defendant-county's motion for summary judgment in an action by Sheriff's Department personnel alleging that a pay plan had been manipulated so that they were deprived of rightfully earned compensation. There was an issue of fact as to whether the Board of Commissioners had continued to approve and allocate funds for a longevity pay plan originally adopted in 1980.

4. Parties— unnecessary—action by sheriff's employees

The trial court should have granted defendant-sheriff's motion to dismiss in an action by Sheriff's Department personnel against the county and the sheriff alleging that a pay plan had been manipulated so that they were deprived of rightfully earned

compensation. Although plaintiffs alleged that the sheriff acted in concert with the County, there was no evidence of such collusion and the sheriff was an unnecessary party.

Appeal by defendants from judgments entered 2 February 2000 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 13 March 2001.

Larry J. McGlothlin for plaintiff appellees.

Harris, Mitchell, Burns & Brewer, by Ronnie M. Mitchell, for defendant appellants.

McCULLOUGH, Judge.

In a letter dated 24 March 1980, Cumberland County Sheriff Ottis F. Jones requested the Cumberland County Board of Commissioners' approval for a proposed longevity pay system for Cumberland County Sheriff's Department personnel. At the time of Sheriff Jones' letter, all Cumberland County Sheriff's Department personnel within each rank received identical salaries, regardless of length of service or job performance. Expressing "grave concern" over the "extremely excessive" turnover rate among law enforcement officers, Sheriff Jones proposed a new salary policy that would include a longevity provision to reward deserving individuals with incremental pay increases. The proposed plan established a seven-step pay scale, with a one-step increase on the completion of five years of satisfactory service, and an additional step increase every four years thereafter. Although the proposal would initially increase the personnel budget by one hundred thousand dollars, Sheriff Jones assured the Board of Commissioners that his plan would eventually save the County money by decreasing the employee attrition rate. Sheriff Jones ended his letter by requesting that the Board of Commissioners approve the new pay policy to be effective 1 July 1980.

In May 1980, the Cumberland County Board of Commissioners approved and implemented Sheriff Jones' proposed longevity pay system for Cumberland County Sheriff's Department personnel. On 30 June 1997, plaintiffs, who are or were Cumberland County Sheriff's Department law enforcement officers, initiated the present action against Cumberland County. Defendant Earl Butler, Sheriff of Cumberland County, was later joined to the action as a potentially necessary party. In their complaint, plaintiffs alleged that defendants had manipulated and otherwise improperly administered the

longevity pay plan such that plaintiffs were wrongfully deprived of rightfully earned compensation. The trial court subsequently denied defendant Butler's motion to dismiss and defendant County's motion for summary judgment, which defendants now appeal to this Court.

[1] We note initially that an appeal from the denial of a summary judgment motion, such as the instant one, is interlocutory and generally not allowed as it does not affect a substantial right of the parties. *Smith v. Phillips*, 117 N.C. App. 378, 380, 451 S.E.2d 309, 311 (1994). When the motion is made on the grounds of sovereign immunity, however, "such a denial is immediately appealable, because to force a defendant to proceed with a trial from which he should be immune would vitiate the doctrine of sovereign immunity." *Id.* at 380, 451 S.E.2d at 311. In the instant case, defendants have asserted a claim of governmental immunity and, therefore, their appeal is properly before this Court.

[2] Defendant County argues that summary judgment should have been granted as to plaintiffs' claims regarding manipulation of the pay plan. Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999); *Kephart v. Pendergraph*, 131 N.C. App. 559, 562, 507 S.E.2d 915, 918 (1998). The movant bears the burden of establishing that no triable issue exists, and he may do this 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." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Defendant County contends that the doctrine of sovereign immunity protects it from plaintiffs' suit. Because defendant County has not waived sovereign immunity or otherwise consented to the present action, it maintains that it is protected from plaintiffs' suit as a matter of law. We disagree.

In general, the doctrine of sovereign immunity provides the State, its counties, and its public officials with absolute and unqualified immunity from suits against them 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). Such immu-

nity may be waived, however. *Id.* at 714, 431 S.E.2d at 493-94. For example, in *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976), our Supreme Court held that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." The *Smith* Court also noted that under N.C. Gen. Stat. § 153A-11, "counties . . . may contract and be contracted with and . . . may sue and be sued." *Smith*, 289 N.C. at 321, 222 S.E.2d at 424; N.C. Gen. Stat. § 153A-11 (1999).

Plaintiffs in the instant case are law enforcement officers hired directly by the Sheriff of Cumberland County. The Sheriff is an independent constitutionally mandated officer, elected by the voters. N.C. Const. art. VII, § 2. Because it is the Sheriff, and not the County, who directly hires law enforcement officers, plaintiffs do not enjoy all of the protections of County employees. *See Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 450, 368 S.E.2d 892, 894, *appeal dismissed, disc. review denied*, 323 N.C. 366, 373 S.E.2d 547 (1988) (holding that dispatcher was employee of the sheriff rather than the county); *see also* N.C. Gen. Stat. § 153A-103(1) (1999) (granting a sheriff "the exclusive right to hire, discharge, and supervise the employees in his office"). "Each sheriff [however] . . . is entitled to at least two deputies who shall be reasonably compensated by the county . . . ." N.C. Gen. Stat. § 153A-103(2) (1999). Such compensation is provided directly by the County. Under N.C. Gen. Stat. § 153A-92, "the board of commissioners shall fix or approve the schedule of pay, expense allowances, and other compensation of all county officers and employees, whether elected or appointed, and may adopt position classification plans." N.C. Gen. Stat. § 153A-92(a) (1999). Further, the power of the Board of Commissioners to determine such compensation is subject to the following limitation:

> If the board of commissioners reduces the salaries, allowances, or other compensation of employees assigned to an officer elected by the people, and the reduction does not apply alike to all county offices and departments, the elected officer involved must approve the reduction. If the elected officer refuses to approve the reduction, he and the board of commissioners shall meet and attempt to reach agreement. If agreement cannot be reached, either the board or the officer may refer the dispute to arbitration by the senior resident superior court judge of the superior court district

N.C. Gen. Stat. § 153A-92(b)(3) (1999). We also note that under N.C. Gen. Stat. § 153A-13, a "county may enter into continuing contracts" for which the county "must have sufficient funds appropriated to meet any amount to be paid under the contract in the fiscal year in which it is made." N.C. Gen. Stat. § 153A-13 (1999).

In addition, all counties are subject to The Local Government Budget and Fiscal Control Act, (LGBFCA), N.C. Gen. Stat. §§ 159-7 through 159-41. Under LGBFCA, "each department head shall transmit to the budget officer the budget requests and revenue estimates for his department for the budget year." N.C. Gen. Stat. § 159-10 (1999). Thereafter, "the governing board shall adopt a budget ordinance making appropriations and levying taxes for the budget year in such sums as the board may consider sufficient and proper . . . ." N.C. Gen. Stat. § 159-13(a) (1999). The governing board, in adopting the budget ordinance, is bound to appropriate the full amount estimated by the finance officer that is required for debt service during the budget year. N.C. Gen. Stat. § 159-13(b)(1) (1999). The board must also appropriate "[s]ufficient funds to meet the amounts to be paid during the fiscal year under continuing contracts previously entered into . . . ." N.C. Gen. Stat. § 159-13(b)(15) (1999). Once the budget ordinance is in place, it becomes the statutory duty of the county's finance officer to "disburse all funds of the local government or public authority in strict compliance with [the LGBFCA and] the budget ordinance . . ." and to "receive and deposit all moneys accruing to the local government or public authority, or supervise the receipt and deposit of money by other duly authorized officers or employees." N.C. Gen. Stat. §§ 159-25(a)(2) and (4) (1999).

Defendant County has a statutory duty to provide the salaries to which it has committed itself in the enacted budget ordinance. Such salaries provide the necessary consideration for the formation of employment contracts between the Sheriff and his deputies. *See Pritchard v. Elizabeth City*, 81 N.C. App. 543, 552, 344 S.E.2d 821, 826, *disc. reviews denied*, 318 N.C. 417, 349 S.E.2d 598 (1986) (holding that once employment was offered and accepted by plaintiff firefighters under the compensation plan set forth in the city ordinance, its provisions became part of the employment contract); *see also Burns v. Brinkley*, 933 F.Supp. 528, 533 (E.D.N.C. 1996) (noting that the pension system established for deputy sheriffs was part of the consideration forming the basis of their public employment contracts). Defendant County, after having availed itself of the services provided by the law enforcement offi-

cers, may not claim sovereign immunity as a defense to its statutory and contractual commitment. We determine that, under the facts of this case, defendant County is not protected by sovereign or governmental immunity.

[3] Plaintiffs have alleged that defendant County failed to comply with its duties under the budget ordinance. Plaintiffs offer the affidavit of a certified public accountant, who, after examining plaintiffs' pay records and the budget ordinances, stated that "there were irregularities . . . in the application of the policy over a period of years." Defendant County clearly has a statutory duty to abide by the terms of the budget ordinance which it approves. The Board of Commissioners is not obligated to accept a submitted budget proposal from a Sheriff, of course, but once it approves a budget and salary plan and enacts such in the budget ordinance, the County is obligated to abide by the budget ordinance and pay out monies appropriated therefor. It is unclear from the record before us whether the Board continued to approve and appropriate in their budget ordinance each year the longevity pay plan originally proposed by Sheriff Jones and adopted by the county in 1980.[1] As such, there are genuine issues of material fact that render a grant of summary judgment inappropriate at this time. We hold, therefore, that the trial court correctly denied defendant County's motion for summary judgment. We now examine whether the trial court correctly denied defendant Butler's motion to dismiss.

[4] The essential question on a motion to dismiss is whether, as a matter of law, the allegations of the complaint, when liberally construed, are sufficient to state a claim upon which relief may be granted under any legal theory. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6); *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). As plaintiffs acknowledge, "it is not the Sheriff's responsibility to fund the Sheriff's Department but that of the County." *See* N.C. Gen. Stat. § 153A-103(2). Nor does the Sheriff administer the funds. *See* N.C. Gen. Stat. § 159-25. Although plaintiffs' complaint alleges that defendant Sheriff "acted in concert" with defendant County, there is no evidence of such collusion in the record. Because there is absolutely no evidence that defendant Butler had anything to do with the administration of plaintiffs' salaries, he is an unnecessary party to

1. We do not imply by this statement that the Board's actions in allocating budget funds are determinative of plaintiffs' claims. Whether or not the Board could revoke the longevity pay plan by merely failing to allocate funds therefor in the annual budget ordinance is an issue of law not before this Court.

this case, and therefore his motion to dismiss should have been granted by the trial court.

We decline to address additional arguments by defendant County, as they are interlocutory and do not affect defendant County's substantial rights. Because there are genuine issues of material fact outstanding, and because defendant County is not protected by sovereign immunity, we hereby affirm the trial court's order denying summary judgment to defendant County. We reverse the trial court's order denying defendant Butler's motion to dismiss and remand this case for entry of an order granting such to defendant Butler.

Affirmed in part, reversed in part.

Judges GREENE and HUDSON concur.

STATE OF NORTH CAROLINA v. MICHAEL EUGENE REED, II, DEFENDANT

No. COA99-1574

(Filed 17 April 2001)

1. Jury— selection—denial of challenge for cause—preservation for appeal

A first-degree murder defendant preserved his right to bring forward an assignment of error to the denial of a challenge for cause to a potential juror where he used a peremptory challenge to remove the juror, exhausted his peremptory challenges, and renewed his motion to excuse this juror for cause. N.C.G.S. § 15A-1214(h).

2. Jury— selection—denial of challenge for cause—prejudicial

The trial court erred by denying a challenge for cause to a potential juror who stated that his financial concerns would weigh on his mind during the trial, would interfere with his ability to listen to the evidence fairly, and "would probably" override his ability to render a decision in accordance with his beliefs if he were the sole juror holding a particular opinion and he could return to work at an earlier time by changing his vote. Statements by jurors indicating that they may be unable to render a fair and impartial verdict must be taken at face value, especially when

there is every indication that the juror's concern is sincere. The error here was prejudicial because defendant exhausted his peremptory challenges and told the court that he would otherwise have peremptorily challenged a different juror.

3. Appeal and Error— appealability—pretrial motion to suppress—new trial

A first-degree murder defendant was not entitled to appellate review of the trial court's denial of his pretrial motion to suppress custodial statements where a new trial was granted on other grounds. Defendant will only be entitled to appellate review of the admissibility of the evidence if the State attempts to admit it at the new trial, defendant objects, and the court rules it admissible.

Appeal by defendant from judgments entered 30 March 1999 by Judge J. Marlene Hyatt in Catawba County Superior Court. Heard in the Court of Appeals 13 February 2001.

Michael F. Easley, Attorney General, by Buren R. Shields, III, Assistant Attorney General, for the State.

Mark L. Killian, for defendant-appellant.

HUDSON, Judge.

Defendant was tried and convicted on two counts of first degree murder and sentenced to two consecutive terms of life imprisonment. Defendant timely appealed. On appeal, defendant raises five assignments of error. We order a new trial.

Defendant's first assignment of error pertains to the jury selection process. The record shows that a prospective juror, Mr. Michael, expressed concern regarding the potential length of the trial and the effect it would have on his financial obligations:

Q. First some of the same questions to you. I hate to keep asking the same questions over but there is no other way of doing it. Are there any particular concerns about any of the questions or statements that have been made here?

A. Only on the time period that would be a possible problem for me.

Q. Four to five weeks long trial.

A. Yes.

Q. What concerns you about that?

A. Well, financial obligations for my house payment and stuff and bills. I would not be able to pay them if I am here for that period of time. That would be really on my mind a lot at the time.

Q. Do you think that would be in your thoughts to the point that it would be hard for you to pay attention to the testimony at times in the case?

A. Yes, to a certain degree, for the sooner I get done the sooner able to get back to work and pay my bills and meet my obligations.

Q. Do you think then that might be a factor in your listening to the evidence and deciding the case and deciding the circumstances?

A. It may because, like I said, sooner we get finished, the sooner I would be back to my regular schedule and my financial matter.

Q. You are saying it might become hard for you to pay attention and listen to the evidence for you might become impatient and that might interfere with your ability to be a fair jury?

A. I might not take my time in the whole proceeding. I think it would interfere with that, yes.

Q. Do you think that it might make cause you to come to some quick decision knowing the sooner you do that, the sooner you can leave and go back to work?

A. Actually, you know, sooner done the sooner I get out. It may pose a problem for me.

Q. Do you think that it would impair your ability to listen to the evidence in the case fairly?

A. Yes, I do.

Q. You do?

A. Yes.

Immediately following this exchange, defendant moved to excuse Juror Michael for cause, which motion was denied by the trial court. Counsel for defendant then continued to question Michael regarding

his financial situation. Michael explained that he has a daughter who is eight years old, and that both he and his wife work. He further explained that his wife does not make enough money to pay the bills, and that a month without his earning income would be a hardship on his family.

Counsel for defendant then questioned Juror Michael regarding a number of issues unrelated to his financial concerns. For example, when asked whether he could render an impartial decision even if defendant did not testify, Michael stated: "I could listen to [the evidence] with an open mind and hear it even though he did not testify or produce any evidence at all and it would not cause me to be more towards the state than to him." When asked whether he would be able to render a verdict in accordance with his personal opinion, even if that opinion differed from the opinion of individuals in his community, Michael stated: "I live with myself and not with the community."

Counsel for defendant then returned to the issue of Michael's financial concerns:

> Q. Let me talk about your concern about your financial concern and situation. If you set here for the amount of time and we get to the end of the trial and you were called upon to make the decision, and you have said you don't care what the opinion is of the other jurors, if you were the only one that were of the opinion you held and the case could not be over unless you changed your mind, would you then change due to the pressure of the financial situation you may have?
>
> A. That puts me in a bad spot, you know what I'm saying? That would really have weight on my mind and I really could not tell you what I would do until I was put in that situation. That is what is hard for me.
>
> Q. Well, what you are telling me, do you think that it might or would have some effect?
>
> A. Yes sir . . . madam.
>
> Q. And on your ability to serve?
>
> A. Most definitely, yes.
>
> Q. On your ability to render a decision in accordance with your own beliefs?

A. Right, because like I said, I will not be out there doing my job and I will be on the street and walking because I just cannot pay my bills.

Q. Exactly.

A. I would . . . that would make a difference to me really, you know.

Q. We are looking for jurors in this case that can make the decision, the biggest decision any juror can ever be called upon to make.

A. That lot to think about.

Q. And that is one of your concerns, having that weigh on your mind and when you are trying to make that decision?

A. Yes.

Q. You feel that would affect you?

A. I would not want my problems to override my decision.

Q. And you think that it could do that if you were forced to be here that long?

A. It may. It would probably do so.

Defendant then renewed his motion to excuse Michael for cause, which motion was again denied by the trial court.

Defendant argues that the trial court erred in denying his motion to excuse Juror Michael for cause. This assignment of error requires us to answer three questions: (1) whether defendant preserved his right to bring forward this issue on appeal; (2) if preserved, whether the trial court erred in denying defendant's motion to excuse Juror Michael for cause; and (3) whether any such error was prejudicial to defendant.

[1] Defendant preserved his right to bring forward this assignment of error pursuant to N.C.G.S. § 15A-1214(h) (1999). After his motion to excuse Juror Michael for cause was denied, he employed a peremptory challenge to remove Michael from the jury. He then exhausted his peremptory challenges, and renewed his motion to excuse Michael for cause, which motion was denied. These steps satisfy the requirements of the statute.

[2] As to whether the trial court erred in denying defendant's motion to excuse Juror Michael for cause, we begin with the statutory mandate that a defendant is permitted to excuse a prospective juror for cause if the juror, for any reason, "is unable to render a fair and impartial verdict." N.C.G.S. § 15A-1212(9) (1999). It is also well-established that a decision to deny a challenge for cause rests in the sound discretion of the trial court. *See State v. Hartman*, 344 N.C. 445, 458, 476 S.E.2d 328, 335 (1996), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997). Thus, on appeal, a trial court's decision to deny a challenge for cause will not be disturbed absent a showing of an abuse of that discretion. *Id.*

In the case of *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992), our Supreme Court addressed a similar situation arising during the jury selection process. In *Hightower*, the defendant challenged for cause a prospective juror who expressed his concern that the defendant's failure to testify would affect his ability to render a fair and impartial verdict. The juror stated that the defendant's failure to testify would "stick in the back of [his] mind" while deliberating, and that it might hinder his ability to render an impartial decision. *Id.* at 641, 417 S.E.2d at 240. However, the trial court denied the defendant's challenge for cause to this juror. On appeal, the defendant assigned error to the trial court's denial of his challenge for cause. Upon a close examination of the transcript, our Supreme Court concluded that the juror's answers indicated he might have trouble being fair to the defendant if the defendant did not testify. Thus, the Court held the denial of the defendant's challenge for cause constituted error pursuant to both subdivision (8) and (9) of G.S. § 15A-1212. *See id.*

Here, defendant's challenge for cause should have been allowed pursuant to subdivision (9) of G.S. § 15A-1212. Michael stated that his financial concerns would weigh on his mind during the trial, would interfere with his ability to pay attention during the trial, and would interfere with his ability to listen to the evidence fairly. Furthermore, Michael stated that if he were the sole juror holding a particular opinion regarding defendant's guilt, such that changing his vote would result in a unanimous verdict and allow him to return to work at an earlier time, his financial concerns "would probably" override his ability to render a decision in accordance with his own beliefs. This trial did, in fact, last for an entire month. The first day of jury selection occurred on 1 March 1999, and defendant was sentenced on 30 March 1999. Jury deliberations at the guilt phase lasted approxi-

mately five and one half hours and transpired over a period of two days.

After a careful examination of the voir dire transcript, we conclude it was error not to allow the challenge for cause to Juror Michael. Statements by a juror indicating that the juror may be unable to render a fair and impartial decision must be taken at face value. This is especially so where, considered in context, there is every indication that the juror's concern regarding his ability to act as a fair and impartial member of the jury is sincere. Here, had Juror Michael simply been seeking to provide responses that would cause him to be excused from the jury, it seems unlikely that he would have provided such strong, affirmative responses to other questions regarding his ability to follow the law and his ability to come to a decision without allowing outside influences to affect his judgment. Despite his apparent recognition that outside matters should not affect a juror's decision, Michael conceded in a forthright manner that his financial concerns might affect his ability to render a fair decision. The primary goal of the jury selection process is to ensure both the defendant and the State that persons chosen to decide the guilt or innocence of the accused will render a fair and impartial decision, and that they will reach that decision based solely upon evidence produced at trial. *See State v. Honeycutt*, 285 N.C. 174, 179, 203 S.E.2d 844, 848 (1974), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976). Here, it can only be concluded from Juror Michael's statements that although he would try to be fair to defendant, he might have trouble doing so as a result of his financial concerns.

Moreover, this failure to allow the challenge for cause was prejudicial error. After defendant used a peremptory challenge to excuse Michael, and after defendant exhausted his peremptory challenges, he renewed his challenge for cause to Michael and told the court that he would have peremptorily challenged a different juror if he had not exhausted his peremptory challenges. Because defendant was deprived of the right to exercise a peremptory challenge as a result of the court's denial of his challenge for cause to Juror Michael, there must be a new trial. *See Hightower*, 331 N.C. at 641, 417 S.E.2d at 240; *Hartman*, 344 N.C. at 459, 476 S.E.2d at 335-36.

[3] We do not discuss defendant's other assignments of error because the questions they raise may not arise at a new trial. *See Hightower*, 331 N.C. at 642, 417 S.E.2d at 241. This includes defend-

ant's assignments of error pertaining to the denial of his pretrial motion to suppress certain alleged custodial statements by defendant. It is well-established that

> [a] trial court's ruling on a motion *in limine* is preliminary and is subject to change depending on the actual evidence offered at trial. The granting or denying of a motion *in limine* is not appealable. To preserve the evidentiary issue for appeal where a motion *in limine* has been granted, the non-movant must attempt to introduce the evidence at trial.

Condellone v. Condellone, 129 N.C. App. 675, 681, 501 S.E.2d 690, 695, *disc. review denied*, 349 N.C. 354, 517 S.E.2d 889 (1998) (citations omitted). Thus, defendant is not entitled to appellate review of the trial court's denial of his pretrial motion to suppress, in that the new trial has not yet occurred. Defendant will only be entitled to appellate review of the admissibility of this evidence if, at the new trial, the state attempts to admit the evidence, defendant objects to admission of the evidence, and the trial court rules to admit the evidence.

New trial.

Judges GREENE and McCULLOUGH concur.

JOANN UPCHURCH EMBLER v. HENRY JAMES EMBLER, II

No. COA00-24

(Filed 17 April 2001)

Appeal and Error— appealability—equitable distribution order—alimony left open

An appeal from an equitable distribution order was dismissed as interlocutory where the order explicitly left open the related issue of alimony, there was no certification by the trial court, defendant did not argue that his appeal implicates a substantial right, and the Court of Appeals could not discern a substantial right. Appeals that challenge only the financial repercussions of a separation or divorce generally have not been held to affect a substantial right and there did not appear to be any danger of inconsistent verdicts or of the loss of a personal right such as trial by

jury. Plaintiff's remarriage and other events occurring since the entry of the equitable distribution order were not properly before the Court of Appeals.

Appeal by defendant from Order entered 2 September 1999 by Judge James M. Honeycutt in Iredell County District Court. Heard in the Court of Appeals 14 February 2001.

Rudolf, Maher, Widenhouse & Fialko, by M. Gordon Widenhouse, for plaintiff-appellee.

Cheshire, Parker, Schneider, Wells & Bryan, by Jonathan McGirt, for defendant-appellant.

BIGGS, Judge.

Defendant-appellant appeals from an Equitable Distribution Order entered by the trial court. We find this appeal to be interlocutory in nature, and further find that no substantial right of defendant's will be lost without immediate review. Accordingly, we allow plaintiff's Motion to Dismiss Interlocutory Appeal, filed 7 June 2000.

Henry Embler, defendant-appellant, and Joann Embler, plaintiff-appellee, were married in 1976, separated in 1993, and were divorced in 1996. The couple had one child from the marriage. On 10 June 1996, plaintiff filed a complaint seeking custody, child support, attorneys' fees, absolute divorce, and equitable distribution. Defendant filed a counterclaim for custody and child support. The plaintiff's claim for equitable distribution was heard before Judge Honeycutt on 15 March 1999. On 2 September 1999, the court entered an order finding that the distributional factors in plaintiff's favor outweighed those in defendant's favor. The trial judge awarded plaintiff sixty percent (60%) of the marital estate; distributed specific property to each party; and ordered the defendant to pay a distributive award of over $24,000 to the plaintiff. The court's order also states that "*the issue of alimony has not yet been heard.*" (emphasis added).

Defendant appealed from the equitable distribution order on 30 September 1999. Several months later, on 20 January 2000, the parties signed a consent order regarding child custody. Although a dispute subsequently arose regarding the location where the parties would exchange the child, this was resolved in an Order entered 31 March 2000, leaving no further disputes regarding child custody. On 1 May 2000 the defendant filed a Motion to Amend the Record, and a

Petition for Writ of Certiorari. The Motion to Amend sought to insert into the Record a missing transcript page and a copy of the Order resolving the dispute between the parties over where to exchange their child. The Petition asked this Court to entertain the appeal, notwithstanding the fact that the defendant's appeal is from an order entered prior to resolution of the issues of custody, child support, or alimony.

On 7 June 2000, plaintiff filed a Motion to Dismiss Interlocutory Appeal. Plaintiff's Motion sought dismissal of defendant's appeal on the ground that it had been filed before a final resolution of all issues in the case. On 8 June 2000, plaintiff notified defendant of her intention to seek a 31 July 2000 hearing on the issue of alimony. On 31 July 2000, plaintiff filed a Motion to Amend the Record, seeking to add a Cross Assignment of Error and several documents to the Record.

On 28 February 2001, this Court issued orders denying defendant's Petition for Writ of Certiorari, and allowing plaintiff's Motion to Amend the Record. We have allowed defendant's Motion to Amend the Record. Upon review of the record, briefs of the parties and applicable law, this Court concludes that defendant has appealed prematurely, from an interlocutory order that is not immediately appealable. Accordingly, we allow plaintiff's Motion to Dismiss Interlocutory Appeal.

A judicial order is either "interlocutory or the final determination of the rights of the parties." N.C.G.S. § 1A-1, Rule 54(a) (1999). The distinction between the two was addressed in *Veazey v. Durham*, 231 N.C. 354, 57 S.E.2d 377 (1950), wherein the Court stated:

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Id. at 361-62, 57 S.E.2d at 381 (citations omitted). A final judgment is always appealable. However, an interlocutory order is immediately appealable only under two circumstances. First, "if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334

(1995) (citations omitted). Under Rule 54(b), the trial judge must certify that there is no just reason for delay. Since there was no certification in the instant case, this avenue of interlocutory appeal is closed to defendant.

The other situation in which an immediate appeal may be taken from an interlocutory order is when the challenged order affects a substantial right of the appellant that would be lost without immediate review. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980); *Goodwin v. Zeydel*, 96 N.C. App. 670, 387 S.E.2d 57 (1990) (where denial of motion to amend answer would result in forfeiture of any future claim for equitable distribution, a substantial right is at issue and the denial is immediately appealable). This rule is grounded in sound policy considerations. Its goal is to "prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard." *Bailey*, 301 N.C. at 209, 270 S.E.2d at 434. (citations omitted). " 'Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment.' " *Hunter v. Hunter*, 126 N.C. App. 705, 708, 486 S.E.2d 244, 245-46 (1997) (quoting *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951)). An appellant who objects to an interlocutory order should allow the case to proceed, and then bring the issue before the Court as part of an appeal from the final judgment. *Yang v. Three Springs, Inc.*, 142 N.C. App. 328, 542 S.E.2d 666 (2001).

In the instant case, defendant appeals from an equitable distribution order that explicitly left open the related issue of alimony. The parties do not seriously dispute that this was an interlocutory order; even defendant "concedes that, in the strictly formal sense, Appellee has a 'pending' claim for alimony." The issue before this Court is whether an immediate appeal lies from this interlocutory order.

Immediate appeal from an interlocutory order depends upon a finding by this Court that delay of the appeal will jeopardize a substantial right of appellant's, causing an injury that might be averted if the appeal were allowed. A substantial right is "one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000), (quoting *Blackwelder v. Dept. of*

Human Resources, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)), (substantial right not affected by order granting summary judgment on contract claim but not on tort claim).

Whether an interlocutory appeal affects a substantial right is determined on a case by case basis. *McCallum v. North Carolina Cooperative Extension Service of N.C. State University*, 142 N.C. App. 48, 542 S.E.2d 227 (2001). Our courts generally have taken a restrictive view of the substantial right exception. *Blackwelder*, 60 N.C. App. 331, 299 S.E.2d 777 (1983).

Interlocutory appeals that challenge only the financial repercussions of a separation or divorce generally have not been held to affect a substantial right. *See, e.g., Stafford v. Stafford*, 133 N.C. App. 163, 515 S.E.2d 43 (1999) (parties seek immediate review, prior to equitable distribution trial, of date of separation used by trial court in its entry of order granting absolute divorce; held not to affect substantial right where date relevant only to equitable distribution claim); *Rowe v. Rowe*, 131 N.C. App. 409, 507 S.E.2d 317 (1998) (orders awarding postseparation support not immediately appealable); *Hunter v. Hunter*, 126 N.C. App. 705, 486 S.E.2d 244 (1997) (interim equitable distribution order not immediately appealable); *Dixon v. Dixon*, 62 N.C. App. 744, 303 S.E.2d 606 (1983) (order requiring one spouse to return property to marital home pending resolution of equitable distribution and divorce actions not immediately appealable); *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981) (*pendente lite* awards not immediately appealable).

The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 444 S.E.2d 252 (1994). Defendant has not argued that his appeal implicates a substantial right, and we do not discern one. As this Court noted in *Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281:

> [T]he matter could have been heard on its merits and a final order entered by the District Court . . . months before the appeal reached this Court for disposition. There is an inescapable inference drawn . . . that the appeal . . . is pursued for the purpose of delay rather than to accelerate determination of the parties' rights. The avoidance of deprivation due to delay is one of the purposes for the rule that interlocutory orders are not immediately appealable.

Id. at 251, 285 S.E.2d at 282. There does not appear to be any danger of inconsistent verdicts in this situation, nor of the loss of a personal right, such as the right to trial by jury.

Defendant asserts in his Response to Appellee's Motion to Dismiss Interlocutory Appeal that plaintiff has remarried, rendering her claim for alimony "quixotic, if not utterly futile." However, plaintiff's alleged remarriage is not properly before this Court; nor are any other events that purportedly have occurred since the entry of the equitable distribution order.

Considerations of judicial economy militate towards deferring our consideration of defendant's appeal until a final judgment has been entered in this case. Defendant has appealed from an interlocutory order, which does not affect a substantial right. We find that there is no right to immediate appeal from this Order of Equitable Distribution. Therefore, we grant plaintiff's Motion to Dismiss Interlocutory Appeal.

Appeal Dismissed.

Judges WALKER and SMITH concur.

TERNIA MAE MULLINS OLIVER, EMPLOYEE-PLAINTIFF v. LANE COMPANY, INCORPORATED, EMPLOYER-DEFENDANT AND SELF INSURED (ALEXIS SERVICING AGENT), CARRIER-DEFENDANT

No. COA00-353

(Filed 17 April 2001)

1. Workers' Compensation— refusal of job offer after injury—justified

The Industrial Commission did not err by finding that plaintiff was justified in refusing a job offered her by defendant after her carpal tunnel surgery where the Commission was presented with evidence that the job consisted of highly repetitive motions involving the hand and wrist which were not within the limitations imposed by plaintiff's physician and found no evidence that any modifications to the job were ever communicated to plaintiff or her physician.

2. Workers' Compensation— disability—failure of defendant to meet burden

The Industrial Commission did not err in a workers' compensation action by finding that plaintiff was entitled to ongoing total disability compensation where the Commission properly concluded that defendant failed to meet its burden of establishing that suitable jobs were available considering plaintiff's physical and vocational limitations, that plaintiff was capable of earning wages, or that plaintiff was no longer disabled.

Appeal by defendant Lane Company, Incorporated (Lane) from opinion and award filed 7 December 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 January 2001.

Randy D. Duncan for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P. by J.A. Gardner, III and Dana M. Mango, for defendant-appellant.

WALKER, Judge.

Plaintiff filed a claim to recover benefits for injuries resulting from her employment with defendant Lane. The deputy commissioner denied the claim; however, the Commission awarded total disability benefits and remanded the matter to the deputy commissioner for a "determination of the date of maximum medical improvement and the permanent partial disability, if any, . . ." suffered by plaintiff. Lane appealed to this Court but the appeal was dismissed as interlocutory pending the remand to the deputy commissioner. *Oliver v. Lane Co., Inc.*, 123 N.C. App. 354, 473 S.E.2d 693 (1996).

On remand, the deputy commissioner found plaintiff reached maximum medical improvement on 8 March 1994 and was left with permanent partial disabilities of ten and fifteen percent in her right and left hands respectively. On 7 December 1999, the Commission again reversed the deputy commissioner and ordered that plaintiff receive "ongoing total disability" until she returned to work or until further order of the Commission.

The findings of the Commission, in pertinent part, are summarized as follows: Lane is a furniture manufacturer and employed plaintiff as a jitterbug sander, a job which involved the continuous use of a vibrating, handheld sander. After suffering pain and numb-

ness in her hands, plaintiff was diagnosed with bilateral carpal tunnel syndrome by Dr. Mark Marchese, a neurosurgeon in Hickory. Plaintiff underwent carpal tunnel release surgery on each hand in the Fall of 1993 and was released to return to light duty work on 29 November 1993. Plaintiff was restricted from performing repetitive motion work or lifting more than ten pounds for a period of three months.

Also, on 29 November 1993, Lane sent plaintiff a description of the wipe glaze job which was to be her position upon her return to work. The wipe glaze job entailed extensive use of the hands and wrists including polishing rough spots on furniture with steel wool, applying glaze, rubbing filler or stain over the furniture using a brush, cloth or power rubbing tool and rubbing the furniture to remove excess filler, stain, glaze or washcoat. When plaintiff returned to work, she refused to perform the wipe glaze job. The wipe glaze job offered to plaintiff by Lane was not suitable in that it was not within the physical restrictions established by Dr. Marchese. The wipe glaze job required repetitive hand and wrist use, which directly contradicted Dr. Marchese's recommendation. Plaintiff was unable to perform the wipe glaze job due to her compensable injury and there was no credible evidence that any plans for modification of the wipe glaze job were ever communicated to plaintiff or her treating physician. Plaintiff was justified in refusing to accept the wipe glaze job offered her by Lane as it was unsuitable given her physical condition and limitation resulting from her compensable occupational disease.

Further, after plaintiff refused the wipe glaze job, she was terminated from her employment. Thereafter, Lane made no effort to provide vocational rehabilitation or to help plaintiff locate suitable employment. Subsequent to her termination, plaintiff filled out at least one hundred job applications, registered with the North Carolina Employment Security Commission and received assistance from North Carolina Vocational Rehabilitation for approximately four years. In March 1997, plaintiff found work as a cashier at a Food Lion grocery store but was unable to continue working there after July 1997 because of pain and other symptoms from her carpal tunnel syndrome.

Based on these findings, the Commission concluded, in part:

2. Plaintiff's employment with defendant-employer caused, or significantly contributed to the development of her occupational disease, carpal tunnel syndrome, and exposed her to an increased

risk of developing this condition as compared to members of the general public not so employed. N.C. Gen. Stat. § 97-53(13).

3. As a result of her occupational disease, plaintiff was justified in refusing the wipe glaze position offered by defendant-employer on 29 November 1993. N.C. Gen. Stat. § 97-32.

4. As defendants failed to produce credible evidence that suitable jobs are available that plaintiff is capable of obtaining given her physical and vocational limitations, or that plaintiff is otherwise capable of earning wages; defendants have failed to prove that plaintiff is no longer disabled. *Brown v. S & N Communications, Inc.*, 124 N.C. App. 320, 477 S.E.2d [197] (1996).

5. Plaintiff made reasonable efforts to obtain suitable employment without assistance from defendant. Plaintiff's trial return to work as a cashier at Food Lion was unsuccessful. N.C. Gen. Stat. § 97-32.1. The wages plaintiff earned at Food Lion are not indicative of her wage earning capacity. N.C. Gen. Stat. § 97-30.

The Commission awarded plaintiff ongoing total disability benefits of $171.57 per week for the periods of 29 November 1993 to 3 March 1997 and from 1 July 1997 until she returns to work.

[1] Lane first contends that the Commission erred in finding plaintiff was justified in refusing the wipe glaze job offered her by Lane. Lane argues that the job assigned to plaintiff was within the physical restrictions placed on her and that plaintiff's physician stated he would have allowed her to attempt the job on a short-term basis. Lane further points to the testimony of Lane employees that plaintiff refused the job because it was dirty, she did not like the supervisor and she wished to return to her old job as a jitterbug sander. Lane argues this evidence establishes that plaintiff did not refuse the wipe glaze job for health reasons and thus it was not a justified refusal.

The standard of review on appeal to this Court from an award by the Commission is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law. *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996). Therefore, if there is competent evidence to support the findings, they are conclusive on appeal even though there is plenary evidence to support contrary findings. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997).

Here, the Commission found that the wipe glaze job would require extensive use of the hands and wrists and that such activity directly contradicted Dr. Marchese's recommendation. In support of these findings, the Commission was presented with evidence which showed the wipe glaze job consisted of highly repetitive motion involving the hand and wrist. Lane's own description of the job suggested that a constant wiping or rubbing motion was required. This type of repetitive motion was not within her physician's limitations and the Commission found no evidence that any modifications to the job were ever communicated to her or her physician. Therefore, competent evidence exists to support the findings of the Commission.

[2] Lane next contends that the Commission erred in finding plaintiff was entitled to ongoing total disability compensation. Lane first argues that the Commission erroneously placed the burden of proof on them and that plaintiff had the burden of proving the existence of her disability. Further, Lane asserts that plaintiff did not meet her burden because she failed to show that she was incapable of obtaining suitable employment and earning wages.

Under the Workers' Compensation Act, a claimant seeking benefits has the burden of proving disability. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). However, when the parties execute a Form 21 that is approved by the Commission, that initial burden is met by claimant and the burden then shifts to defendant to disprove plaintiff's disability. *Brown v. S & N Communications, Inc.*, 124 N.C. App. 320, 477 S.E.2d 197 (1996). In order to meet that burden, defendant must produce evidence that: (1) suitable jobs are available for the employee; (2) that the employee is capable of getting said job taking into account the employee's physical and vocational limitations; and (3) that the job would enable the employee to earn some wages. *Franklin v. Broyhill*, 123 N.C. App. 200, 472 S.E.2d 382 (1996). In the absence of such evidence, plaintiff's disability continues until she returns to work at wages equal to those received at the time of the injury. *Brice v. Sheraton Inn*, 137 N.C. App. 131, 527 S.E.2d 323 (2000).

Based on its findings, the Commission properly concluded that Lane failed to meet its burden of establishing that suitable jobs were available considering plaintiff's physical and vocational limitations, that plaintiff was capable of earning wages or that plaintiff was no longer disabled. The opinion and award of the Commission is

Affirmed.

Judges HUNTER and CAMPBELL concur.

PAMELA STAMPER, PLAINTIFF v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, A BODY POLITIC, DEFENDANT

No. COA00-436

(Filed 17 April 2001)

Emotional Distress— intentional infliction—conduct not sufficiently extreme and outrageous

The trial court did not err by granting summary judgment in favor of defendant board of education on plaintiff teacher's claim for intentional infliction of emotional distress, because: (1) plaintiff has not shown defendant's conduct was sufficiently extreme and outrageous when her evidence shows defendant was following its procedures for evaluating and eliminating problematic teachers; and (2) even assuming various school personnel went through these motions in bad faith based on personal animosity toward plaintiff, their conduct did not go beyond all possible bounds of decency.

Appeal by plaintiff from judgment entered 17 December 1999 by Judge John M. Gardner in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 March 2001.

Roger W. Rizk, P.A., by Roger W. Rizk, for plaintiff-appellant.

Smith, Helms, Mulliss & Moore, L.L.P., by James G. Middlebrooks, John G. McDonald, and T. Jonathan Adams, for defendant-appellee.

HUDSON, Judge.

Plaintiff appeals from the trial court's grant of summary judgment to defendant on plaintiff's claim for intentional infliction of emotional distress. We affirm the trial court.

In her complaint and in a supporting affidavit, plaintiff alleged the following: she served for many years as an exemplary teacher with

the Charlotte-Mecklenburg Schools. However, in the fall of 1996, when plaintiff gave a student a B in a math class, the student's parent complained to the school's assistant principal, Linda Kiser (Kiser), who was a friend of the parent. Following this incident, there was a change in attitude toward plaintiff on the part of Kiser, and plaintiff was subjected to a hostile atmosphere at work.

In November 1996, Kiser changed posted conduct rules in plaintiff's classroom without plaintiff's permission. In January 1997, the test scores of plaintiff's class were falsified to show that they were below those of the class of a first-year teacher at plaintiff's school. Plaintiff was embarrassed when the test results were published to her fellow teachers. She determined that Kiser had placed the test results of two failing students who were not in plaintiff's class with plaintiff's scores and had placed the scores of one of plaintiff's excellent students with the first-year teacher's scores. Although the error was corrected, the new results were not distributed to the teachers in written form.

In February, plaintiff's principal informed her that she desired plaintiff to move to a different school. Between 10 March 1997 and 5 June 1997, plaintiff was subjected to more than fifteen classroom observations and conference meetings. In April, she was placed on remediation and given an improvement plan with requirements she deemed onerous, including that she rewrite daily schedules and submit them for approval by the administration, submit lesson plans to the principal on a weekly basis, and conduct weekly conferences with administrators.

In May 1997, plaintiff was given two letters of insubordination, including one for declining to sign the improvement plan noted above. Furthermore, she was videotaped teaching a lesson, which plaintiff found intrusive. She was placed on probation in June despite complying with most of the principal's directives and despite her students' receiving a level 3 (with 4 being the highest) in every subject in their test scores.

In July 1997, plaintiff received calls from principals at other schools informing her that her name had been placed on a "displacement list." The Director of Human Resources told her this was a mistake, but that she was being transferred to a different school. Plaintiff was told she would have no input regarding her new placement, even though she requested that she be relocated to a school near her children. Plaintiff informed the Director of Human Resources she did not

want her son to have to ride the school bus, because he would then have to take increased medication for his attention-deficit/hyperactivity disorder.

Nevertheless, she was placed at a school a long distance from her children's school and was required to report to work 45 minutes earlier than her children's school began. She was furthermore placed in a kindergarten classroom, despite not having experience teaching kindergarten, and was not provided with a kindergarten start-up kit having a value of $1,500, which deprived her students of having the same materials as other beginning kindergarten classes.

Plaintiff alleged that as a result of the above actions, she experienced major depression, chronic anxiety, sleep disturbances, weight loss, and general malfunctioning on a daily basis. She furthermore alleged that her family suffered extreme stress, resulting in her husband's developing cracked teeth and her children failing their course work and having to attend summer school.

Defendant moved for summary judgment on the grounds that plaintiff could not prove the elements of her claim, and that it had governmental immunity against the suit due to its lack of insurance. Judge John M. Gardner granted defendant's motion for summary judgment on the basis that there was no genuine issue of material fact as to the outrageous conduct element of plaintiff's claim. Plaintiff filed notice of appeal to this Court.

In ruling on a motion for summary judgment, the trial court must determine whether the pleadings, affidavits, and discovery materials submitted by the parties establish "that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). The moving party has the burden to show the lack of a triable issue and may meet this burden by showing that the non-moving party cannot produce evidence to support an essential element of its claim. *Boudreau v. Baughman*, 322 N.C. 331, 342, 368 S.E.2d 849, 858 (1988). Moreover, the court must view the evidence presented in the light most favorable to the non-moving party. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

The elements of a claim for intentional infliction of emotional distress are: (1) extreme and outrageous conduct (2) which is intended to and does cause (3) severe emotional distress to another. *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). The conduct

in question must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 493, 340 S.E.2d 116, 123, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986) (quoting Restatement (Second) of Torts § 46, Comment d (1965)). It is for the court to decide whether defendant's alleged behavior rises to the level of being extreme and outrageous, as it is a question of law. *See id.* at 490, 340 S.E.2d at 121.

Taking all of plaintiff's allegations as true, we do not believe she has shown defendant's conduct was sufficiently extreme and outrageous to make out a claim for intentional infliction of emotional distress. For the most part, her allegations show defendant was following its procedures for evaluating and eliminating problematic teachers. Even assuming various school personnel went through these motions in bad faith, based on some personal animosity toward plaintiff, their conduct did not go "beyond all possible bounds of decency."

In *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 440 S.E.2d 119, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994), the plaintiff's principal, *inter alia*, visited the gym while she was teaching and stared at her for "minutes at a time," did not show up for scheduled evaluations, told her one day that if he were grading her, he would give her an "F," switched her from physical education teacher to an ISS coordinator, placed her office in a small room with a temperature of 90 to 100 degrees and no phone, denied her the opportunity to attend workshops in her area, assigned her different working hours than the other teachers, told her she had the worst job in the school, and returned a student that had pushed plaintiff to her classroom.

This Court held that while the principal's conduct may well have been insulting to the plaintiff and have caused her to suffer "indignities," we did not regard his behavior "as atrocious, and utterly intolerable in a civilized community." *Id.* at 586, 440 S.E.2d at 124. Plaintiff in this case has not established a fact pattern more egregious than that presented by *Wagoner*.

We conclude that the trial court did not err in granting defendant's motion for summary judgment on the ground that plaintiff could not prove an essential element of her claim.

Affirmed.

Judges GREENE and McCULLOUGH concur.

ARCHIE CHESLEY COGHILL, JR. AND WIFE, MARGARET COGHILL, PETITIONERS v. OXFORD SPORTING GOODS, INC., RESPONDENT

No. COA00-149

(Filed 17 April 2001)

Highways and Streets— neighborhood public road—continuous and open public use for twenty years

The trial court's findings of fact do not support the conclusion of law that Coghill-Dickerson Lane is a neighborhood public road, because: (1) N.C.G.S. § 136-67 requires petitioners to show the road is outside city or town limits, serves a public use, and served as a means of ingress or egress for one or more families continuously and openly for public use for twenty years between 1921 and 1941; and (2) the trial court's findings do not establish that Coghill-Dickerson Lane was continuously and openly used by the public for twenty years between 1921 and 1941.

Appeal by respondent from judgment filed 12 August 1999 by Judge Donald M. Jacobs in Vance County Superior Court. Heard in the Court of Appeals 20 February 2001.

Currin & Dutra, LLP, by Lori A. Dutra, for petitioner-appellees.

Zollicoffer & Long, by Nicholas Long, Jr., for respondent-appellant.

GREENE, Judge.

Oxford Sporting Goods, Inc. (Respondent) appeals a 12 August 1999 judgment in favor of Archie Chesley Coghill, Jr. (Mr. Coghill) and Margaret Coghill (Mrs. Coghill) (collectively, Petitioners) declaring "the roadbed of the Old Stagecoach Road . . . a neighborhood public road."

Petitioners own a 91.6 acre tract of land (the Coghill tract) conveyed to them by Mr. Coghill's father, who obtained the land by deed

in 1965. The Coghill tract is south of Respondent's 75.12 acre tract (Respondent's tract), which adjoins State maintained Road 1523 (Southerland Mill Road). The Coghill tract, however, does not adjoin any State maintained roads. Petitioners and their predecessors have always accessed Southerland Mill Road by using Coghill-Dickerson Lane, which is described as "an old path" in a 1914 partitioning proceeding. Coghill-Dickerson Lane crosses over Petitioner's tract toward Weldon Mill Road and Weaver Creek to the west and extends over Respondent's tract to access Southerland Mill Road.

Respondent's tract was obtained in 1998 from Ernestine Overton. Respondent began developing its tract into a subdivision, Aycock Village, in 1998. In its plan to develop Aycock Village, Respondent upgraded Coghill-Dickerson Lane to a fifty-foot right-of-way with drainage ditches and graveling. The Petitioners were still permitted to use Coghill-Dickerson Lane to reach their property. Respondent, however, did not develop the portion of Coghill-Dickerson Lane which crosses over Petitioners' tract.

On 24 November 1998, Petitioners filed a petition to have Coghill-Dickerson Lane declared a neighborhood public road within the meaning of N.C. Gen. Stat. § 136-67 and a motion to temporarily restrain Respondent from selling the lots in Aycock Village until a determination was made concerning the nature and status of Coghill-Dickerson Lane. On 18 December 1998, the parties consented to a preliminary injunction permitting Respondent to sell lots within Aycock Village provided the sale of these lots did not hinder or interfere with "Petitioners' right of ingress, egress, access and regress."

After a hearing on Petitioners' petition, the trial court entered its judgment in open court on 21 July 1999 and filed a written judgment consistent with its oral judgment on 12 August 1999. The trial court's findings of fact, which are not disputed by either party, provides, in pertinent part, that:

> 7. [Petitioners] and their predecessors in title have traditionally accessed [Southerland Mill Road] by using a road or path crossing [Respondent's tract], which road is currently denominated "Coghill-Dickerson Lane."
>
> 8. Coghill-Dickerson Lane was used for ingress, egress and access to [Petitioners'] property prior to 1941, and was never a part of the public roads system, and was never constructed or reconstructed with unemployment relief funds.

9. . . . Coghill-Dickerson Lane is located outside the boundaries of any municipality in a rural farming area of Vance County.

10. [Coghill-Dickerson Lane] serves as a means of ingress and egress for one or more families . . . living along [Coghill-Dickerson Lane].

11. Coghill-Dickerson Lane essentially follows the old road bed of a road which was in existence prior to 1933 for some period of time running from what is now known as Southerland Mill Road down and across Weaver Creek to what is now known as the Weldon Mill Road.

. . . .

15. That senior citizens in the community know [Coghill-Dickerson Lane] as Old Stagecoach Road and in fact, it existed as early as 1930.

16. That prior to 1941 [Coghill-Dickerson Lane] was used by one and two-horse wagons, Model T and Model A automobiles, and the locals used [Coghill-Dickerson Lane] to go from one road to the other; to go to two mills located in the area, one somewhere on or near Southerland Mill Road, the other on or near Weldon Mill Road; to Sandy Creek Road and to a church in the neighborhood.

17. That, in addition, the citizenry of Vance County used [Coghill-Dickerson Lane] at their convenience, prior to 1941, to access the public waters of Weaver Creek and to fish for "horny heads," to wash their cars, and to gain access to public gatherings on the shores of Weaver Creek, especially on Sundays.

. . . .

20. That more recently the road has been used as ingress and egress by [Mr. Coghill's] family; his son; Anthony Garrett; landowner Roberson; landowner Dickerson; and the Clark family, a non-adjacent property owner.

21. That through the last years a number of citizens, not living along the road, have used it as a means to suit their convenience as members of the traveling public.

. . . .

> 27. That [Coghill-Dickerson Lane] . . . has had incidental, occasional use by postmen, particularly within the last two months, when unable to deliver mail to [Coghill-Dickerson Lane's] residents at their mailboxes along Southerland Mill Road; in addition, the police or law enforcement authorities have incidentally and occasionally used [Coghill-Dickerson Lane] for law enforcement activity, more particularly to chase fleeing offenders . . . .

The trial court concluded Coghill-Dickerson Lane was a neighborhood public road in 1941.

The dispositive issue is whether the trial court's findings of fact support the conclusion of law that Coghill-Dickerson Lane is a neighborhood public road.

Appellate review of findings of fact "made by a trial judge, without a jury, is limited to . . . whether there is competent evidence to support [the] findings of fact." *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996). A trial court's conclusions of law, however, are reviewable *de novo* on appeal. *Id.* at 336, 477 S.E.2d at 215.

North Carolina General Statutes section 136-67 declares three types of roads to be neighborhood public roads. N.C.G.S. § 136-67 (1999). The third type of road, which is at issue in this case, is described as:

> all . . . roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city or town in the State which serve a public use and as a means of ingress or egress for one or more families, regardless of whether the same have ever been a portion of any State or county road system . . . .

Id. This definition of a public road was enacted in 1941. *Roten v. Critcher*, 135 N.C. App. 469, 473, 521 S.E.2d 140, 143 (1999). The definition of neighborhood public roads specifically excludes "any street, road or driveway that serves an essentially private use." N.C.G.S. § 136-67. Our Courts have construed section 136-67 to require petitioners show the road: (1) is outside city or town limits, (2) serves a public use, and (3) serves as a means of ingress or egress, (4) for one or more families, (5) continuously and openly for public

use for twenty years between 1921 and 1941.[1] *Roten*, 135 N.C. App. at 474, 521 S.E.2d at 144 (citing *West v. Slick*, 313 N.C. 33, 48, 326 S.E.2d 601, 610 (1985); *Speight v. Anderson*, 226 N.C. 492, 496, 39 S.E.2d 371, 374 (1946)).

Respondent argues the trial court's findings of fact do not support its conclusion of law that Coghill-Dickerson Lane was a neighborhood public road. We agree. The trial court's findings of fact establish Coghill-Dickerson Lane was used by the public to access Weaver Creek and to go to church beginning in the early 1930's. The trial court, however, makes no findings of fact concerning the public's use of Coghill-Dickerson Lane anytime before the 1930's. Indeed, Petitioners failed to present evidence at trial of any use of Coghill-Dickerson Lane prior to 1930. Accordingly, because the trial court's findings of fact do not establish Coghill-Dickerson Lane was continuously and openly used by the public for twenty years between 1921 and 1941, the trial court erred in concluding Coghill-Dickerson Lane was a neighborhood public road.

Reversed.[2]

Judges McCULLOUGH and HUDSON concur.

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1. We note Petitioners argue that pursuant to *Griffin v. Price*, Petitioners do not have to establish continuous and open public use of Coghill-Dickerson Lane for twenty years from 1921 to 1941. *See Griffin v. Price*, 108 N.C. App. 496, 505-06, 424 S.E.2d 160, 165, *reversed*, 334 N.C. 686, 435 S.E.2d 72 (1993). Our Supreme Court, however, reversed *Griffin* in light of *Speight v. Anderson*, 226 N.C. 492, 496, 39 S.E.2d 371, 374 (1946), which held a petitioner must establish continuous and open public use for twenty years between 1921 and 1941.

2. We note Respondent presents additional arguments in its brief to this Court. In light of our holding in this case, however, we need not address Respondent's additional arguments.

THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, PLAINTIFF-APPELLEE v. DAVID NOLES, DEFENDANT-APPELLANT

No. COA00-73

(Filed 17 April 2001)

1. **Appeal and Error— preservation of issues—notice of appeal**

Although defendant contends the trial court erred by failing to dismiss plaintiff's action under N.C.G.S. § 1A-1, Rule 12(b)(6), the Court of Appeals lacks jurisdiction to address this issue because defendant's notice of appeal refers only to the 7 October 1999 entry of summary judgment and makes no reference to the earlier order denying defendant's motion to dismiss.

2. **Process and Service— failure to serve summons—general appearance—answer failing to contest personal jurisdiction**

The trial court had jurisdiction over defendant when it issued its 1988 judgment even though defendant contends he was never served with a summons, because: (1) defendant made a general appearance before the trial court in the 1988 case by filing an answer that failed to contest personal jurisdiction; (2) it remained possible for plaintiff to serve an effective summons upon defendant since plaintiff's action against defendant had not yet been discontinued under N.C.G.S. § 1A-1, Rule 4(e); and (3) defendant's general appearance before the trial court obviated the need for plaintiff to serve defendant with a summons in order to grant the trial court jurisdiction over defendant, N.C.G.S. § 1-75.7.

3. **Judgments— interest—only from underlying award**

The trial court's award to plaintiff of interest on the interest gained since the 1988 judgment is remanded to the trial court for modification, because plaintiff is only entitled to future interest on the underlying 1988 award of $170,527.92.

Appeal by defendant from order entered 7 October 1999 by Judge Claude S. Sitton in Superior Court, Mecklenburg County. Heard in the Court of Appeals 14 February 2001.

F. Douglas Canty, Senior Assistant City Attorney, for plaintiff-appellee.

William D. McNaull, Jr. for defendant-appellant.

McGEE, Judge.

Plaintiff was awarded a judgment against defendant of $170,527.92 plus interest and costs on 22 August 1988. Plaintiff filed a verified complaint on 24 July 1998 alleging that the 1988 judgment remained unsatisfied. Defendant filed a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief could be granted, and plaintiff moved for summary judgment.

Following a hearing on 14 April 1999, the trial court denied defendant's motion to dismiss and delayed ruling on plaintiff's motion for summary judgment "pending further proceedings." Defendant filed an answer asserting that the trial court issuing the 1988 judgment had no jurisdiction over defendant because the summons and complaint were never served upon defendant, no alias or pluries summons was ever issued by the clerk, and defendant did not file an answer until more than thirty days after the summons was issued. The trial court granted summary judgment in favor of plaintiff on 7 October 1999 and awarded plaintiff $307,041.25 plus interest and costs. Defendant appeals the grant of summary judgment.

[1] Defendant first assigns error to the failure of the trial court to dismiss plaintiff's action pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). However, defendant's notice of appeal refers only to the 7 October 1999 entry of summary judgment and makes no reference to the earlier order denying defendant's motion to dismiss. We therefore lack jurisdiction to address defendant's first assignment of error. *See* N.C.R. App. P. 3(d); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 157, 392 S.E.2d 422, 425 (1990); *Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994), *aff'd*, 341 N.C. 702, 462 S.E.2d 219 (1995).

[2] Defendant next assigns error to the entry of summary judgment in favor of plaintiff on the grounds that the trial court that granted the 1988 judgment lacked jurisdiction over defendant. Because a judgment rendered without jurisdiction is void, defendant is entitled to collaterally attack the 1988 judgment through the present action. *See Dunn v. Wilson*, 210 N.C. 493, 494, 187 S.E. 802, 803 (1936). Defendant contends that he was never served with a summons in

the 1988 action, and therefore that the trial court never had jurisdiction over him.

The defenses of insufficiency of process and insufficiency of service of process are waived if they are not raised in a motion or responsive pleading before the trial court. *See* N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (1999). Defendant acknowledges that he filed an answer to plaintiff's complaint in the 1988 action, and that he did not raise the defenses of insufficiency of process or insufficiency of service of process in his answer. Defendant argues, however, that because he filed his answer after the expiration of the time limit for serving a summons, the summons had already lost effectiveness and become *functus officio* and therefore the trial court was unable to gain jurisdiction over him.

Service of process is not the sole way by which a trial court gains personal jurisdiction over a defendant.

> A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person . . . [w]ho makes a general appearance in an action[.]

N.C. Gen. Stat. § 1-75.7 (1999). Defendant made a general appearance before the trial court in the 1988 case by filing an answer that failed to contest personal jurisdiction. *See Stern v. Stern*, 89 N.C. App. 689, 692, 367 S.E.2d 7, 9 (1988). Defendant filed his answer fifty-one days after plaintiff's summons was issued, after the summons had become *functus officio* under N.C. Gen. Stat. § 1A-1, Rule 4(c) (1999) but before plaintiff's action against defendant was discontinued pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(e) (1999). Because plaintiff's action against defendant had not yet been discontinued, it remained possible for plaintiff to serve an effective summons upon defendant. *See Lemons v. Old Hickory Council*, 322 N.C. 271, 367 S.E.2d 655 (1988). Defendant's general appearance before the trial court obviated the need for plaintiff to serve defendant with a summons in order to grant the trial court jurisdiction over defendant. *See* N.C. Gen. Stat. § 1-75.7.

We therefore conclude that the trial court did have jurisdiction over defendant when it issued its 1988 judgment. Because defendant's collateral attack on the 1988 judgment fails, we affirm the trial court's summary judgment against defendant in the present case.

[3] Finally, defendant assigns error to the trial court's award to plaintiff of interest on the interest gained since the 1988 judgment.

Plaintiff concedes that, under *NCNB v. Robinson*, 80 N.C. App. 154, 341 S.E.2d 364 (1986), plaintiff is entitled to future interest only on the underlying 1988 award of $170,527.92. We therefore remand this case to the trial court for modification of the judgment to include the award of $307,041.25 plus interest from 7 October 1999 only upon $170,527.92.

Affirmed in part, reversed in part and remanded.

Judges WYNN and THOMAS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 APRIL 2001

BADGETT v. YUSON No. 00-322	Forsyth (99CVS1926)	Affirmed
BRANDON v. BRANDON No. 00-99	New Hanover (98CVD3975)	Affirmed in part, vacated in part, and remanded
IN RE FURR No. 00-453	Harnett (97J123) (97J124)	Affirmed
IN RE JACOBY No. 00-79	Burke (99J2) (99J3) (99J4)	Affirmed
NATIONWIDE MUT. INS. CO. v. McCRARY No. 00-179	Guilford (98CVS10361)	Affirmed
NELSON v. SYDNEY DEV., INC. No. 00-469	Guilford (99CVD3563)	Affirmed
PETTY v. PETTY No. 00-418	Cabarrus (99CVD01167)	Affirmed
RICE v. RICE No. 00-407	Wake (96CVS1576)	Affirmed
STATE v. AIKEN No. 00-295	Buncombe (95CRS70191) (95CRS70192) (95CRS70193) (96CRS00023) (96CRS00024) (96CRS00027)	Reversed and remanded for a new trial
STATE v. BRIDGES No. 00-88	Cumberland (99CRS51159)	No error
STATE v. DEHART No. 00-234	Jackson (99CRS2536) (99CRS2537) (99CRS2538)	Affirmed
STATE v. GIPSON No. 99-1582	Cumberland (98CRS33681) (98CRS33682) (98CRS33683) (98CRS33684)	No error

STATE v. GREENE No. 00-267	Avery (96CRS1951) (97CRS1968)	Reversed and remanded
STATE v. HOCUTT No. 00-299	Wake (98CRS82960)	Appeal dismissed, remanded for correction of judgment
STATE v. JACKSON No. 00-285	Durham (98CRS2440)	No error in trial. Remanded for sentencing.
STATE v. JAMES No. 00-6	Carteret (98CRS6876) (99CRS8687)	Affirmed
STATE v. JOHNSON No. 00-103	Harnett (98CRS4444) (98CRS4445)	The judgment of the court is affirmed in part and vacated in part
STATE v. KALEY No. 94-142-2	Wayne (92CRS7235)	No error
STATE v. KELSEY No. 00-366	Wake (98CRS83934)	Reversed and remanded
STATE v. REEVES No. 99-1628	Cumberland (95CRS43393)	No error
STATE v. RIDGEWAY No. 99-1586	Columbus (97CRS8786) (98CRS3381)	No error
STATE v. SIMMONS No. 00-427	Craven (99CRS1838) (99CRS1839) (99CRS1840) (99CRS1841)	Affirmed
VYVX, INC. v. WASHBURN No. 00-570	Rockingham (97SP194)	Dismissed
WALSTON v. BARNES No. 00-487	Wilson (98CVS1414)	Affirmed

STATE OF NORTH CAROLINA v. THOMAS JABIN BERRY

No. COA00-263

(Filed 1 May 2001)

1. Evidence— rape—testimony on source of DNA—DNA data bank—samples from convicted offenders—no plain error

The trial court did not commit plain error in a prosecution for first-degree murder and first-degree rape by allowing SBI agents to inform the jury of the source of the DNA in the DNA data bank collected from unsolved crimes and samples drawn from convicted offenders, because: (1) defendant did not object to the bulk of the agents' testimony regarding the source of DNA specimens in the data bank; (2) defendant opened the door to testimony that he was incarcerated at the time blood was drawn from him by objecting under the grounds of lack of foundation that the State complied with the requirements of N.C.G.S. § 15A-266.6 without requesting an instruction limiting this testimony; and (3) defendant has not shown that admission of this testimony had a probable impact on the jury's finding of guilt in light of the other evidence and the fact defendant opened the door to such testimony.

2. Evidence— prior bad acts—sexual assaults—motive—similarities—not too temporally remote

The trial court did not err in a prosecution for first-degree murder and first-degree rape by allowing into evidence defendant's prior bad acts under N.C.G.S. § 8C-1, Rule 404(b) including testimony by two female witnesses of prior sexual assaults by defendant on them, because: (1) the testimony was properly offered to show defendant's motive for killing his third victim; (2) the trial court identified the similarities in the three assaults to support a reasonable inference that defendant committed all three assaults; (3) the trial court properly limited the purposes for which the jury could consider the prior two assaults to show motive, plan, common modus operandi, and absence of mistake or identity; and (4) the prior incidents were not so temporally remote as to diminish the probative value of the evidence.

3. Evidence— expert testimony—barefoot analysis—reliability of scientific procedure—admission harmless error

The trial court committed harmless error in a prosecution for first-degree murder and first-degree rape by admitting expert testimony regarding barefoot analysis to determine if the shoes found near the victim's body were regularly worn by defendant even though the expert's own testimony reveals the evidence was not sufficiently reliable at the time of trial based on the fact his research was not yet complete, because: (1) the expert's testimony corroborates the testimony of defendant's wife and defendant's former girlfriend who both stated the shoes looked similar to and were the same size as defendant's shoes; (2) the shoes were not the only physical evidence linking defendant to the crime scene; and (3) DNA evidence recovered from the victim's body linked defendant to the scene.

4. Homicide; Rape— first-degree murder—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of first-degree murder and first-degree rape based on the manner of the killing, the medical examiner's testimony, and the DNA evidence.

Appeal by defendant from judgment entered 29 January 1999 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 22 February 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Laura Crumpler, for the State.

Margaret Creasy Ciardella, Attorney for defendant-appellant.

TYSON, Judge.

A. Facts

During late August of 1993, Janet Siclari ("Janet" or "Siclari"), an ultrasound nurse from New Jersey, vacationed for a week on the Outer Banks of North Carolina. Janet spent the week with her brother, Robert, and several other friends. The group rented a "Friday to Friday rental" cottage in Southern Shores, North Carolina. The group originally planned to return home on Friday, 27 August 1993. However, at the end of the week they decided to extend their vacation by an extra day.

On Friday, 27 August 1993, the group checked out of their cottage in Southern Shores and checked into the Carolinian Hotel located in Nags Head, North Carolina for one final day and night of vacation. Janet and Robert shared "the most expensive room" at the Carolinian. The group spent the day together relaxing, swimming, and playing on the beach. The group ate dinner together at a local restaurant. Afterwards, they went to a comedy club. Robert, fatigued from the day's activities, returned to the hotel room after leaving the comedy club. Janet and her friends, however, continued on to a local bar. Later that night, Janet left the bar and returned to the Carolinian Hotel. Janet walked into her room and saw Robert already asleep. Robert awoke briefly. Janet stated to him "it's only me," lit a cigarette, removed her sandals, and left the room.

On the morning of 28 August 1993, a sanitation worker found Janet lying on the beach in a "puddle of blood" near the steps leading to the deck of the Carolinian. Janet had suffered small stab wounds on the side of her neck, a deep cut around her throat, lacerations on the side of her face and jaw, and cuts on her hands. Authorities located a pair of gray socks and worn, size nine, Spaulding high-top tennis shoes ("Spaulding shoes") near her body. Janet's shorts and belt laid next to her throat soaked in blood.

An autopsy revealed that Janet died from a loss of blood due to the two-and-one-half inch cut across her neck, severing her jugular vein. Janet also showed signs of hand wounds around her throat and a severed larynx. During the autopsy, the medical examiner discovered semen inside Janet's vagina, samples of which were retained. The medical examiner concluded that Janet had sexual intercourse less than twenty-four hours before her death. Despite intensive investigation, authorities made no arrests for over four years.

In 1996, Thomas Jabin Berry ("defendant") was incarcerated as a result of a probation revocation from an earlier offense. During defendant's incarceration, authorities took a sample of defendant's blood and entered it into the State's Deoxyribonucleic Acid ("DNA") data bank. In April 1997, a computer search matched defendant's DNA with the DNA profile of the semen taken from Janet's body three years earlier. Police subsequently arrested and charged defendant with the rape and murder of Janet.

The defendant informed authorities that he regularly smoked marijuana and crack cocaine around the time Janet was murdered. Defendant admitted to having been in Nags Head the day before

Janet's murder to obtain an identification card at the local Department of Motor Vehicles office. Defendant did not remember if he immediately returned home or stayed in the area. Defendant denied knowing Janet. Later, after several hours of questioning, defendant admitted that he could not remember whether he raped and killed Janet, due to his use of crack cocaine during that time. Defendant added that, as a fisherman, he regularly carried knives. When confronted with a picture of the Spaulding shoes found near Janet's body, defendant "remembered having shoes similar to this." Defendant indicated that he wore shoes like that when he performed roofing jobs. Defendant denied raping and killing Janet.

At trial, State Bureau of Investigation ("SBI") Agents Mark Boodee ("Boodee") and Mark Nelson ("Nelson") testified that the DNA evidence stored in the data bank originates from persons convicted of certain offenses, and from unsolved crimes. Boodee, an expert in forensic DNA analysis, performed a DNA analysis of the defendant's blood and the semen found in Janet's body. Boodee concluded that "it was 112 trillion times more likely that the DNA sample [of the semen found in Janet's body] came from [the defendant] than another individual in the white population." Boodee also stated that "it is scientifically unreasonable to think that [the semen found in Janet's body] could have come from anyone other than the defendant, including a close relative."

The jury also heard testimony from defendant's former girlfriend and the mother of two of his children. She testified that defendant carried a knife with him "all the time." She recognized the Spaulding shoes as similar to those belonging to the defendant. She stated that she recognized the shoes "[b]ecause we had went and bought a pair . . . similar to those." She also testified that defendant wore size nine shoes. When shown a photo of the Spaulding shoes, she immediately recognized a pair of gray socks inside the Spaulding shoes. She testified that defendant wore similar gray socks "mostly all the time."

Defendant's wife and the mother of one of his children also testified as a witness for the State, stating that defendant carried a knife with him "98 percent of the time." She recognized the Spaulding shoes because they were the type and size defendant wore.

The jury also heard testimony that defendant had assaulted two other women prior to Janet's murder. Shelley Perry ("Perry") stated that during 1992, defendant broke into her house, "jumped" on top of her, "snatched" off her underwear, and tried to "penetrate" her. C.R.

testified that in early 1992, defendant attempted to touch her in an inappropriate manner when she was 12 years old. C.R. also testified about a second incident later in 1992 where defendant pushed her down, pulled her pants and panties off, and had sexual intercourse with her against her will. Defendant pled guilty to taking indecent liberties with a minor as a result of the second assault on C.R.

The jury also heard testimony from Robert Kennedy ("Kennedy"), a forensic crime scene analyst. Kennedy was qualified and accepted as an expert "in physical comparisons with a specialist [sic] in barefoot comparisons." Kennedy compared the shoes found at the crime scene to shoes known to have been regularly worn by defendant. Kennedy examined the impressions made by the heel, the ball of the foot and the upper portion of the shoe. He concluded that it was "likely" that the shoes found at the crime scene and the defendant's shoes were regularly worn by the same person.

Defendant moved for a dismissal of the charges at the close of the State's evidence. The trial court denied the motion. The jury found defendant guilty on the charges of first degree rape and first degree murder. The jury sentenced defendant to life in prison for the first degree murder conviction. The trial court sentenced defendant to an additional life sentence for the first degree rape conviction, and ordered the sentences to be served consecutively and to commence at the end of defendant's present term of imprisonment. Defendant appeals.

B. Issues

Defendant assigns as error four issues on appeal: (1) whether the admission of testimony regarding the sources of the DNA in the DNA data bank was plain error; (2) whether the admission of testimony regarding defendant's prior assaults on Perry and C.R. was reversible error; (3) whether the admission of Robert Kennedy's expert testimony regarding barefoot analysis was reversible error; and, (4) whether there was sufficient evidence to support the convictions. We find all of defendant's assignments of error on appeal to be without merit.

1. DNA Data Bank Testimony

[1] Defendant contends that it was error for the trial court to allow Agents Boodee and Nelson to inform the jury of the source of the DNA in the DNA data bank. Defendant contends that such testimony implicitly informed the jury that defendant had a criminal record and

had been incarcerated. Defendant argues that this testimony was inadmissible under Rules 403 and 404(b) of the North Carolina Rules of Evidence. Defendant failed to object to this testimony at trial. On appeal, defendant contends that the admission of such testimony amounts to plain error. We disagree.

During the State's case, the court conducted *voir dire* of Nelson regarding how authorities had connected defendant to Janet's murder. During *voir dire*, Nelson testified that North Carolina maintains a statewide DNA data bank. Nelson stated that the DNA in the data bank comes from persons convicted of certain violent and sexual offenses. Each time a convicted offender's profile is entered into the data bank, the computer automatically compares the offender's DNA to all the unsolved cases on file in the data bank. A computer search matched defendant's DNA to the semen found in Janet's body.

Defendant did not object to this testimony on Rule 403 or 404(b) grounds. Defendant did object to the admission of the DNA testimony on the grounds that the State failed to lay a proper foundation that the initial drawing of defendant's blood was done pursuant to the statutory requirements of G.S. § 15A-266.6.

THE COURT: So your objection is what?

DEFENSE COUNSEL: Well, my objection is that there hasn't been a proper foundation laid as far as whose blood that was, whether it was properly drawn as part of the statute.

THE COURT: So you want the State to show that they have complied with [G.S. §] 15A-266.6 and the blood was drawn properly?

DEFENSE COUNSEL: That is correct.

The court allowed further *voir dire*. At the conclusion of *voir dire*, the following exchange occurred:

THE COURT: Is there any part of this proffered testimony that you would have any specific objection to, and if so, basis?

DEFENSE COUNSEL: We just renew our objection on the grounds made previously, Judge.

THE COURT: Which was?

DEFENSE COUNSEL: Noncompliance with the statute and chain of custody.

THE COURT: Anything further?

DEFENSE COUNSEL: No, Your Honor.

THE COURT: All right. There has been no request for any specific—objection to any specific portion of the testimony or request for any limited instructions or otherwise to the nature *in limine* to limit such, so the Court does not make any such ruling. I have also independently reviewed some of the testimony and I don't find that, without any specific objection, any part that should be limited at this juncture. If there is a portion of the testimony as it comes in that needs—that needs to be objected to specifically or some exact portion of the testimony, exact words of the testimony, that objection will need to be made at that time.

DEFENSE COUNSEL: All right.

The jury returned to the courtroom. Thereafter, Agents Nelson and Boodee testified that specimens in the data bank are from DNA data collected from unsolved crimes and samples drawn from convicted offenders. During direct examination, defendant objected to Nelson's comment that the data bank includes the DNA profiles of "sex offenders." The trial court sustained the objection. However, defendant did not object to the bulk of the agents' testimony regarding the source of DNA specimens in the data bank.

"Where evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of evidence." *State v. Ramey*, 318 N.C. 457, 462, 349 S.E.2d 566, 570 (1986) (citations omitted). "Having failed to object, defendant is entitled to relief based on this assignment of error only if he can demonstrate plain error." *State v. Roseboro*, 351 N.C. 536, 552, 528 S.E.2d 1, 12 (2000). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *Id.* (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)). "[T]he appellate court must study the whole record to determine if the error has such an impact on the guilt determination, therefore constituting plain error." *See State v. Lee*, 348 N.C. 474, 482, 501 S.E.2d 334, 340 (1998) (citation omitted) (the plain error rule must be applied cautiously and only in exceptional cases).

During *voir dire* of Nelson, defendant objected to the DNA testimony on the grounds that the State had not laid a proper foundation

that they complied with the statutory procedures for withdrawal of a blood sample for a DNA analysis pursuant to G.S. § 15A-266.6. That statute provides, in part:

> **Procedures for withdrawal of blood sample for DNA analysis.**
>
> Each DNA sample required to be drawn pursuant to G.S. 15A-266.4 from persons who are incarcerated shall be drawn at the place of incarceration. DNA samples from persons who are not sentenced to a term of confinement shall be drawn at a prison or jail unit to be specified by the sentencing court. Only a correctional health nurse technician, physician, registered professional nurse, licensed practical nurse, laboratory technician, phlebotomist, or other health care worker with phlebotomy training shall draw any DNA sample to be submitted for analysis. . . .

N.C. Gen. Stat. § 15A-266.6 (1999).

The trial court requested that defendant state the specific basis for his objection. *See State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983) (trial judge should not have to decide "on his own" the soundness of a party's trial strategy). Defendant replied that the basis of his objection was a lack of foundation that the State complied with the requirements of G.S § 15A-266.6. Part of G.S. § 15A-266.6 states that blood must be drawn from incarcerated persons at the place of incarceration. Therefore, defendant opened the door for testimony that defendant was incarcerated at the time the blood was drawn. Defendant did not request an instruction limiting this testimony. Defendant cannot now claim that it was plain error for the trial court to not strike such testimony *ex mero motu*.

Assuming the evidence was excludable under Rule 404(b), defendant cites no authority holding that it was plain error to admit testimony showing defendant had been previously incarcerated under these circumstances. In *State v. Doisey*, 138 N.C. App. 620, 532 S.E.2d 240 (2000), defendant was charged with sexually assaulting a child. The trial court allowed evidence that defendant had set up a camcorder to record activities in his bathroom. *Id.* Defendant did not object to this evidence at trial. On appeal, defendant in *Doisey* argued that the admission of such evidence violated Rule 404(b) and was plain error. *Id.* This Court stated that it was error under Rule 404(b) to admit this evidence. *Id.* However, this Court stated that to constitute plain error, the error must be a "fundamental error, something so

basic, so prejudicial, so lacking in its elements that justice cannot have been done." *Id.* at 625-26, 532 S.E.2d at 244 (quoting *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983)). This Court held that such admission, without defense objection, did not amount to plain error. *Id.*

In the present case, defendant has not shown that admission of testimony regarding the source of the DNA in the data bank had a probable impact on the jury's finding of guilt, when viewing all the other evidence and the fact that defendant opened the door to such testimony. Accordingly, the trial court did not commit plain error when it did not strike this testimony *ex mero motu*.

2. Prior Assaults

[2] Defendant also argues that the trial court committed reversible error by allowing into evidence his prior bad acts. Specifically, defendant objects to the trial court's decision to allow the State to present the testimony by two female witnesses of prior assaults by the defendant on them. We disagree.

Shelly Perry, 29 at the time of the trial, testified that sometime in early 1992 the defendant broke into her home around 3:00 a.m. Perry awoke when the defendant turned on the lights in her bedroom. Defendant removed his pants and "jumped on top" of her. Defendant proceeded to "snatch off" Perry's underwear and tried to "penetrate" her. Defendant did not attempt to remove Perry's upper body clothing. Perry noticed that defendant's arm was bleeding, apparently from breaking into her house. Perry calmed defendant by telling him she would do "anything he wanted" if he first allowed her to tend to his bleeding arm. Perry walked to the kitchen and fled out the back door. Perry never filed charges.

C.R., 19 at the time of the trial, was 12 years old at the time defendant assaulted her. C.R. testified that in early 1992, she was in her mother's bedroom watching television with her babysitter. Defendant, a family acquaintance, was also in the home. Defendant placed his hand up and into C.R.'s shorts. C.R. pushed defendant's hand away and left the room.

C.R. further testified regarding a second incident involving the defendant. In the spring of 1992, defendant asked C.R. to help him search for his nephew who was "outside somewhere." C.R. suggested that they might be in the woods "where we had forts." C.R. and defendant walked to one fort and, not seeing the nephew, walked to

a second fort. Defendant's nephew was not present at the second fort. Defendant pushed C.R. to the ground, pulled off her pants, rapidly pushed her underwear to one side and penetrated her. Defendant instructed C.R. not to tell or he would kill her and her mother. C.R. told a friend, and eventually C.R.'s mother learned of the incident. Defendant was charged with statutory rape. Defendant pled guilty to taking indecent liberties with a minor.

Rule 404(b) of the North Carolina Rules of Evidence states:

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

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). "The list of permissible offenses set forth in Rule 404(b) is not exclusive and 'the fact that evidence cannot be brought within a [listed] category does not necessarily mean that it is inadmissible.' " *State v. Blackwell*, 133 N.C. App. 31, 34, 514 S.E.2d 116, 119 (1999) (quoting *State v. DeLeonardo*, 315 N.C. 762, 770, 340 S.E.2d 350, 356 (1986)).

> Our Supreme Court has held that Rule 404(b) states a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Barnett, 141 N.C. App. ——, ——, 540 S.E.2d 423, 431 (2000) (citing *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)); *see also State v. Doisey*, 138 N.C. App. 620, 626, 532 S.E.2d 240, 244 (2000). "Accordingly, although 'evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under rule 404(b) so long as it also is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried.' " *Blackwell*, 133 N.C. App. at 34-35, 514 S.E.2d at 119 (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986).

In the present case, the State argues that the prior assaults show defendant's motive for killing Janet. At trial, the State argued "that defendant had wised up; his first victim had gotten away; his second

had turned him in, resulting in his incarceration," therefore he could not let Janet "get away." The North Carolina Supreme Court addressed a similar "motive theory" in *State v. Moseley*, 338 N.C. 1, 43-5, 449 S.E.2d 412, 438-39 (1994). In *Moseley*, the defendant sexually assaulted Ms. Fletcher in June 1989. Under somewhat similar circumstances, the defendant sexually assaulted and murdered Ms. Johnson in April 1991. At defendant's trial for the rape and murder of Ms. Johnson, the trial court allowed Ms. Fletcher to testify regarding defendant's 1989 assault on her. The defendant argued that such testimony was improper under Rule 404(b). Our Supreme Court held:

> [T]he testimony of Ms. Fletcher was properly offered to show defendant's motive for killing Ms. Johnson: From his experience with Ms. Fletcher, defendant knew that his crime would be reported to law enforcement authorities and that he would suffer the consequences if he left his victim alive. We find no error.

Id. As in the present case, the testimony regarding the prior assaults was properly admitted for a purpose other than to show that the defendant has the propensity to commit sexual assault and murder.

"The admissibility of evidence under [Rule 404(b)] is guided by two further constraints—similarity and temporal proximity [of the acts]." *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993) (citation omitted). In *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), our Supreme Court stated that "[w]hen the State seeks to introduce evidence of prior, similar sex offenses by a defendant this Court has been markedly liberal in admitting such evidence for the purposes cited in Rule 404(b)." "Indeed, such evidence is relevant and admissible so long as the incidents are sufficiently similar and not too remote." *Blackwell*, 133 N.C. App. at 35, 514 S.E.2d at 119 (citation omitted).

"Under Rule 404(b) a prior act or crime is 'similar' if there are 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both.' " *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991) (citations omitted). "However, it is not necessary that the similarities between the two situations 'rise to the level of the unique and bizarre.' " *Id.* "Rather, the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts." *Id.* "[T]he findings of fact of the trial court are binding upon the appellate court if supported by competent evidence." *Moseley*, 338 N.C. at 37, 449 S.E.2d at 434.

The trial court recognized that there were some dissimilarities between the three assaults. However, the trial court identified the following similarities in the Perry and Siclari assaults: (1) both offenses occurred around the same time of night; (2) both victims were petite; (3) there was evidence of rapid removal of underpants; (4) there was no removal of the upper body clothing; (5) only vaginal intercourse was "attempted or performed"; and (6) defendant made "some sort of claim of consent" in both matters. The trial court identified the following similarities in the C.R. and Siclari assaults: (1) both offenses occurred in isolated areas; (2) both victims were petite; (3) both incidents involved the use of threats, direct or indirect; (4) only vaginal intercourse was performed; and (5) defendant claimed the encounters were consensual. Based on these findings, the trial court properly found there were sufficient similarities to support a reasonable inference that the defendant committed all three assaults, and thus making the prior acts admissible under Rule 404(b). *See, Artis, supra* (evidence of attempted rape and manual strangulation of a woman ten years earlier properly admitted in case of murder prosecution where victim had been raped and manually strangled); *Moseley, supra* (evidence of sexual assaults on wife properly admitted in case of sexual assault and murder of stranger).

Furthermore, the trial court properly limited the purposes for which the jury could consider the Perry and C.R. assaults. The court repeatedly instructed the jury that the prior assaults were to be considered for:

> limited purposes . . . That is to show motive, plan, common modus operandi, absence of mistake or identity, to the extent it does so. It is not offered, nor may it be considered by you for any other purpose. [The prior assaults] [c]annot be considered by you specifically as to any evidence of guilt in this case.

Finally, the prior incidents were not so "temporally remote" as to diminish the probative value of the evidence. The Perry and C.R. assaults occurred in the spring and summer of 1992. The defendant was incarcerated from September 1992 until February 1993. The Siclari rape and murder occurred in August 1993. It is proper to exclude time defendant spent in prison when determining whether prior acts are too remote. *Blackwell*, 133 N.C. App. at 36, 514 S.E.2d at 120. In *Blackwell*, this Court held that "a six year interval between . . . prior acts and the conduct relating to the crime charged" was not too temporally remote. Furthermore, in the present case, defendant

conceded at trial that: "I am not going to address remoteness . . . I think these two incidents were certainly close together in time." A six to seven month interval between assaults in the present case does not render the prior assaults too remote to be admitted. *See, Stager*, 329 N.C. at 307, 406 S.E.2d at 893 (the death of defendant's first husband ten years ago was not so remote as to have lost its probative value in a prosecution of defendant for the first degree murder of her second husband).

Therefore, the trial court did not err by admitting testimony of defendant's prior sexual assaults where (1) the prior assaults were admitted for purposes other than to show defendant had a propensity to commit the crimes charged; (2) the trial court instructed the jury to limit its consideration of the prior assaults to those proper purposes; (3) the trial court found that the assaults bore several similarities; (4) there were sufficient similarities to support a reasonable inference that the defendant committed all three assaults; and (5) the prior assaults were not so temporally remote as to diminish their probative value. After considering all these factors, we overrule this assignment of error.

3. "Barefoot Impression" Testimony

[3] Authorities found a pair of size nine, medium, high top, Spaulding athletic shoes near Janet's body. Before trial, Robert Kennedy ("Kennedy"), of the Royal Canadian Mounted Police, compared the Spaulding shoes with two pairs of shoes known to belong to the defendant. Kennedy also examined "inked impressions" and photographs of the defendant's feet to determine if the Spaulding shoes were regularly worn by the defendant. At trial, the trial court accepted Kennedy as an expert "in physical comparisons with a specialist [sic] in barefoot comparisons."

Kennedy stated that he has been conducting "barefoot research" since 1989. Kennedy defined "barefoot research" as "the research into the uniqueness of bare feet found inside of shoes at crime scenes and mud or blood, to insure that the bare foot is unique enough to do a comparison on." Kennedy testified that he has "collected 10,000 [inked impressions of] feet, that is 5,000 people . . . and still adding to the data base." Kennedy has also collected and analyzed the shoes of soldiers in the Canadian Army.

Kennedy stated that he has testified "for the past 28 years on physical comparisons . . . hundreds of times." Kennedy added that he

has testified about "barefoot comparison" "approximately 20 times." Kennedy has written and published articles and presented lectures on numerous occasions regarding barefoot analysis. Kennedy explained that his "hypothesis" regarding "barefoot impression" analysis:

> [A] barefoot [is] unique to an individual. Research is not done yet so obviously we can't say they are [unique]. . . . We don't believe at present that we can identify a barefoot impression until our research is done. The research is showing that the barefoot is unique to the individual but obviously my research is ongoing, so I can't do research to prove that and before it's done say 'yes,' we can.

During redirect examination, the following exchange occurred:

> STATE: Okay, you feel like your research indicates that—that eventually you will feel it's a positive means of identification?
>
> KENNEDY: I think it's definitely going in that direction.
>
> STATE: You just can't say that at this point because your research is not complete?
>
> KENNEDY: Yeah, I wouldn't do a positive yet, no.
>
> STATE: You said that some person could have left the same similarities in those shoes as the defendant if he had the same features as to the wear in the uppers of the shoe, the same features that you saw as to the wear in the soles of the shoe and also as to the wear pattern of the overall shoe. So it would take similarities in all of those for another person to have worn those shoes such as the defendant, is that what you are saying?
>
> KENNEDY: That is correct, yes.
>
> STATE: You believe, Sergeant Kennedy, from your research that the individual persons have individual characteristics as to their bare feet and as to the way they wear shoes and the way the shoes are worn?
>
> KENNEDY: Yes. We have done research on that particular area and they definitely have unique areas, unique patterns on the out sole of the shoe, unique patterns on the inside uppers and they leave very good unique features inside the insole.

At the conclusion of *voir dire*, the Court asked the following questions regarding Kennedy's credentials and barefoot comparison:

THE COURT: Let me ask you, Sergeant Kennedy, you are employed as a forensic crime scene analyst?

KENNEDY: That is correct, yes.

THE COURT: And you are a member of professional organizations that are involved with identifications and comparisons?

KENNEDY: Correct, both in the international and local, Canadian.

THE COURT: Among those organizations and professionals and experts in your field of forensic crime scene analysis, is barefoot comparison generally accepted?

WITNESS: Definitely, yes.

THE COURT: And are the tests, data, methodology employed by you and used by you reasonably relied upon by other experts in your field?

WITNESS: Yes, they are. As a matter of fact, I have doctors of podiatry and anthropology adding to the collection of the database. The quicker we finish it, the quicker we get results so they can use the database also in their expertise.

After this colloquy, the defendant objected to the admission of the testimony, and asked the trial court to make findings of fact. The trial court overruled the objection, and denied the request:

THE COURT: Well, the objection is overruled. He is allowed as an expert. I am not required to make findings of fact. I am considering 109 [N.C. App.] 184, 189, however, notwithstanding I do find that there is scientific, technical or other specialized knowledge that this witness has that will assist the trier of fact to understand the evidence and determine facts which may be in issue. Also, this witness is qualified as an expert by his knowledge, skill, experience and training or education and may therefore testify and form an opinion, if appropriate.

Kennedy then explained barefoot comparison analysis to the jury. Kennedy informed the jury that he examines the impressions left by the heel, the ball of the foot and the upper portion of the shoes. Kennedy stated that after examining barefoot impressions in shoes he can make one of four conclusions: (1) the shoes were positively worn by the same person, (2) the shoes were positively not worn by the same person, (3) the shoes were "highly likely" worn by the same person, (4) the shoes were "likely" worn by the same person. Kennedy

stated that he has never made a positive identification. In this case, Kennedy found many similarities in the impressions left in the Spaulding shoes found at the crime scene, to other shoes known to belong to the defendant, and to the characteristics of defendant's bare feet. Based on his examinations, Kennedy concluded that it was "likely" that the Spaulding shoes found at the crime scene and the defendant's other shoes were regularly worn by the same person. Kennedy explained that he could only conclude it was "likely" that the shoes were regularly worn by the same person, because of a lack of clarity in the impressions, not because of any dissimilarities between the impressions. On cross-examination, Kennedy admitted that barefoot impressions were not a "positive means to identify somebody at present because my research is not finished to prove that. Others do feel that it is a positive means to identify somebody."

Defendant argues that Kennedy's own testimony reveals that barefoot impression evidence is not yet scientifically reliable, and its admission was unduly prejudicial. We agree that, based on Kennedy's own testimony, this evidence was not sufficiently reliable at the time of trial. However, after reviewing the entire record, we find the admission of Kennedy's testimony to be harmless.

Rule 702(a) of the North Carolina Rules of Evidence provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702 (1999). "Thus, under our Rules of Evidence, when a trial court is faced with a proffer of expert testimony, it must determine whether the expert is proposing to testify to scientific, technical, or other specialized knowledge that will assist the trier of fact to determine a fact in issue." *State v. Goode*, 341 N.C. 513, 527, 461 S.E.2d 631, 639 (1995).

The acceptance of a witness as an expert and "the admission of expert testimony are within the sound discretion of the trial court and will not be upset absent a showing of an abuse of discretion." *State v. Willis*, 109 N.C. App. 184, 192, — S.E.2d —, — (1993) (citing *State v. Parks*, 96 N.C. App. 589, 386, S.E.2d 748 (1989)). "The expert is not required to have specific credentials, *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984), and it is sufficient if the scientific technique

supporting his testimony is reliable." *Willis*, 109 N.C. App. at 192, —— S.E.2d at —— (emphasis supplied) (citation omitted). Our Supreme Court has stated that:

> This Court is of the opinion, that we should favor the adoption of scientific methods of crime detection, where the demonstrated accuracy and reliability has become established and recognized. Justice is truth in action, and any instrumentality, which aids justice in the ascertainment of truth, should be embraced without delay.

State v. Temple, 302 N.C. 1, 12 273 S.E.2d 273, 280 (1981) (citation omitted) (emphasis supplied). "As recognozed by the United States Supreme Court in [*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993)], the admissibility of expert scientific testimony . . . requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether that reasoning or methodology can be properly applied to the facts in issue." *Goode*, 341 N.C. at 527, 461 S.E.2d at 639.

"In *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984), [our Supreme Court,] addressing the reliability of footprint identification, gave a comprehensive review of the law concerning the determination of whether a proffered method is sufficiently reliable." *Goode*, 341 N.C. at 527, 461 S.E.2d at 639. The *Bullard* Court stated the following rule with regards to assessing the reliability of a scientific method:

> In general, when no specific precedent exists, scientifically accepted reliability justifies admission of the testimony of qualified witnesses, and such reliability may be found either by judicial notice or from the testimony of scientists who are expert in the subject matter, or by a combination of the two.

Bullard, 312 N.C. at 148, 322 S.E.2d at 381 (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 86, at 323 (2d ed. 1982)).

In *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852-53 (1990), our Supreme Court examined the reliability of a scientific method by setting out the following principles:

> Reliability of a scientific procedure is usually established by expert testimony, and the acceptance of experts within the field is one index, though not the exclusive index, of reliability. *See State v. Bullard*, 312 N.C. at 147, 322 S.E.2d at 380; *State v.*

> *Peoples*, 311 N.C. 515, 532, 319 S.E.2d 177, 187 (1984). . . . [W]e have focused on the following indices of reliability: the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked 'to sacrifice its independence by accepting [the] scientific hypotheses on faith,' and independent research conducted by the expert. *State v. Bullard*, 312 N.C. at 150-51, 322 S.E.2d at 382.

Where a scientific method is in its "infancy", our Courts have looked to other jurisdictions. *Bullard*, 312 N.C. at 148, 322 S.E.2d at 381. Our research reveals two recent cases in South Carolina and Texas specifically addressing Kennedy's research.

Kennedy testified as a witness for the State of South Carolina in a first degree murder trial held in Lexington, South Carolina. *State v. Jones*, — S.C. —, 541 S.E.2d 813 (2001). In *Jones*, the only physical evidence found at the crime scene was a "bloody boot print." *Id.* at —, 541 S.E.2d at 814. The trial court admitted Kennedy as an expert in "barefoot insole impression" analysis. *Id.* at —, 541 S.E.2d at 818. The State introduced testimony that the "barefoot impressions" in the boot were "consistent with the boots having been worn by the [defendant]." *Id.* at —, 541 S.E.2d at 819. The South Carolina Supreme Court held:

> The State relies most heavily on Kennedy to establish that there is a science underlying "barefoot insole impressions." While Kennedy testified that he had published several peer-reviewed articles, he also testified that he was still in the process of collecting data in order to determine which standards were appropriate for comparison purposes. Further he candidly acknowledged that earlier work in this area had been discredited . . . In our opinion, it is premature to accept that there exists a science of 'barefoot insole impressions'. . . .We find, therefore, that the trial judge erred in permitting expert testimony purporting to demonstrate that "barefoot insole impression" testing revealed [defendant's] foot to be consistent with the impression made by the primary wearer of the . . . [crime scene] boot.

Id. The South Carolina Supreme Court vacated the death sentence and remanded the case for a new trial.

Kennedy also testified as an expert in another murder trial in Lubbock, Texas. *Hurrelbrink v. State*, No. 07-99-0376-CR, 2001 WL

324726 (Tex. App. April 4, 2001). In *Hurrelbrink*, a "bloody sock foot print was found at the crime scene which the State purported to tie to [defendant] through the testimony of two anthropologists [Dr. Gill-King and Dr. Sonek] as to footprint comparison and analysis." *Id.* In *Hurrelbrink*, Kennedy testified as an expert witness for the defendant. *Id.*

Dr. Sonek testified during *voir dire* that there was a "positive identification" between the footprints at the crime scene and the defendant's footprints. *Id.* Kennedy testified that he would not make a "positive identification on that type of evidence because 'the clarity is not to the point where I would want it.' " *Id.* Kennedy stated "that if Dr. Sonek concluded it was likely or probably the same person, [I] would have agreed, but [I do] not agree with a positive identification." *Id.* The trial court, agreeing with Kennedy, "did not believe that sufficient research had been done to opine that no two individuals can ever have the same identical footprint, Dr. Sonek was not allowed to testify to such an opinion." *Id.*

In *Hurrelbrink*, defendant argued that it was error to admit the "barefoot impression" testimony because such testimony "was not grounded in a valid underlying scientific theory." *Id.* The Texas Court of Appeals held that: "We do not believe that the trial court abused its discretion in allowing this testimony." The Court elaborated that "[b]ased . . . on the other evidence presented at trial, as well as the limitations imposed on Dr. Sonek's . . . testimony, we believe that any error [in admitting the barefoot impression testimony] was harmless." *Id.*

In the present case, we agree that, based on Kennedy's testimony, the barefoot impression evidence does not yet meet the requirements for admissibility. Kennedy is undoubtedly an expert in many areas of forensic science. However, Kennedy testified that he was still in the process of collecting data with regard to "barefoot impression" analysis and that his research was not yet complete. Kennedy opined:

> We don't believe at present we can identify a barefoot impression until our research is done. The research is showing that the barefoot is unique to the individual but obviously my research is ongoing, so I can't do research to prove that and before it's done say 'yes,' we can.

Therefore, based on Kennedy's own testimony, barefoot impression analysis was not scientifically reliable as of the date of this

trial. However, we hold that the admission of this testimony was harmless error.

An error is harmless "unless a different result would have been reached at the trial if the error in question had not been committed." *State. v. Hardy*, 104 N.C. App. 226, 238, 409 S.E.2d 96, 102 (1991) (citation omitted). There have been many cases in North Carolina where the admission of inadmissible expert testimony has been held to be harmless error. *See State v. Figured*, 116 N.C. App. 1, 446 S.E.2d 838 (1994), *disc. rev. denied*, 339 N.C. 617, 454 S.E.2d 261 (1995) (psychologist improperly permitted to testify that children were abused by defendant; harmless error in light of corroborating evidence); *State v. Davis*, 106 N.C. App. 596, 418 S.E.2d 263 (1992) (expert opinion that victim suffered from post-traumatic stress disorder improperly admitted without limiting instruction; harmless error in view of other testimony); *State v. Helms*, 127 N.C. App. 375, 490 S.E.2d 565 (1997) (expert testimony regarding horizontal gaze nystagmus test improperly admitted in DWI trial where proponent did not lay a proper foundation for the reliability of such evidence; harmless error in light of other testimony).

In *State v. Payne*, 312 N.C. 647, 325 S.E.2d 205 (1985), the State presented "hypnotically refreshed testimony" during a first degree murder trial. Our Supreme Court affirmed that the admission of such testimony was error. *Id.* However, the Court held that such error was harmless where the testimony was merely corroborative of other evidence. *Id.*

As in *Payne*, Kennedy's testimony corroborates the testimony of defendant's wife and defendant's former girlfriend. Both women testified that the Spaulding shoes looked similar to, and were the same size as defendant's shoes. Furthermore, unlike the facts before the South Carolina Supreme Court in *Jones*, the Spaulding shoes were not the only physical evidence linking defendant to the scene. In this case, the DNA evidence recovered from Janet's body was another powerful link placing defendant at the scene.

Kennedy testified that he could only state that it was "likely" that the two sets of barefoot impressions from the shoes found at the crime scene and defendant's shoes were made by the same person. He explained to the jury that his research was not yet complete. He stated that, although there were similarities between the footprints, he could not make a positive identification.

We hold that although barefoot impression analysis was not yet a reliable science at the time of trial, the admission of such testimony was harmless error.

4. Sufficiency of the Evidence

[4] Defendant moved to dismiss the charges of first degree murder and first degree rape. The trial court denied the motion at the end of the trial. Defendant argues that there was insufficient evidence to support the jury's finding that defendant murdered Janet with premeditation and deliberation. Defendant also argues that there was no evidence of force to support the finding of first degree rape. We overrule this assignment of error.

> In reviewing the sufficiency of the evidence needed to survive defendant's motion to dismiss, we are guided by several principles. The evidence is to be viewed in the light most favorable to the State. *State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978). All contradictions in the evidence are to be resolved in the State's favor. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984). All reasonable inferences based upon the evidence are to be indulged in. *Id.* . . . [W]hile the State may base its case on circumstantial evidence requiring the jury to infer elements of the crime, that evidence must be real and substantial and not merely speculative. Substantial evidence is evidence from which a rational trier of fact could find the fact to be proved beyond a reasonable doubt. *State v. Pridgen*, 313 N.C. 80, 326 S.E.2d 618 (1985); *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835 (1981).

State v. Zuniga, 320 N.C. 233, 258, 357 S.E.2d 898, 914 (1987) (quoting *State v. Reese*, 319 N.C. 110, 138-39, 353 S.E.2d 352, 368 (1987)).

Defendant correctly notes that in order to convict him of first degree murder, the jury must have found beyond a reasonable doubt that defendant not only intended the killing, but formed that intent after premeditation and deliberation. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986); *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 90 L.Ed.2d 733 (1986). Defendant also correctly states that in order to convict him of first degree rape, the State had to prove beyond a reasonable doubt defendant had sexual intercourse with Janet "by force" and against her will with the use or threatened use of a weapon or that serious injury was inflicted. N.C. Gen. Stat. § 14-27.2 (1999). The State argues that there was suf-

ficient evidence from which the jury could properly have convicted defendant of first degree murder and first degree rape. We agree.

The State Medical Examiner, Dr. Page Hudson, testified that Janet weighed 92 pounds and was less than five feet tall. His autopsy examination revealed that Janet had a series of small, superficial stab wounds on her throat. Dr. Hudson stated that these wounds were consistent with "compliance or intimidation wounds." Dr. Hudson defined compliance wounds as: "wounds that result from—well threat or the use of the weapon or the tool, the device in an incomplete sort of way, such as holding a gun to someone's head, might not leave a mark there, or holding someone—trying to be in command of someone with the tip of a knife. That sort of thing leaves wounds of this sort." Dr. Hudson also identified cuts on the inside of Janet's hands. Dr. Hudson informed the jury that these wounds were "typical defense knife-type defense wounds." Dr. Hudson further testified that the killing was accomplished by a person slicing Janet's neck with a knife, half-way severing her left jugular vein. Dr. Hudson also testified that he found sperm inside Janet's body.

STATE: Do you know, or do you have an opinion, Dr. Hudson, based on what you saw as to the spermatozoa, as to some time frame of when the spermatozoa were put in Janet Siclari's vagina?

DR. HUDSON: Yes.

STATE: What is your opinion, sir?

DR. HUDSON: In my opinion they had been there less than 24 hours prior to roughly the time of her death and most likely a good bit less than that, 12 hours, for example.

STATE: 24 hours—

DR. HUDSON: Or less.

STATE: And you feel like much less than that, is your feeling, is that correct?

DR. HUDSON: Yes. I am saying as much as 24, to be sort of on the safe side as it were, but I think it is probably less and it could—they could have been there just a matter of—well, minutes, for that matter.

THE STATE: Before she died?

DR. HUDSON: Right, before she died.

Defendant claims that the evidence tends to show that the sexual encounter with defendant was consensual. There is no evidence that Janet and the defendant were acquaintances. Janet was found on the beach with her pants removed and defendant's semen inside her. The jury could find it unlikely that Janet had consensual intercourse with defendant, a stranger, and then be murdered by a third person, while still nude from the waist down. Given the manner of the killing, the medical examiner's testimony, and the DNA evidence, we find that sufficient evidence existed from which the jury was entitled to find defendant guilty of the first degree rape and the first degree murder of Janet Siclari.

Defendant received a fair trial by a jury of his peers before an able trial judge that was free of prejudicial error.

No error.

Judges MARTIN and TIMMONS-GOODSON concur.

KENDRA J. THIGPEN, PLAINTIFF-APPELLANT v. CORAZON NGO, M.D., MARSHALL B. FRINK, M.D., NATIONAL EMERGENCY SERVICES, INC., EMERGENCY PHYSICIANS ASSOCIATION, INC., CP/NATIONAL, INC. A/K/A COMMUNITY PHYSICIANS/NATIONAL, INC., AND ONSLOW COUNTY HOSPITAL AUTHORITY, DEFENDANT-APPELLEES

No. COA00-409

(Filed 1 May 2001)

Medical Malpractice— Rule 9(j) certification lacking in original complaint—amended complaint—Rule 15 prevents dismissal

The trial court erred in a medical malpractice action by dismissing plaintiff's original and amended complaints based on an alleged failure to comply with the certification requirements of N.C.G.S. § 1A-1, Rule 9(j), because: (1) a complaint may be amended under N.C.G.S. § 1A-1, Rule 15 to prevent dismissal for

failure to include Rule 9(j) certification; (2) Rule 9(j) certification that the medical care has been reviewed by a medical expert is merely a pleading requirement and has no effect on plaintiff's burden of proof under N.C.G.S. § 90-21.12; (3) plaintiff's amended complaint with the inclusion of the Rule 9(j) certification must be deemed under Rule 15(c) to have been filed at the time of the original complaint since plaintiff's original complaint includes notice of transactions or occurrences sufficient to allege medical malpractice under N.C.G.S. § 90-21.12; (4) plaintiff's amended complaint is not prevented from relating back under Rule 15(c) since all parties and all claims were the same in both plaintiff's original and amended complaints; (5) an amended complaint certifying that a medical review took place, without more, satisfies the language of Rule 9(j); (6) a plaintiff could not unilaterally extend the time for certification by amending later without the necessity of a showing of good cause when a plaintiff is bound under N.C.G.S. § 1A-1, Rule 11(a) by a duty of good faith when filing a complaint; and (7) the statute of limitations was extended pursuant to Rule 9(j) meaning plaintiff filed her original complaint within the extended statute of limitations.

Judge BIGGS dissenting.

Appeal by plaintiff from order entered 17 November 1999 by Judge Jay D. Hockenbury in Superior Court, Onslow County. Heard in the Court of Appeals 6 February 2001.

Jimmy F. Gaylor for plaintiff-appellant.

Harris, Shields, Creech & Ward, P.A., by C. David Creech and W. Gregory Merritt, for defendant-appellee Corazon Ngo, M.D.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by John D. Madden and Deanna Davis Anderson, for defendant-appellee Onslow County Hospital Authority.

McGEE, Judge.

Plaintiff appeals the dismissal of her medical malpractice suit as to defendants Corazon Ngo, M.D. (Ngo) and Onslow County Hospital

Authority (OCHA) pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 9(j). For the reasons stated below, we reverse the trial court's dismissal.

Plaintiff alleges that defendants committed medical malpractice on 8 June 1996. On 8 June 1999, plaintiff secured an extension of 120 days to the three-year statute of limitations for actions for medical malpractice pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j). On 6 October 1999, the final day of the extension, plaintiff filed a complaint which lacked the certification required by Rule 9(j). On 12 October 1999, before defendants had filed responsive pleadings, plaintiff amended her complaint as a matter of course pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(a) to include the requisite Rule 9(j) certification.

Defendants Ngo and OCHA moved to dismiss plaintiff's complaint in November 1999 pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 9(j). On 17 November 1999, the trial court dismissed plaintiff's original complaint as to defendants Ngo and OCHA pursuant to Rule 9(j) for lack of certification and dismissed plaintiff's amended complaint as to defendants Ngo and OCHA pursuant to Rule 12(b)(6) insofar as it was barred by the statute of limitations for actions for medical malpractice. Plaintiff appeals the dismissals.

As a preliminary matter, we note that plaintiff has failed to adhere to the N.C. Rules of Appellate Procedure in her brief to this Court. The argument portion of plaintiff's brief does not specify the pertinent assignments of error, as required by N.C.R. App. P. 28(b)(5). At the conclusion of plaintiff's brief, plaintiff's counsel failed to identify himself and sign his name, as required by N.C.R. App. P. 28(b)(7). "The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal." *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984). However, in the interest of justice, we suspend the requirements of N.C.R. App. P. 28(b)(5) and (7) for plaintiff in the present case pursuant to N.C.R. App. 2.

The present case turns on the relationship between N.C. Gen. Stat. § 1A-1, Rule 9(j) and N.C. Gen. Stat. § 1A-1, Rule 15. " 'Legislative intent controls the meaning of a statute.' To determine legislative

intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998) (citations omitted). Rule 9(j) provides:

> Any complaint alleging medical malpractice by a health care provider . . . *shall be dismissed* unless:
>
> (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness . . . and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness . . . and who is willing to testify that the medical care did not comply with the applicable standard of care . . . ; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (1999) (emphasis added). Rule 15(a) provides:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

N.C. Gen. Stat. § 1A-1, Rule 15(a) (1999). At issue is whether a complaint may be amended under Rule 15 to prevent dismissal for failure to include Rule 9(j) certification.

Rule 9 sets out a number of specialized pleading requirements, including rules for averring fraud and for seeking special damages. *See, e.g.*, N.C. Gen. Stat. § 1A-1, Rule 9(b) and (g). Although many of the subsections of Rule 9 include the word "shall" in their directives

to parties filing pleadings, only subsection (j) includes the phrase "shall be dismissed," presumably a directive to the trial court. Since failure to follow the requirements laid out in *any* subsection of Rule 9 entitles an opposing party to dismissal, *see, e.g.,* N.C. Gen. Stat. § 1A-1, Rule 41(b), we must determine whether the General Assembly's use of the specific phrase "shall be dismissed" was intended to preclude amendment to a pleading under Rule 15.

In *Keith v. Northern Hosp. Dist. of Surry County*, 129 N.C. App. 402, 499 S.E.2d 200, *disc. review denied*, 348 N.C. 693, 511 S.E.2d 646 (1998), the judge writing the opinion for the panel concluded that the inclusion of "shall be dismissed" in Rule 9(j) acted to prevent a plaintiff from subsequently amending a complaint under Rule 15 to add the requisite Rule 9(j) certification. However, another judge on the panel disagreed with that reasoning and concluded that the language of Rule 9(j), when read *in pari materia* with Rule 15, allowed correction through amendment. That second judge concurred in the result only, on the basis of the trial court's discretion to deny an amendment under Rule 15. Because the third judge on the *Keith* panel also concurred in the result only, on the basis of discretion under Rule 15, the precedential authority of *Keith* is limited to its holding that the trial court did not abuse its discretion under Rule 15. *See, e.g., State v. Bryant*, 334 N.C. 333, 341, 432 S.E.2d 291, 296 (1993), *vacated on other grounds*, 511 U.S. 1001, 128 L. Ed. 2d 42 (1994). Although portions of the principal opinion in *Keith* were subsequently quoted by and thus incorporated into *Allen v. Carolina Permanente Med. Grp., P.A.*, 139 N.C. App. 342, 533 S.E.2d 812 (2000), *Allen* did not address the application of Rule 15 to Rule 9(j) and therefore holds no precedential value applicable to the case before us.

In *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000), our Supreme Court held that a complaint lacking Rule 9(j) certification may be voluntarily dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) and re-filed within a year with the requisite Rule 9(j) certification, even if the statute of limitations had already expired before the complaint was dismissed. *Brisson* at 595, 528 S.E.2d at 571. However, the Court explicitly declined to address whether amendment of a complaint pursuant to Rule 15 would similarly allow an action to proceed. *Id.* at 593, 528 S.E.2d at 570.

Nonetheless, *Brisson* does assist our analysis of the interaction between Rules 9(j) and 15.

> Rule 41(a)(1) provides that
>
> an action or any claim therein may be dismissed by the plaintiff without order of court . . . by filing a notice of dismissal at any time before the plaintiff rests his case. . . . Unless otherwise stated in the notice of dismissal . . . , the dismissal is without prejudice. . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal[.]

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1999). In *Brisson*, noting that "[s]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each[,]" *Bd. of Adjmt. of the Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993) (citation omitted), the Supreme Court stated:

> Although Rule 9(j) clearly requires a complainant of a medical malpractice action to attach to the complaint specific verifications regarding an expert witness, the rule does not expressly preclude such complainant's right to utilize a Rule 41(a)(1) voluntary dismissal. Had the legislature intended to prohibit plaintiffs in medical malpractice actions from taking voluntary dismissals where their complaint did not include a Rule 9(j) certification, then it could have made such intention explicit. In this case, the plain language of Rule 9(j) does not give rise to an interpretation depriving plaintiffs of the one-year extension pursuant to their Rule 41(a)(1) voluntary dismissal merely because they failed to attach a Rule 9(j) certification to the original complaint.

Brisson at 595, 528 S.E.2d at 571. The question in the case before this Court is whether the plain language of Rule 9(j) gives rise to an interpretation depriving plaintiff of the Rule 15 right to amend a complaint to correct a failure to include a Rule 9(j) certification.

One possible interpretation of Rule 9(j)'s "shall be dismissed" language is that a complaint lacking the necessary Rule 9(j) certification is to be deemed dismissed and therefore a nullity immediately upon its filing with the trial court. Under that interpretation, an attempt to amend such a complaint pursuant to Rule 15 would in fact constitute the filing of a new complaint, possibly after the statute of limitations had expired. However, we find that such an interpretation is not possible under *Brisson*. If the complaint in *Brisson* had been deemed dismissed automatically upon its initial filing, voluntary dismissal under Rule 41(a)(1) would no longer have been available. *See* N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). It therefore follows that a complaint "shall be dismissed" under Rule 9(j) only through action by a trial court.

A second interpretation of "shall be dismissed" might be that a complaint filed without necessary Rule 9(j) certification is to be dismissed upon motion by a defendant, but the complaint cannot be amended by a plaintiff before that motion to dismiss is ruled upon. In other words, "shall be dismissed" would be read to exclude any action upon the complaint *except* dismissal. That interpretation could be reconciled with *Brisson*, insofar as a voluntary dismissal under Rule 41(a)(1) is a form of dismissal. However, such an interpretation of Rule 9(j) would require a legislative intent to permit a voluntary dismissal with a one-year extension to re-file while categorically prohibiting the achievement of any similar effect through immediate amendment.

To correct a lack of Rule 9(j) certification through either a Rule 41(a)(1) voluntary dismissal or a Rule 15 amendment, a plaintiff would have to make an appropriate filing sometime before the trial court involuntarily dismissed the action. A Rule 41(a)(1) voluntary dismissal may be taken without leave of the court and a plaintiff is allowed up to a full year to re-file the complaint. *See* N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). A Rule 15 amendment may only be made as a matter of course once, before an opponent files a responsive pleading, or leave of the court is required to amend, and the amendment would provide a plaintiff no additional time. *See* N.C. Gen. Stat. § 1A-1, Rule 15(a). Defendants argue that a Rule 41(a)(1) voluntary dismissal is distinguishable from a Rule 15 amendment by virtue of

the duty of good faith imposed upon a Rule 41(a)(1) dismissal under *Estrada v. Burnham*, 316 N.C. 318, 341 S.E.2d 538 (1986). In *Estrada*, our Supreme Court held that a complaint filed solely with the intention of dismissing it under Rule 41(a)(1) so as to gain a one-year extension to the statute of limitations violated N.C. Gen. Stat. § 1A-1, Rule 11(a). *See Estrada* at 323, 341 S.E.2d at 542. However, the same Rule 11(a), and thus the same duty of good faith, likewise apply to a complaint filed solely for the purpose of amending it later under Rule 15 in a similar effort to extend the relevant statute of limitations. *See* N.C. Gen. Stat. § 1A-1, Rule 11(a) (1999).

The language of Rule 9(j) does not indicate why the General Assembly would have intended to permit a Rule 41(a)(1) voluntary dismissal to the exclusion of a Rule 15 amendment. " '[T]he absence of any express intent and the strained interpretation necessary to reach the result urged upon us by [defendants] indicate that such was not [the legislature's] intent.' " *Brisson* at 595, 528 S.E.2d at 571 (citation omitted). We conclude that Rule 9(j)'s "shall be dismissed" language does not prevent amendment of a complaint lacking requisite Rule 9(j) certification.

A third interpretation of "shall be dismissed" is simply that a complaint lacking Rule 9(j) certification is to be dismissed by a trial court upon motion by a defendant. As such, Rule 9(j) would be treated no differently than any other subsection of Rule 9. We note that, insofar as subsection (j) is the only subsection of Rule 9 to include the directive "shall be dismissed," " '[t]he presumption is that no part of a statute is mere surplusage, but each provision adds something which would not otherwise be included in its terms.' " *City of Concord v. Duke Power Co.*, 346 N.C. 211, 217, 485 S.E.2d 278, 282 (1997) (citation omitted). However, we also note that subsection (j) is the only subsection of Rule 9 to include multiple alternative mandates. We conclude that the use by the General Assembly of the phrase "shall be dismissed" in Rule 9(j) is adequately explained simply as a choice of grammatical construction.

Defendants assert that, even if Rule 9(j) permitted plaintiff to amend her complaint under Rule 15, the amended complaint cannot be deemed to have been filed before the statute of limitations

expired. Relation back of amendments is governed by subsection (c) of Rule 15:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (1999). In the present case, each claim asserted in the amended complaint was first asserted in the original complaint. *See Hyder v. Dergance*, 76 N.C. App. 317, 332 S.E.2d 713 (1985) ("[A]n amended complaint has the effect of superseding the original complaint."). The principal difference between the original complaint and the amended complaint is the addition of certification pursuant to Rule 9(j) that plaintiff's medical care had been reviewed by a medical expert.

Defendants argue that the medical review required under Rule 9(j) is a transaction or occurrence to be proved pursuant to a claim of medical malpractice and therefore, because plaintiff's original complaint lacked notice of the review, Rule 15(c) prevents the relation back of plaintiff's amended complaint. We disagree with defendants' characterization of the Rule 9(j) medical review. A medical malpractice action, as defined in N.C. Gen. Stat. § 90-21.11 (1999), seeks damages for personal injury or death arising out of professional medical care. The Rule 9(j) certification that the medical care has been reviewed by a medical expert is merely a pleading requirement imposed under the N.C. Rules of Civil Procedure and has no effect on the plaintiff's burden of proof under N.C. Gen. Stat. § 90-21.12 (1999). We therefore conclude that, insofar as plaintiff's original complaint includes notice of transactions or occurrences sufficient to allege medical malpractice under § 90-21.12, plaintiff's amended complaint, Rule 9(j) certification included, must be deemed under Rule 15(c) to have been filed at the time of the original complaint.

Defendants also assert that *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995) prevents plaintiff's amended complaint from relating back under Rule 15(c). In *Crossman*, our Supreme Court con-

sidered an effort to amend a complaint to include an additional defendant after the statute of limitations had expired.

> When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur. As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed.

Crossman at 187, 459 S.E.2d at 717. In the present case, plaintiff did not seek to add new defendants to her action when she amended her complaint. Because all parties and all claims were the same in both plaintiff's original and amended complaints, the defendants named in the amended complaint had no less notice of the transactions or occurrences to be proved than they received from the original complaint. *Crossman* does not prevent relation back in the present case.

Defendants assert that, even if an amended complaint may relate back to the filing of an original complaint under Rule 9(j), the amended complaint in the present case nonetheless failed to meet the requirements of Rule 9(j) because it did not assert that the requisite medical review actually took place prior to the filing of the original complaint. Defendants point first to the language of Rule 9(j) that "[a]ny complaint alleging medical malpractice . . . shall be dismissed unless . . . [t]he pleading specifically asserts that the medical care has been reviewed[,]" N.C. Gen. Stat. § 1A-1, Rule 9(j), as an indication that such review must take place before the original complaint is filed. However, that language does not mention an original complaint or when the review must occur. Rule 9(j) requires only that certification of the review be included in the complaint. We conclude that an amended complaint certifying that a medical review took place, without more, satisfies that language of Rule 9(j).

Defendants point next to the 120-day extension to the statute of limitations permitted under Rule 9(j):

> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge . . . 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.

N.C. Gen. Stat. § 1A-1, Rule 9(j). Defendants argue that allowing subsequent certification and relation back would render the 120-day extension meaningless, since a plaintiff could unilaterally extend the time for certification by amending later without the necessity of any showing of good cause. However, as noted above, a plaintiff is bound by a duty of good faith when filing a complaint. *See* N.C. Gen. Stat. § 1A-1, Rule 11(a). In addition, once a plaintiff has filed a complaint lacking necessary Rule 9(j) certification, a defendant is entitled to move for dismissal, and the plaintiff's action will be dismissed if the plaintiff does not amend the complaint to include certification before the trial court rules on the motion. If the plaintiff has already amended the complaint once, or the defendant has already served a responsive pleading on the plaintiff, the plaintiff may amend the complaint only with leave of the trial court. *See* N.C. Gen. Stat. § 1A-1, Rule 15(a). Because a plaintiff is bound by a duty of good faith, and because a plaintiff's ability to accomplish review and certification after the expiration of the statute of limitations can be effectively limited through action of the defendant, we conclude that relation back pursuant to Rule 15(c) of an amended complaint including only the barest Rule 9(j) certification of review does not render meaningless the Rule 9(j) 120-day extension of the statute of limitations.

Finally, defendants assert that, because plaintiff failed to file a Rule 9(j)-certified complaint within the 120-day extension permitted under Rule 9(j), the purpose of the extension was defeated and the extension should not apply. With no extension, defendants contend that even plaintiff's original, non-certified complaint was filed after the expiration of the statute of limitations and therefore that relation back under Rule 15(c) would not help plaintiff. Defendants cite *Osborne v. Walton*, 110 N.C. App. 850, 431 S.E.2d 496 (1993), in which a plaintiff requested and received a 20-day extension to file a complaint, then filed the complaint more than twenty days later. Our Court held that the extension could not apply to the complaint, and that by the time the complaint was filed the relevant statute of limitations had expired. *See id.* at 854, 431 S.E.2d at 449.

However, Rule 9(j) does not just grant an extension of time to file a Rule 9(j)-certified complaint, *cf.* N.C. Gen. Stat. § 1A-1, Rule 3(a) (1999), it actually extends the underlying statute of limitations. We conclude that the language of Rule 9(j) is not intended to retroactively condition the extension of the statute of limitations upon compliance with the requirement of certification, but instead is intended to guide the resident superior court judge in deciding whether good cause exists to grant the extension. In the present case, the statute of limitations was extended pursuant to Rule 9(j), and plaintiff filed her original complaint within that extended statute of limitations. Under Rule 15, plaintiff was permitted to amend her complaint to bring it into compliance with Rule 9(j). We find no violation of Rule 9(j) or the statute of limitations in the present case.

In summary, we hold that plaintiff was entitled to amend her initial complaint to include the necessary Rule 9(j) certification, and to have the amended complaint relate back to the filing of the initial complaint. In doing so, we reject defendants' contention that the purpose of Rule 9(j) is to act as a gatekeeper at the time of filing a medical malpractice action. After consideration of the language of Rule 9(j), and in light of *Brisson*, we conclude that the intent of the General Assembly was to prevent the filing of frivolous medical malpractice suits by providing defendants with a means for quick dismissal unless appropriate Rule 9(j) review is performed and certified. In the present case, appropriate Rule 9(j) review was performed and certified before the action was dismissed. It follows that the dismissal of plaintiff's action was in error.

We reverse the trial court's dismissals of plaintiff's original and amended complaints.

Reversed.

Judge WYNN concurs.

Judge BIGGS dissents.

BIGGS, Judge dissenting.

I respectfully dissent. Assuming I agreed with the majority in this case, that a plaintiff can avail himself of a Rule 15 amendment to cure defective medical malpractice complaints lacking 9(j) certification, the issue presented is whether, on the facts of this case, a denial of Rule 15 relief is an abuse of the trial court's discretion. I believe it is not.

The rules regarding statutory construction are well established.

> [J]udicial construction is controlled by the intent of the General Assembly in enacting the statute. 'In seeking to discover this intent, the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish.' All statutes dealing with the same subject matter are to be construed *in pari materia*—i.e., in such a way as to give effect, if possible, to all provisions. Further, where one statute deals with certain subject matter in particular terms and another deals with the same subject matter in more general terms, the particular statute will be viewed as controlling in the particular circumstances absent clear legislative intent to the contrary.

State ex rel. Utilities Comm. v. Thornburg, 84 N.C. App. 482, 485, 353 S.E.2d 413, 415 (1987) (citations omitted).

We must first look to the language of the statute. The language used by the legislature in Rule 9(j) is explicit in its mandate that a complaint failing to comply with the directives of the applicable subsections "*shall be dismissed.*" Rule 9(j) (emphasis added). The directive that is of critical concern in this case states that "[a]ny complaint alleging medical malpractice . . . shall be dismissed unless . . . [t]he pleading specifically asserts that the medical care *has been reviewed* by a person who is reasonably expected to qualify as an expert witness." Rule 9(j) (emphasis added). It is clear that the legislature intended to treat 9(j) complaints differently than other special pleadings outlined in Rule 9. While the other subsections use the mandatory language "shall", none other goes so far as to declare that if a complaint fails to comply with the expressed provisions, it "shall be dismissed." Rule 9(j). I can not agree with the majority that the dif-

ference in the wording of 9(j) and other subsections involving special pleadings under Rule 9 is merely grammatical construction. However, nor am I prepared to say that the legislature intended to preclude Rule 15 relief under all circumstances where there is a defective 9(j) complaint. Thus we look to additional evidence of legislative intent for further guidance.

As argued in the Appellee's brief, Subsection (j) of Rule 9 was added by the North Carolina legislature in 1995 pursuant to Chapter 309, House Bill 730 entitled "An Act to Prevent Frivolous Medical Malpractice Actions By Requiring that Expert Witnesses In Medical Malpractice Cases Have Appropriate Qualifications to Testify On the Standard of Care at Issue and to Require Expert Witness Review *As A Condition of Filing A Medical Malpractice Action* (the Act)." The Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611 (emphasis added). One of the stated purposes of the Act was to attempt to "weed out law suits which are not meritorious *before they are filed.*" Minutes of Hearing on April 19, 1995 before the House Select Committee on Tort Reform, 1995 Session (emphasis added).[1]

Thus, in considering the plain language of 9(j), the name of the Act, and its stated purpose, what appears to be the clear intent of the legislature is that the review by an expert occur *prior* to the filing of the lawsuit. That being the case, to read Rule 9(j) and Rule 15 in *pari materia*, it must be clear that the review by an expert occurred *before* the filing of the original complaint to allow Rule 15 relief to cure a complaint which lacks 9(j) certification. To allow a Rule 15 amendment to cure a 9(j) complaint where the review by the expert occurred after the filing of the lawsuit completely abrogates the express language of the statute and intent of the legislature.

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1. Minutes not cited as authority, but provide guidance for legislative intent.

In addition, the rules of statutory construction as quoted above provide that, if any conflict or ambiguity results from the comparison of two rules addressing the same subject, the statute that deals with the subject matter with particularity will be viewed as controlling, absent clear legislative intent otherwise. *Thornburg*, 84 N.C. App. at 485, 353 S.E.2d at 415. Rule 9(j) specifically addresses complaints alleging medical malpractice, while Rule 15 is a general provision allowing for amendment to any variety of pleadings, where justice so requires. Accordingly, the specifically tailored mandates of Rule 9(j) must prevail.

Applying these principles to the case *sub judice*, the trial court did not abuse its discretion in dismissing plaintiff's complaint. On 8 June 1999, the very day that the three year statute of limitations was to expire, plaintiff filed a motion to extend the statute of limitations for alleged negligence that occurred 8 June 1996. The motion was allowed and plaintiff's deadline was extended to 6 October 1999 pursuant to 9(j) which states that a trial judge "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. . . ." Rule 9(j). Thereafter on 6 October 1999, the final date of the extended deadline, plaintiff filed her original complaint without the certification required by Rule 9(j). Plaintiff then filed an amended complaint on 12 October 1999 which stated in Paragraph 19 "[t]hat the Plaintiff's medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence. . . ."

Plaintiff did not allege that the review occurred before the filing of the original complaint on 6 October, nor did she come forward with an affidavit as did the plaintiff in *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 315 N.C. 589, 528 S.E.2d 568 (2000), which stated that the medical care had been reviewed prior to the filing of the original complaint. *Brisson*, 351 N.C. at 592, 528 S.E.2d at 569-70. The record is devoid of any evidence that plaintiff obtained such review prior to filing the lawsuit. The plaintiff in this case appears to be doing precisely what the legislature sought to prevent—the filing of a last minute medical malpractice suit without review by a qualified expert willing to testify in support of plaintiff's claim of negligence. While questions

remain as to whether Rule 15 relief may be used to cure a defective complaint, there appears to be no disagreement over the legislature's intent to prevent the filing of frivolous medical malpractice lawsuits. *See Keith v. Northern Hosp. Dist. of Surry County*, 129 N.C. App. 402, 404-05, 499 S.E.2d 200, 202, *disc. review denied*, 348 N.C. 693, 511 S.E.2d 646 (1998); *Brisson*, 315 N.C. 589, 528 S.E.2d 568 (2000) (court declined to address relationship of Rule 9(j) and Rule 15). The plaintiff in this case is not entitled to further consideration. The trial court properly dismissed her complaint in that it did not comply with Rule 9(j).

While I am not prepared to accept the proposition that Rule 9(j) precludes Rule 15 relief as a matter of law; nor am I prepared to accept the majority's position in the present case that a plaintiff, pursuant to Rule 15, is entitled as a matter of course, to amend a defective 9(j) complaint. Absent legislative intervention to clarify whether it intended to preclude Rule 15 relief in all medical malpractice cases where there is a defective 9(j) complaint, I believe the decision of whether a plaintiff should be granted Rule 15 relief to cure a defective 9(j) complaint should be decided on a case by case basis. Further, I will not second guess the trial court in its exercise of discretion where there is a reasonable basis for its decision.

The trial court did not abuse its discretion in dismissing plaintiff's original complaint for lack of 9(j) certification. Nor did it err in dismissing the plaintiff's amended complaint on the basis that it was filed outside the statute of limitations, and did not relate back to the original filing date pursuant to Rule 15(c).

I would affirm the trial court in this case.

KENDRA J. THIGPEN, PLAINTIFF-APPELLANT v. CORAZON NGO, M.D., MARSHALL B. FRINK, M.D., NATIONAL EMERGENCY SERVICES, INC., EMERGENCY PHYSICIANS ASSOCIATION, INC., CP/NATIONAL, INC. A/K/A COMMUNITY PHYSICIANS/NATIONAL, INC., AND ONSLOW COUNTY HOSPITAL AUTHORITY, DEFENDANT-APPELLEES

No. COA00-410

(Filed 1 May 2001)

Medical Malpractice— Rule 9(j) certification—Rule 56—dismissal improper—summary judgment improper

The trial court erred in a medical malpractice action by dismissing plaintiff's initial complaint based on a lack of N.C.G.S. § 1A-1, Rule 9(j) certification and by granting summary judgment on plaintiff's amended complaint under N.C.G.S. § 1A-1, Rule 56.

Judge BIGGS dissenting.

Appeal by plaintiff from judgment entered 6 December 1999 by Judge Jay D. Hockenbury in Superior Court, Onslow County. Heard in the Court of Appeals 6 February 2001.

Jimmy F. Gaylor for plaintiff-appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by E.C. Bryson, Jr. and Christopher J. Derrenbacher, for defendant-appellees Marshall B. Frink, M.D., National Emergency Services, Inc., and CP/National, Inc., a/k/a Community Physicians/National, Inc.

McGEE, Judge.

Plaintiff appeals the dismissal and entry of summary judgment in her medical malpractice suit as to defendants Marshall B. Frink, M.D. (Frink), National Emergency Services, Inc. (NES), and CP/National, Inc., a/k/a Community Physicians/National, Inc. (CP/N). For the reasons stated below and in companion case COA00-409, we reverse the trial court's dismissal and summary judgment.

Plaintiff alleges that defendants committed medical malpractice on 8 June 1996. On 8 June 1999, plaintiff secured an extension of 120 days to the three-year statute of limitations for actions for medical

malpractice pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j). On 6 October 1999, the final day of the extension, plaintiff filed a complaint which lacked the certification required by Rule 9(j). On 12 October 1999, before defendants had filed responsive pleadings, plaintiff amended her complaint as a matter of course pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(a) to include the requisite Rule 9(j) certification.

In November 1999, defendants Frink, NES and CP/N moved for judgment on the pleadings and summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(c) and 56. On 6 December 1999, the trial court dismissed plaintiff's original complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j) for lack of certification and granted summary judgment on plaintiff's amended complaint in favor of defendants Frink, NES and CP/N pursuant to Rule 56 insofar as the claims were barred by the statute of limitations for actions for medical malpractice. Plaintiff appeals the trial court's judgment.

Plaintiff assigns error to "[t]he court's granting of the defendants' motions under N.C.R.Civ.P. 12(b)(6)9(j)" [sic] and cites to an incorrect page in the record for the error, in violation of N.C.R. App. P. 10(c)(1). Defendants Frink, NES and CP/N made no Rule 12(b)(6) motion, and plaintiff assigns no error to the trial court's grant of summary judgment in favor of defendants Frink, NES and CP/N. In fact, plaintiff's assignments of error in the present case are identical to those in companion case COA00-409, plaintiff's appeal from a dismissal under Rules 9(j) and 12(b)(6). In our discretion we nonetheless consider the arguments of plaintiff pursuant to N.C.R. App. P. 2.

All other issues presented in the present case are considered and resolved in companion case COA00-409. The trial court erred in dismissing plaintiff's initial complaint and in granting summary judgment on plaintiff's amended complaint. Accordingly, we reverse the trial court's judgment.

Reversed.

Judge WYNN concurs.

Judge BIGGS dissents.

BIGGS, Judge dissenting.

The plaintiff's assignments of error in the present case are identical to those considered and resolved in companion case COA00-409 filed on 1 May 2001. Accordingly, I dissent and find that the trial court did not abuse its discretion in dismissing plaintiff's original complaint, nor did it err in granting summary judgment as to plaintiff's amended complaint for the reasons set forth in the dissent in companion case COA00-409.

I would affirm the decision of the trial court in this case.

KENNETH A. BLOCH, PLAINTIFF-APPELLEE v. THE PAUL REVERE LIFE INSURANCE COMPANY, THE PAUL REVERE VARIABLE ANNUITY INSURANCE COMPANY, THE PAUL REVERE PROTECTIVE LIFE INSURANCE COMPANY, KYLE S. MERCER AND BRIDGET COSTNER, DEFENDANTS-APPELLANTS

No. COA00-97

(Filed 1 May 2001)

1. **Employer and Employee— termination of at-will employee—damages**

The trial court erred by denying a motion for judgment notwithstanding the verdict by defendants-Paul Revere in an action arising from the termination of an at-will employee on the ground that the employee could not recover damages past his termination date. Although the jury returned damages for 15 years of lost earnings, either plaintiff or defendant could terminate the employment contract for any reason with thirty days' notice and plaintiff had no contractual right or reasonable expectation of 15 years continued employment.

2. **Wrongful Interference— tortious interference with employment contract—co-employees—sufficiency of evidence**

The trial court did not err by denying motions for a directed verdict, judgment notwithstanding the verdict, or a new trial by defendants Mercer and Costner on a tortious interference with contract claim where there was sufficient evidence to show that these two defendants, co-employees with plaintiff, were not motivated in their actions by reasonable good faith attempts to protect their interests or the corporation's interests, and that they exceeded their legal right or authority in order to prevent the continuation of the contract between plaintiff and defendants-Paul Revere.

Appeal by defendants from judgment entered 11 June 1999 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 February 2001.

Wilson & Bos, by Gerard A. Bos, for plaintiff-appellee.

Robinson, Bradshaw & Hinson, P.A., by Charles E. Johnson; Paul, Hastings, Janofsky & Walker, LLP, by Eric T. Levine and Patrick W. Shea, for defendants-appellants.

TYSON, Judge.

Defendants: The Paul Revere Life Insurance Company, The Paul Revere Variable Annuity Insurance Company, and The Paul Revere Protective Life Insurance Company (collectively, "Paul Revere") and individual defendants Kyle S. Mercer ("Mercer") and Bridget Costner ("Costner"), appeal the trial court's entry of judgment in favor of plaintiff Kenneth A. Bloch ("Bloch"). We reverse in part and affirm in part the trial court's entry of judgment as to Paul Revere, and affirm the trial court's entry of judgment as to Mercer and Costner.

Facts

Bloch began working for Paul Revere as a Group Insurance Underwriter in 1972 in Chicago, Illinois. In 1979, Bloch was transferred to Charlotte, North Carolina to establish a disability insurance office for Paul Revere. On 1 November 1983, Bloch executed a General Management Agreement ("GMA") with Paul Revere to become a Brokerage General Manager in Paul Revere's Charlotte office. The GMA detailed Bloch's responsibilities as General Manager and Paul Revere's responsibilities of support and assistance for Bloch's office operations. The GMA provided: (1) "Paul Revere reserves the right to restrict [Bloch's] authority at any time with respect to . . . the management of the office" and (2) "[t]his Agreement may be terminated by either party giving the other thirty days' written notice."

Mercer was also transferred by Paul Revere to Charlotte in 1983. In 1984, Mercer became a General Manager for Paul Revere's Group Sales in Charlotte. Although Bloch and Mercer worked in different divisions of Paul Revere, Brokerage and Group, the two were required to work together to sell certain policies. Bloch and Mercer exercised differing management styles, and friction developed between the two.

Costner began employment with Paul Revere in 1984 as an office manager, supervising the daily functions of Bloch's Brokerage office. Bloch promoted Costner to Brokerage Representative in 1986. Bloch considered Costner for a promotion to Sales Manager in 1991. In a confidential annual evaluation for management review, Bloch stated that Costner was a candidate for the Sales Manager position. However, Bloch expressed concern that Costner was a single mother with two children, and that she "no longer has any support mechanism at home." Costner was not promoted in 1991.

In 1992, Mary Rachal, Sales Vice-President, provided Costner with a set of criteria to achieve in order for her to be promoted to Sales Manager in Bloch's office by 1993. Bloch urged Costner to meet the criteria and work for the promotion.

In July 1993, Mercer was promoted by Paul Revere to Regional Managing Director. Bloch remained in his position as General Manager. Bloch requested Paul Revere's senior management to reconsider Mercer's promotion, without success. Mercer was promoted. Bloch was required to report to Mercer.

Costner and Mercer had become friendly during the time they worked together at Paul Revere. Donald Tardif ("Tardif"), a sales representative in Mercer's Charlotte office and Mercer's personal friend, testified that Mercer and Costner had confided in him that their relationship had developed into a sexual relationship. Susan Potter ("Potter"), who became Bloch's Office Manager in 1991, corroborated that Costner had admitted to having a sexual relationship with Mercer.

Tardif also testified that Mercer and Costner often talked about Bloch, "how poor of a manager he was, how much they disliked him, they didn't trust him, he was an idiot." Tardif further testified that, based on "just hundreds of conversations," it was apparent that Mercer "was interested in having Mr. Bloch removed from Paul Revere." Potter testified that Bloch was "one of the best managers [she] ever had."

Following Mercer's promotion, and with his assistance, Costner filed a formal internal discrimination complaint against Bloch. Costner alleged that Bloch unfairly discriminated against her by failing to promote her to Sales Manager in 1991. Specifically, Costner cited as unfair Bloch's comments that he was concerned about her single-mother status at home.

Bloch testified that his comments were made in a confidential review for management, and that he did not know how Costner obtained the document. A copy of the review with Costner's handwritten notes was introduced into evidence. Bloch testified it was "highly unusual" for a sales representative to have a copy of their own evaluation, and that he was "flabbergasted" when he saw Costner's handwritten notes on the evaluation.

Paul Revere investigated Costner's complaint. Patrick Morris ("Morris"), Sales Vice-President, interviewed Costner, Mercer and Bloch. Costner alleged that Bloch reneged on a promise to promote her. Bloch denied promising Costner the promotion. Bloch testified that he asked to see any documentation that had been developed regarding the complaint, but that Paul Revere management "refused to give it to [him]." Bloch acknowledged that his GMA gave Paul Revere senior management the final authority to determine office operations, including promotions.

Over Bloch's written protest, Morris promoted Costner to the Sales Manager position in Bloch's office in December 1993. Morris further ordered Bloch to pay Costner back pay and manager commissions from November 1991 through November 1993. Bloch made the required payments.

Costner admitted at trial that she had not met all of the sales criteria that had been given to her by Mary Rachal prior to her promotion. Tardif testified that just prior to her promotion, Mercer confided in him that "he was concerned" about Costner because she "was not doing her job." Tardif testified that Mercer admitted to him that Costner "was not achieving her numbers." Mercer told Tardif that "because of their friendship he was fighting hard for her." Bloch also testified that Mercer had expressed to him that Costner was not qualified for the promotion, but that Mercer supported her claim that she was entitled to the promotion nonetheless.

Potter testified that she later discovered Costner had told Paul Revere senior management that Potter had corroborated her claim that Bloch promised Costner the promotion. Potter drafted a letter to Barry Lundquist ("Lundquist"), Senior Sales Vice-President, to state that she "absolutely did not" corroborate Costner's claim, and that she never heard Bloch promise Costner the promotion. Potter testified that she was upset that no one had "even bothered to look into it or ask me or have anyone else ask me." Potter further stated that she

expressed to Lundquist that she felt "that there were still things going on in the office that [he] needed to know about."

Relations between Bloch, Mercer, and Costner continued to deteriorate. Bloch testified that after Mercer became a regional director, Mercer began to "circumvent [his] general managership." Bloch testified that Mercer began sending documents and "pertinent information on the running of the brokerage operation" directly to Costner. Bloch complained to Morris, who stated that he would have Mercer rectify the situation. Bloch testified that the situation did not change, and that Mercer continued to channel information "that should be coming to the manager . . . directly to Bridget Costner and not to me at all."

Bloch stated that the documents Mercer channeled to Costner "did in fact affect the performance of the operation and other representatives." Bloch testified that Mercer sent Costner, and not Bloch, the training manuals for two large Paul Revere accounts. The manuals contained pertinent information on how to operate the accounts. Tardif testified that while he worked in Mercer's Charlotte office, he witnessed and participated in conversations with Mercer and Costner wherein Costner would provide Mercer with information about Bloch's office and operation, even though Costner reported to Bloch.

Bloch testified that he "redefined [Paul Revere's] override system that [employees] could give commissions to brokers. Ms. Costner was aware of that." Bloch further testified that Costner interfered in a broker relationship without his knowledge. Costner completed documentation raising a broker's commission from 50% to 70%. This documentation required Bloch's signature as General Manager. However, the documents were signed by Mercer and delivered directly to the Paul Revere home office without Bloch's knowledge. Bloch learned of the higher commissions from the home office, and requested that the documents be sent back to Charlotte for his review.

Bloch stated that overall, Costner and Mercer were "undermining my authority at every turn. [Costner] was running into [Mercer's] office all the time, [Mercer] was running into [Costner's] office all the time. I had learned that [Costner] had made comments that I could not be trusted, and do not talk with [me], those types of things." Bloch testified that Mercer's and Costner's actions had a negative impact on his operations. Frances Hendricks ("Hendricks"), Costner's assistant, complained to Bloch that "she was unhappy having to cover

up for [Costner]" and that she was "intimidated to go directly to [Mercer]."

Tardif testified that in 1994, Mercer discussed with both Tardif and Morris his desire to remove Bloch from the Charlotte office. They discussed a proposal for a new distribution system at Paul Revere in North Carolina which would eliminate the distinction between the Brokerage and Group divisions. The new distribution system eliminated the need for Bloch's General Manager position. Tardif testified that Mercer and Costner expressed to him that one of the reasons to implement the new plan was to force Bloch out.

Bloch testified that Mercer developed a new marketing initiative program in 1995. Bloch stated that Mercer did not inform him of the new program, thereby preventing Bloch's sales representatives from benefitting from the new program. Again in 1995, Mercer introduced a new sales program in the Carolinas. Bloch testified that the program information went directly to Costner and not to Bloch, thereby "prevent[ing] all my other reps [other than Costner] from selling that concept." Bloch testified that the new concepts and initiatives were introduced to his sales team, only after his removal as General Manager.

In 1995, Bloch discovered Costner's handwritten notes in her office, wherein Bloch's removal from the Charlotte office was contemplated. The notes expressed a need for better leadership, and stated that Bloch had caused "low productivity, continuous staff problems, low morale, lack of vision, growth and unity." Costner also had written that Bloch had continuously failed to meet goals, and that "he is distrusted by sales and staff alike." Costner's notes concluded that Mercer should be made head of all operations in Charlotte.

Bloch interpreted the notes as originating from a meeting of which Bloch was not aware and had not attended. Costner testified that the notes were a "homework" assignment, wherein she was asked to design her own ideal office structure as though she had "a magic wand." Bloch reported the notes to Morris and Lundquist. Bloch informed them that Mercer and Costner were conspiring against him and interfering with his ability to perform his job. Bloch testified that he had never received an unfavorable performance review during his employment at Paul Revere.

While Lundquist investigated the contents of Costner's memorandum, Costner filed another complaint against Bloch. Costner based

the complaint on the manner in which Bloch had handled Hendrick's complaint of being unhappy working for Costner, and of being intimidated by Mercer. Bloch testified that Costner was upset because "[Costner] felt that she could control the situation, that no one had to be involved in it." Mercer accused Bloch of lying about the details surrounding Hendricks' complaint.

Mercer prepared a memorandum to Lundquist and Morris on 20 September 1995. The memorandum contained "a written summary of [Mercer's] notes with the employees who are involved in a recent situation involving [Bloch] and the Charlotte Brokerage office." Mercer's memorandum indicated that he interviewed Tanya Green ("Green"), a sales assistant in Bloch's office, on 11 September 1995. Mercer's memorandum also indicated that Green had told Mercer that Bloch did not provide "backup or support" for employees. Mercer's memorandum indicated that Green stated that Costner "cares about the staff and how we feel and our happiness. . . ." Green testified that Mercer never conducted any such interview.

As a result of the memorandum and Costner's complaint, Paul Revere investigated Bloch. Morris spent time at the Charlotte office evaluating Bloch in November 1995. Bloch testified that Morris also met with Costner. Bloch told Morris the various problems he had encountered with Mercer and Costner. Morris' evaluation report did not address Bloch's concerns. Morris' report detailed Bloch's weaknesses, the "biggest concern" of which was Bloch's "leadership abilities going forward." Morris' report concluded that Bloch's lack of improvement would be "grounds for removal from [his] management position."

Green testified that Morris called her on 14 November 1995. Morris' summary of the interview with Green indicated that Green had expressed that Bloch was not a good manager, that he did not help employees, that he encouraged only certain employees, but not Costner, and that Bloch always took 100% of the credit, without recognizing staff for their work. Green testified that she did not make any such statements to Morris, and that she did not know where Morris had gotten this information.

In November 1995, in the same month Morris evaluated Bloch's performance, Bloch received a letter from Lundquist congratulating Bloch on his outstanding performance:

> You are to be especially commended for your efforts and that of your associates for exceeding your contest goal during our just

> concluded centennial sales campaign. I know this in a large part has to do with the leadership you provide through your hard work, dedication, and the fact that you truly care about our company and your associates.

Bloch testified that Morris' appraisal report did not reference Bloch's high performance addressed in Lundquist's letter.

Morris instructed Bloch to meet with Mercer to discuss ways in which Bloch could improve his performance. Bloch met with Mercer at Morris' direction, also in November 1995. Bloch told Mercer that he believed that the two could work well together. Bloch testified that Mercer responded that he did not agree, and that he did not think Bloch would ever change. Mercer told Bloch that he "was fired," and to expect a package in December explaining Bloch's future role at Paul Revere. Bloch reported the incident to Morris. Morris directed Bloch to meet again with Mercer.

At Morris' direction, Bloch met with Mercer the following day. Bloch testified that he told Mercer, "let's get through these [trust factors] and let's work together for the future." Mercer responded to Bloch, "I don't like you, I don't respect you, I don't trust you . . . you're fired effective December 1, 1995." Bloch again reported the meeting to Morris, who told Bloch that he was not fired. Nonetheless, in late December 1995, Morris notified Bloch that Paul Revere was terminating his GMA. The contract ended 31 January 1996.

On 23 April 1996, Bloch filed this action against Paul Revere, Mercer, and Costner. Bloch alleged: (1) breach of contract; (2) tortious interference with contract; (3) intentional infliction of emotional distress; and (4) libel and slander. All defendants filed motions to dismiss, or in the alternative, for partial summary judgment on 24 June 1996. On 13 August 1996, the trial court granted partial summary judgment for defendants on Bloch's claim for breach of contract arising out of the termination of the GMA. The trial court dismissed Bloch's claim for tortious interference with contract against Paul Revere, as well as Bloch's claim for intentional infliction of emotional distress as to all defendants.

The trial court deferred judgment pending discovery on Bloch's breach of contract claim arising out of alleged breaches prior to termination of the GMA, claims for tortious interference with contract against Mercer and Costner, and Bloch's claim for libel and slander

against all defendants. On 8 May 1997, the trial court allowed defendants to file an Amended Answer with counterclaims against Bloch for breach of the GMA, breach of a fiduciary duty, and breach of a confidentiality agreement.

On 18 September 1997, the trial court denied defendants' renewed motion for summary judgment on Bloch's remaining claims. Bloch's claims were tried before a jury during April 1999. All defendants moved for a directed verdict following the close of Bloch's evidence. The trial court granted the motion as to Bloch's libel and slander claims, but denied the motion as to all other claims.

The jury returned a verdict in favor of Bloch in the amount of $1,079,000.00 for breach of contract. The jury specifically divided the breach of contract award, finding that the amount of damages Bloch suffered prior to the 31 January 1996 termination of the GMA was $15,000.00. The jury also found that Bloch sustained damages of $1,064,000.00 after termination of the GMA.

The jury also awarded Bloch $75,000.00 in compensatory damages and $100,000.00 in punitive damages against Mercer for tortious interference with contract. The jury further awarded Bloch $15,000.00 in compensatory damages and $5,000.00 in punitive damages against Costner for tortious interference with contract. The jury found that Bloch had breached the GMA, the confidentiality agreement, and a fiduciary duty. The jury awarded Paul Revere a total of $5,000.00.

On 3 May 1999, all defendants moved for judgment notwithstanding the verdict, or new trial. The trial court denied the motions on 4 June 1999. The trial court entered judgment on the jury's award on 11 June 1999, and additionally ordered that all defendants pay Bloch a total of $19,105.25 in costs, and that Bloch pay Paul Revere $822.00 in costs. Defendants appeal.

Issues

Paul Revere appeals the trial court's denial of its motions for directed verdict, judgment notwithstanding the verdict, or new trial, contending that Bloch is an at-will employee, and cannot recover damages beyond the 31 January 1996 termination of the GMA. Mercer and Costner appeal the trial court's denial of their motions for directed verdict, judgment notwithstanding the verdict, or new trial, on grounds that Bloch failed to produce evidence sufficient to sustain claims of tortious interference with contract.

We reverse the trial court's entry of judgment for $1,064,000.00 for Paul Revere's breach of contract post-termination. We remand for entry of judgment against Paul Revere for $15,000.00, plus costs and interest, consistent with the jury's finding of damages sustained by Bloch prior to termination of the GMA. We affirm the trial court's entry of judgment as to Mercer and Costner.

I. Breach of Contract

[1] Paul Revere assigns error to the trial court's denial of its motions for directed verdict, judgment notwithstanding the verdict, or new trial, on grounds that Bloch, an at-will employee, cannot recover damages past the 31 January 1996 termination of the GMA. We agree.

Our standard of review on a motion for directed verdict and judgment notwithstanding the 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)).

Here, the jury returned a verdict in favor of Bloch for $1,079,000.00 for breach of Bloch's GMA. The jury specifically divided the award, indicating that Bloch was entitled to $15,000.00 for Paul Revere's breach of the GMA prior to its 31 January 1996 termination. The jury awarded $1,064,000.00, equal to 15 years of Bloch's lost earnings, following his termination. Paul Revere does not assign error to the trial court's entry of judgment in favor of Bloch for $15,000.00 prior to termination of the GMA.

It is a well-established principle of contract law that:

> 'A party to a contract who is injured by another's breach of the contract is entitled to recover from the latter damages for all injuries and only such injuries as are the direct, natural, and proximate result of the breach or which, in the ordinary course of events, would likely result from a breach and can reasonably be said to have been foreseen, contemplated, or expected by the parties at the time when they made the contract as a probable or natural result of a breach.'

Lamm v. Shingleton, 231 N.C. 10, 14, 55 S.E.2d 810, 812-13 (1949) (quoting 15 A.J. 449, § 51; 25 C.J.S. Damages, § 24, page 481). "The

interest being protected by this general rule is the non-breaching party's 'expectation interest.' " *First Union Nat'l Bank of North Carolina v. Naylor*, 102 N.C. App. 719, 725, 404 S.E.2d 161, 164 (1991) (quoting Restatement (Second) of Contracts § 344(a) comment a (1979)).

Our Supreme Court has specifically held that the measure of damages recoverable for breach of an employment contract is "the actual loss or damage sustained on account of the breach. The maximum amount recoverable would be the difference, if any, between the agreed compensation and the amount plaintiff earned or by reasonable effort could earn during the contract period." *Thomas v. Catawba College*, 248 N.C. 609, 615, 104 S.E.2d 175, 179 (1958) (citations omitted) (emphasis supplied); *see also, Lowery v. Love*, 93 N.C. App. 568, 571, 378 S.E.2d 815, 817 (1989).

It is also well-settled "that 'in the absence of an employment contract for a definite period, both employer and employee are generally free to terminate their association at any time and without any reason.' " *McMurry v. Cochrane Furniture Co.*, 109 N.C. App. 52, 54, 425 S.E.2d 735, 737 (1993) (quoting *Salt v. Applied Analytical*, Inc., 104 N.C. App. 652, 655, 412 S.E.2d 97, 99 (1991), *disc. review denied*, 331 N.C. 119, 415 S.E.2d 200 (1992)).

We apply these basic contract principles here. Bloch maintained that Paul Revere's breach of its obligations under the GMA interfered with Bloch's ability to perform the GMA. As a result, Bloch sustained an actual loss of the GMA. Bloch's damages for Paul Revere's breach of the GMA are coequal with his entitlement under the GMA. Bloch was entitled to recover the damages he sustained only while the GMA was effective. The jury determined this amount to be $15,000.00. Bloch, a contractual employee for an indefinite term, was not contractually or legally entitled to continued employment with Paul Revere under the GMA beyond 30 days. Paul Revere or Bloch could terminate the GMA for any reason with 30 days notice. Thus, Bloch is not entitled to recover damages beyond the lawful termination of the GMA. *See Bennett v. Eastern Rebuilders, Inc.*, 52 N.C. App. 579, 583, 279 S.E.2d 46, 49 (1981) (contract damages for at-will employee are coextensive with entitlement).

The jury's award of $1,064,000.00, equal to 15 years of lost earnings following termination of the GMA, is contrary to basic contract principles. Bloch had no contractual right or reasonable expectation to 15 years of continued employment under the GMA. The trial court

erred in failing to grant Paul Revere's motion for judgment notwithstanding the verdict on breach of contract post-termination of the GMA.

II. Tortious Interference with Contract

[2] Mercer and Costner assign error to the trial court's denial of their motions for directed verdict and judgment notwithstanding the verdict, or new trial, on grounds that Bloch did not present evidence sufficient to sustain claims of tortious interference with contract against them. We disagree.

> The elements of tortious interference with contract are:
>
> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff.

Embree Construction Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992) (citing *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)). A plaintiff may maintain a claim for tortious interference with contract even if the employment contract is terminable at will. *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) (citing *Smith v. Ford Motor Co.*, 289 N.C. 71, 85, 221 S.E.2d 282, 290 (1976)).

A party who induces one party " 'to terminate or fail to renew a contract with another may be held liable for malicious interference with the party's contractual rights if the third party acts without justification.' " *Robinson, Bradshaw & Hinson, P.A. v. Smith*, 129 N.C. App. 305, 317, 498 S.E.2d 841, 850, *disc. review denied*, 348 N.C. 695, 511 S.E.2d 649 (1998) (quoting *Fitzgerald v. Wolf*, 40 N.C. App. 197, 199, 252 S.E.2d 523, 524 (1979)). Bad motive is the essence of a claim for tortious interference with contract. *Id.* at 318, 498 S.E.2d at 851 (citation omitted).

Whether a defendant is justified in interfering with a plaintiff's contract depends upon " 'the circumstances surrounding the interference, the actor's motive or conduct, the interests sought to be advanced, the social interest in protecting the freedom of action of the actor[,] and the contractual interests of the other party.' " *Robinson, Bradshaw & Hinson, P.A.* at 317-18, 498 S.E.2d at

850 (quoting *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 221, 367 S.E.2d 647, 650, *reh'g denied*, 322 N.C. 486, 370 S.E.2d 227 (1988)). A defendant may be justified in interfering with a contract if he does so " 'for a reason reasonably related to a legitimate business interest.' " *Id.* at 318, 498 S.E.2d at 850 (quoting *Fitzgerald*, 40 N.C. App. at 200, 252 S.E.2d at 524); *see also*, *Barnard v. Rowland*, 132 N.C. App. 416, 426, 512 S.E.2d 458, 465-66 (1999).

As a general rule, " 'non-outsiders' [to the contract] often enjoy qualified immunity from liability for inducing their corporation or other entity to breach its contract with an employee." *Lenzer* at 513, 418 S.E.2d at 286 (citing *Smith* at 85, 221 S.E.2d at 290). However, "[t]he qualified privilege of a non-outsider is lost if exercised for motives other than reasonable, good faith attempts to protect the non-outsider's interests in the contract interfered with." *Id.* (quoting *Smith* at 91, 221 S.E.2d at 294).

In order to hold a "non-outsider" liable for tortious interference with contract, a plaintiff must establish that the defendant acted with legal malice, that " 'he does a wrongful act or exceeds his legal right or authority in order to prevent the continuation of the contract between the parties.' " *Robinson, Bradshaw & Hinson, P.A.*, at 318, 498 S.E.2d at 851 (quoting *Varner v. Bryan*, 113 N.C. App. 697, 702, 440 S.E.2d 295, 298 (1994)). "The plaintiff's evidence must show that the defendant acted without any legal justification for his action." *Varner* at 702, 440 S.E.2d at 298 (citation omitted).

Mercer and Costner argue that, as employees of Paul Revere, they were "non-outsiders" to Bloch's GMA, and are insulated from liability. They also argue that Bloch did not present sufficient evidence to establish that they acted outside the scope of their employment and without a legitimate business interest, consequently establishing that they acted without legal justification.

In *Lenzer*, *supra*, we held that the plaintiff forecast sufficient evidence to overcome the defendants' "non-outsider" privilege. *Lenzer*, 106 N.C. App. at 512-13, 418 S.E.2d at 286. The defendants argued that they were immune from liability because "their supervisory status dictates they were not outsiders to plaintiff's employment contract." *Id.* The plaintiff alleged that the defendants, her supervisors, purposefully withdrew their supervision from her "for the purpose of causing her to lose the certification required for plaintiff to maintain her position with the State." *Id.* at 512, 418 S.E.2d at 286. She alleged "that defendants were motivated by unlawful reasons rather than

legitimate business interests; and that withdrawal of supervision in fact caused the intended effect of plaintiff losing her employment, resulting in damage to plaintiff." *Id.*

We stated that even if the defendants "were deemed to have the status of non-outsiders, such status 'is pertinent only to the question [of the] justification for [defendants'] action.' " *Id.* at 513, 418 S.E.2d at 286 (quoting *Smith*, 289 N.C. at 88, 221 S.E.2d at 292). In reversing summary judgment for the defendants, we noted that the plaintiff's "forecast of evidence raises precisely the issue of wrongful purpose, which would defeat a non-outsider's qualified privilege to interfere." *Id.*

This Court recently reiterated the principles set forth in *Lenzer*. *See Barker v. Kimberly-Clark Corp.*, 136 N.C. App. 455, 524 S.E.2d 821 (2000). We again held that "non-outsider" status does not insulate a defendant from liability where the defendant acts without a reasonable, good-faith motive. *Id.* at 463, 524 S.E.2d at 826.

The plaintiff in *Barker* alleged that her former managers, the defendants, "out of personal hostility and ill-will toward the Plaintiff, schemed to come up with false and defamatory accusations against the Plaintiff with the intent to bring about the termination of her employment." *Id.* at 463, 524 S.E.2d at 826-27. The plaintiff further alleged that the defendants had a "hit list" of employees they wanted "to get rid of," and that her name was on the list. *Id.* at 463, 524 S.E.2d at 827. The plaintiff contended that when she confronted one of the defendants about the "hit list," he admitted his desire to terminate her employment. *Id.* We reversed the trial court's entry of summary judgment for the defendants, and held that the plaintiff's forecast of evidence was sufficient to raise an issue of whether the defendants' motives "were reasonable, good faith attempts to protect their interests or the corporation's interests." *Id.*

In the present case, Tardif testified that Mercer and Costner constantly discussed their desire to have Bloch terminated. Tardif also testified that Mercer was receiving improper and illegal commissions through a Paul Revere shell entity known as Tax Advantage Planning Company ("TAPCO"), which consisted only of a bank account. Tardif testified that, aside from Mercer's desire to be in control of all North Carolina operations, Mercer wanted Bloch terminated, in part, due to "the fact that [Bloch] was aware of TAPCO." One month prior to his termination, Bloch made known to Paul Revere that he had a "file of evidence" against Mercer.

Tardif testified that Costner, who reported to Bloch, provided Mercer with the details of Bloch's operations. Bloch also testified that Mercer and Costner shared information pertinent to Bloch's office operations without Bloch's knowledge. The evidence established that Mercer channeled information intended for Bloch, the General Manager, directly to Costner, without Bloch's knowledge on several occasions. This information, including the operating manuals for two large Paul Revere accounts, was pertinent to Bloch's ability to successfully operate his office.

The evidence further established that Costner channeled information intended for Bloch, the General Manager, directly to Mercer, without Bloch's knowledge. This information, including increases in broker commissions, was pertinent to Bloch's success as General Manager. Bloch also forecast evidence that Mercer purposefully failed to disclose new sales initiatives and programs to Bloch and his sales representatives, other than Costner. The evidence established that such information was pertinent to the success of Bloch's office in relation to other Paul Revere offices. This and other testimony tended to show that Mercer's and Costner's actions to undermine Bloch as General Manager negatively impacted Bloch's performance and the operations in his area of responsibility.

Evidence also established that Mercer and Costner told Paul Revere senior management, as well as Paul Revere employees working in Bloch's office, that Bloch was a poor manager, that he could not be trusted, and that employees should not confide in or speak with Bloch. Hendricks, Costner's assistant, testified that she was unhappy having to "cover up" for Costner, and that she was intimidated by Mercer. Green testified that she never met with Mercer in September 1995, despite Mercer's memorandum to Lundquist and Morris indicating that he had interviewed Green, and that she had complained about Bloch's management skills. Green also testified that she never made the negative statements about Bloch that appeared in Morris' November 1995 notes from an interview with Green.

The evidence must be viewed in the light most favorable to Bloch, giving him the benefit of every reasonable inference to be drawn therefrom. *See Fulk*, 138 N.C. App. at 429, 531 S.E.2d at 479. We hold that Bloch presented sufficient evidence to show that Mercer and Costner were not motivated by "reasonable, good faith attempts to protect their interests or the corporation's interests," and that they exceeded their legal right or authority in order to prevent the contin-

uation of the contract between Bloch and Paul Revere. *See Barker* at 463, 524 S.E.2d at 827; *Robinson, Bradshaw & Hinson, P.A.*, at 318, 498 S.E.2d at 851.

We distinguish *Varner, supra*, on which Mercer and Costner rely. The plaintiff in *Varner* was the former town manager of Knightdale, North Carolina. *Varner*, 113 N.C. App. at 698, 440 S.E.2d at 296. The plaintiff brought suit for tortious interference with contract against three town council members who sought his resignation:

> Plaintiff's evidence tended to show that defendants' dissatisfaction with his performance was personal in nature, having to do with plaintiff's opinion that defendants Bullock and Bryan were violating certain town ordinances in connection with their businesses, or was politically motivated; defendants' evidence tended to show that they considered plaintiff's job performance to be inadequate. . . . [D]efendants informed plaintiff that they considered plaintiff's job performance to be inadequate and requested his resignation.

Id. at 699, 440 S.E.2d at 297.

In upholding the trial court's grant of summary judgment for the defendants, we held that the plaintiff failed to present evidence establishing that the defendants, as non-outsiders, acted with legal malice. *Id.* at 702, 440 S.E.2d at 299. We noted that the plaintiff, as town manager, served at the pleasure of the town council, and that the defendants, as town council members, had authority to discharge the plaintiff. *Id.* We stated that, "[e]ven if plaintiff was terminated by defendants for personal or political reasons, as his evidence tends to show, such termination was neither a wrongful act nor one in excess of defendants' authority and therefore not legally malicious." *Id.*

In this case, as compared to *Varner*, Bloch forecast evidence beyond Mercer's and Costner's personal or political motivation. The plaintiff's evidence in *Varner* did not establish that the defendants actively undermined the plaintiff's authority in a manner that interfered with the plaintiff's abilities as town manager. Nor did the evidence in *Varner* reveal that the defendants actively spread false and defamatory information about the plaintiff in an effort to turn other council members against him. The evidence merely showed that the defendants sought to terminate the plaintiff for personal reasons.

The present case is more analogous to *Lenzer* and *Barker*, where the evidence tended to show that the non-outsider defendants

actively schemed against the plaintiff, falsely accused the plaintiff, or purposely failed to supervise and work with the plaintiff in an effort to bring about termination.

We hold that Bloch presented sufficient evidence that Mercer and Costner interfered with his employment contract without legal justification to do so. The jury was entitled to consider these issues and render its verdict thereon. The trial court did not err in denying Mercer's and Costner's motions.

We hereby reverse the trial court's denial of Paul Revere's motion for judgment notwithstanding the jury's verdict of $1,079,000.00 for breach of the GMA. We remand for entry of judgment against Paul Revere in the amount of $15,000.00, with costs and interest awarded, consistent with the jury's finding of damages sustained by Bloch prior to the 31 January 1996 termination of the GMA. We affirm the trial court's entry of judgment for compensatory and punitive damages and costs against Mercer and Costner.

Affirmed in part, reversed and remanded in part.

Judges MARTIN and TIMMONS-GOODSON concur.

IN THE MATTER OF THE ESTATE OF GENERAL JACKSON PARRISH

No. COA00-348

(Filed 1 May 2001)

1. Estates— administration—distribution of wrongful death settlement—removal of personal representative

The clerk of superior court had authority to oversee distribution of the proceeds from a federal wrongful death action brought by a decedent's estate and retained jurisdiction to order removal of the personal representative and other relief, with the trial court likewise retaining authority to review the clerk's order. Although wrongful death proceeds are not assets in the estate, a personal representative's authority to commence and settle these actions is incident to the collection, preservation, liquidation, and distribution of a decedent's estate, the personal representative is

accountable for all property, including wrongful death proceeds, which came into her possession in relation to her duties as representative, and the clerk retains authority to remove the personal representative based on her failure to comply with statutory accounting guidelines or any other misconduct in the execution of her office, whether or not the misconduct related to the administration of estate assets.

2. Estates— administration—accounting and removal of personal representative—hearing—right of beneficiaries to participate

The beneficiaries of an estate had the right to participate in an action before the clerk and the subsequent action before the trial court which resulted in the distribution of wrongful death settlement proceeds and the removal of the personal representative even though the beneficiaries did not first file a formal civil action and were not parties to the action. This was an estate proceeding rather than a civil action and did not require a summons or like pleading. *In re Estate of Sturman*, 93 N.C.App. 473, indicated that interested parties are entitled to participate and be represented in proceedings before the clerk concerning estate matters, and the clerk in this case advised the beneficiaries of the hearing and requested their presence.

3. Estates— proceeds of wrongful death action—not assets of estate

The trial court did not err by concluding that the proceeds of a federal wrongful death action should have been distributed according to the laws of intestate succession where the personal representative argued that the settlement amount represented proceeds from pain and suffering during the decedent's lifetime and was an estate asset. An examination of the complaint and related documents reveals that the federal action was an action for wrongful death, as specified by N.C.G.S. § 28A-18-2, and none of the proceeds recovered in a wrongful death suit, whether for pain and suffering or for pecuniary loss, are assets of a decedent's estate.

4. Estates— personal representative—compromise of claims—no presumption of good faith

The trial court did not refuse to recognize a personal representative's right to compromise disputed or uncertain claims. A personal representative has the right to compromise a disputed

or doubtful wrongful death claim, and a review of these proceedings does not support plaintiff's argument that there was innuendo or doubt concerning her pursuit of and decision to settle the federal claim. Furthermore, neither her willingness to compromise nor her settlement of the wrongful death action was the basis of the court's decision to remove her as personal representative. All that is required of a personal representative is that she act in good faith, but she is not entitled to a presumption of good faith.

5. Appeal and Error; Estates— choice of replacement executor—no objection at trial—no abuse of discretion

The issue of whether the clerk of court erred by appointing the Public Administrator to oversee an estate rather than the testamentary alternative executor after removal of the original personal representative was not preserved for appeal where no such issue was presented at the trial court hearing and, even if it had been preserved, the clerk did not abuse her discretion.

Appeal by personal representative, Lucille S. White, from orders entered 18 August 1999 by Judge Robert H. Hobgood in Superior Court, Vance County. Heard in the Court of Appeals 25 January 2001.

Mozart A. Chesson for appellant.

Williams, Mullen, Clark & Dobbins, P.C., by Robert L. Samuel, for appellees.

TIMMONS-GOODSON, Judge.

In his Last Will and Testament, General Jackson Parrish ("Parrish" or "decedent") designated his daughter, attorney Lucille S. White ("White"), executrix and residuary legatee of his estate. In her capacity as the estate's personal representative, White filed an action in federal court to recover damages related to Parrish's death. White settled the federal court action in July 1998 for $275,000.00. After paying the attorneys' fees, White paid herself a commission of $133,500.00 and reimbursed herself for expenses in the amount of $40,216.41. White prepared to distribute the remainder of the court action proceeds to Parrish's heirs, pursuant to North Carolina's Wrongful Death Act, but ultimately distributed a share of the proceeds to only one heir.

On 23 February 1999, the Clerk of Superior Court ("the Clerk"), Vance County, issued an "Order to Appear and Show Cause for Failure to File Inventory/Account" against White, requesting that she appear and show cause concerning why she should not be held in contempt for failing to file an annual accounting of Parrish's estate. White filed an "accounting" on 5 March 1999 that designated the federal court action proceeds as "Estate Settlement Proceeds," which had been distributed to "Lucille S. White." White submitted an amended accounting and time sheets reflecting the work she performed in pursuing the federal court action to the Clerk via facsimile.

Following the show cause hearing and in an order entered 1 April 1999, the Clerk found the accountings filed by White unacceptable. The Clerk noted that the federal action proceeds should have been designated as wrongful death proceeds and that the faxed amended accounting should have been submitted in person, accompanied by canceled checks and receipts. The Clerk further noted that White failed to prove that the federal action proceeds existed and was unaware of certain information relating to the bank accounts in which the proceeds had been deposited.

The Clerk concluded that White was "negligent in her duties in filing accountings, distribution of [the] proceeds from the Wrongful Death action, and proof that the funds are still available to distribute according to the Intestate Succession [Act]." The Clerk further found that White "paid herself an unapproved fee . . . and reimbursed herself an unapproved amount . . . for her expenses." As a result, the Clerk ordered White to submit all proceeds from the federal court action, less attorneys' fees, for deposit into a trust fund, and revoked the letters testamentary issued to White. The Clerk further ordered White to submit information concerning her personal bank accounts and information relating to the debts and expenses incurred by Parrish's estate, including all canceled checks and receipts. The Clerk removed White from all duties relating to decedent's estate and appointed the Public Administrator "to finalize th[e] estate."

White appealed the Clerk's order to the Superior Court, specifically requesting that the court determine the nature of the federal court action proceeds. On 21 April 1999, the Clerk issued an interlocutory order, pursuant to North Carolina General Statutes section 28A-9-5, ordering "the assets of the said estate and the proceeds of the settlement of the said wrongful death action be forwarded and paid into the hands of the Clerk . . ., for safe keeping, pending the final resolution of the appeal in this matter." *See* N.C.G.S. § 28A-9-5 (1999).

Following a trial *de novo*, the trial court concluded that the federal court action proceeds were indeed wrongful death proceeds and not assets of the estate. The court further concluded that because White breached her fiduciary duty, she forfeited any right to a personal representative commission. In an order entered 18 August 1999, the court ordered White to submit the wrongful death proceeds to the Clerk, less White's approved expenses. The court found White in contempt of court for the disbursement of proceeds following the entry of the Clerk's 1 April 1999 order, but allowed White to purge the contempt by submitting the full amount of the wrongful death proceeds. Finally, the court revoked the letters testamentary granted to White.

The beneficiaries to the wrongful death proceeds participating in the proceedings below—Mary Jenkins, John Parrish, Edward Parrish, David Parrish, and Reo Parrish ("the beneficiaries")—moved for an award of attorneys' fees in Superior Court. White moved to dismiss the motion, arguing that the court did not have jurisdiction to award attorneys' fees. Finding that it did indeed have jurisdiction, the court granted the beneficiaries' motion in an order entered 18 August 1999.

White now appeals the 18 August 1999 orders of the Superior Court revoking the letters testamentary and awarding attorneys' fees.

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[1] White first contends that because the trial court found that the federal court action proceeds were not assets of the estate, the Clerk retained no authority to oversee the distribution of the proceeds. Therefore, White argues, neither the Clerk nor the trial court had jurisdiction to order an accounting of the wrongful death proceeds, to remove her as the estate's personal representative, to impose sanctions against her based upon alleged misconduct concerning the proceeds, or to order the proceeds submitted to the Clerk or Public Administrator. We disagree.

"The clerk of superior court . . . shall have jurisdiction of the administration, settlement, and distribution of *estates of decedents* . . . ." N.C.G.S. § 28A-2-1 (1999) (emphasis added). It is well established that proceeds from wrongful death actions are not part of a decedent's estate. *In re Below*, 12 N.C. App. 657, 659, 184 S.E.2d 378, 380 (1971). Therefore, "[i]n receiving funds paid in settlement of a wrongful death claim[,] a personal representative of a decedent's estate is not acting for the estate but as a trustee for the beneficiaries under the law." *Id.* at 660, 184 S.E.2d at 381. Because wrongful death

proceeds are not assets in the decedent's estate, these proceeds are not subject to the assessment of costs, *id.* at 659, 184 S.E.2d at 380, and are not subject to the payment of estate debts. N.C.G.S. §§ 28A-15-10 and 28A-18-2 (1999) (stating that "Where there has been a recovery in an action for wrongful death, the same shall not be applied to the payment of debts and other claims against the estate of decedent").

Therefore, we must determine whether the Clerk retained jurisdiction to revoke the personal representative's letters testamentary and order other related relief concerning the alleged mishandling of monies that were not assets in decedent's estate. The resolution of this issue depends upon a careful reading of the applicable statutory authority.

The clerk of superior court's jurisdiction over a decedent's estate encompasses the "[g]ranting of letters testamentary" to personal representatives. N.C.G.S. § 28A-2-1; *In re Estate of Adamee*, 291 N.C. 386, 397, 230 S.E.2d 541, 548-49 (1976). Sections 28A-9-1 and 28A-9-2 of our General Statutes grant a clerk the authority to revoke a personal representative's letters testamentary. N.C.G.S. §§ 28A-9-1 and 28A-9-2 (1999).

Personal representatives are fiduciaries in administering and distributing an estate. N.C.G.S. § 28A-13-2 (1999). Although wrongful death actions may not yield assets for the estate, a personal representative's authority to commence and settle these actions is "[i]ncident to the collection, preservation, liquidation [and] distribution of a decedent's estate." N.C.G.S. § 28A-13-3(a) (1999).

Personal representatives are obligated by statute,

> for so long as any of the property of the estate remains in [their] control, custody or possession, [to] file annually in the office of the clerk of superior court an inventory and account, under oath, of the amount of property received by [them], or invested by [them], and the manner and nature of such investment, and [their] receipts and disbursements for the past year.

N.C.G.S. § 28A-21-1 (1999); *see cf. Godfrey v. Patrick*, 8 N.C. App. 510, 512, 174 S.E.2d 674, 676 (1970) (stating that "the court has the inherent power to require any appointed fiduciary to file periodic accounts"). Our General Statutes further provide that "[a] personal representative *shall be chargeable in* [*her*] *accounts* with property not a part of the estate which comes into [her] possession at any time." N.C.G.S. § 28A-13-10 (1999) (emphasis added); *see also*

N.C.G.S. § 28A-21-3 (1999) (accounting must include "[t]he amount and value of the property of the estate" as well as "property on hand constituting the balance of the account, if any" and "[a]ll payments, charges, losses, and distributions").

If a personal representative fails to file an accounting in accordance with the aforementioned statutory provisions, a clerk of superior court may compel her to do so. N.C.G.S. § 28A-21-4 (1999); *Ingle v. Allen*, 53 N.C. App. 627, 629, 281 S.E.2d 406, 408 (1981) (citations omitted) (finding that original jurisdiction over accountings "should properly be initially exercised by the clerk"). If, after being compelled to file an accounting, the personal representative fails to do so or files an unsatisfactory account, "the clerk may remove [her] from office." N.C.G.S. § 28A-21-4. Letters testamentary are further revocable if "[t]he person to whom they were issued has violated a fiduciary duty through default or misconduct *in the execution of [her] office.*" N.C.G.S. § 28A-9-1(a)(3) (emphasis added).

Section 28A-23-3(a) mandates that the clerk has discretion in compensating a personal representative out of the estate assets. N.C.G.S. § 28A-23-3(a) (1999). Where an attorney acts as personal representative for an estate, the clerk, "in his discretion, is authorized and empowered to allow counsel fees to [the] attorney . . . where such attorney . . . renders professional services . . . which are beyond the ordinary routine of administration." N.C.G.S. § 28A-23-4 (1999). A clerk may compensate a personal representative out of wrongful death proceeds, where the representative performed legal services in relation to a wrongful death action and no assets remain in the estate. *In re Lessard*, 78 N.C. App. 196, 198, 336 S.E.2d 712, 714 (1985). However, "[n]o personal representative . . . , who has been guilty of . . . default or misconduct in the due execution of [her] office resulting in the revocation of [her] appointment . . . , shall be entitled to any commission." N.C.G.S. § 28A-23-3(e).

A close examination of the aforementioned statutory provisions reveals that the Clerk retained jurisdiction over the actions or misdeeds of White, whether or not she was administering estate assets. White was accountable for all property, including wrongful death proceeds, which came into her possession in relation to her duties as representative. *See cf.* 2 James B. McLaughlin, Jr. & Richard T. Bowser, *Wiggins Wills and Administration of Estates in North Carolina* § 239 n.4, at 138 (4th ed. 2000) (noting that original estate inventory submitted to clerk by personal representative "should include any wrongful death action the personal representative should bring");

Jenkins v. Wheeler, 69 N.C. App. 140, 144, 316 S.E.2d 354, 357 (1984) (finding allegations of attorney malpractice sufficient where plaintiff alleged, among other things, that attorney failed to advise personal representative to list wrongful death action as an asset in accounting), *disc. review denied*, 311 N.C. 758, 321 S.E.2d 136 (1984). Moreover, White should have sought the Clerk's approval prior to paying herself a commission out of the wrongful death proceeds.

The Clerk further retained the authority to remove White based on her failure to comply with the statutory accounting guidelines or any other misconduct "in the execution of [her] office," whether that misconduct related to the administration of estate assets or not. N.C.G.S. §§ 28A-9-1(a)(3) and 28A-23-3(e). Accordingly, the Clerk in the case *sub judice* retained jurisdiction to order White's removal and other relief in relation to her handling of the wrongful death proceeds. The trial court likewise retained the authority to review the Clerk's order *de novo*. *See In re Estate of Longest*, 74 N.C. App. 386, 328 S.E.2d 804, 807, *disc. review denied*, 314 N.C. 330, 333 S.E.2d 488 (1985). White's first argument is therefore without merit.

[2] By her next argument, White contends that the beneficiaries did not have a right to participate in the action before the Clerk or the trial court because they failed to first file a formal civil action and because they were not "parties" in the action below. With this argument, we cannot agree.

We recognize that an action for damages resulting from a fiduciary's breach of duty in the administration of a decedent's estate is not a claim under the original jurisdiction of the clerk of court. Such actions should, therefore, be brought as civil actions in the trial division of Superior Court. *See Ingle*, 53 N.C. App. at 628-29, 281 S.E.2d at 407; *see also In re Estate of Wright*, 114 N.C. App. 659, 661-62, 442 S.E.2d 540, 542, *cert. denied*, 338 N.C. 516, 453 S.E.2d 172 (1994); *In re Estate of Neisen*, 114 N.C. App. 82, 86, 440 S.E.2d 855, 858, *disc. review denied*, 336 N.C. 606, 447 S.E.2d 397 (1994). However, the proceeding below was not a civil action, but a proceeding concerning an estate matter, which was exclusively within the purview of the Clerk's jurisdiction, and over which the Superior Court retained appellate, not original, jurisdiction. *See Ingle*, 53 N.C. App. 627, 281 S.E.2d 406. Furthermore, neither hearings to revoke letters testamentary nor to show cause concerning an accounting require a summons or other like pleadings for their initiation. *See* N.C.G.S. §§ 28A-9-1 and 28A-21-1; *In re Estate of Sturman*, 93 N.C. App. 473, 476, 378 S.E.2d 204, 205-06 (1989). It follows that the hearing below to compel an

accounting and remove the personal representative was a proceeding properly before the Clerk, for which the beneficiaries were not required to commence a civil action.

Concerning the beneficiaries' right to participate in the proceeding below, we find the case *In re Estate of Sturman*, 93 N.C. App. 473, 378 S.E.2d 204, instructive. In *Sturman*, the clerk of court appointed a *guardian ad litem* to represent the interests of minor heirs at a hearing to remove the administratrix of the decedent's estate. On appeal to our Court, the administratrix argued that the court did not have the authority to appoint a guardian under Rule 17 of the Rules of Civil Procedure, because "the minor heirs were not 'parties' to the revocation procedure." *Id.* at 475, 378 S.E.2d at 205. This Court concluded that the clerk of court had the authority to appoint the guardian to represent the heirs' interest in the proceeding because "the minor heirs had a vested interest in who administered the estate of their [decedent]." *Id.*

Although the *Sturman* court was specifically concerned with a clerk's authority to appoint a guardian per Rule 17, it nevertheless indicated that interested parties are entitled to participate and be represented in proceedings before the clerk concerning estate matters. In the case *sub judice*, the Clerk advised the beneficiaries of the hearing and requested their presence. Like the *Sturman* heirs, the beneficiaries, also legatees under Parrish's will, clearly had an interest in the wrongful death proceeds, *see Below*, 12 N.C. App. at 660, 184 S.E.2d at 381 (noting that personal representative acts as beneficiaries' trustee), as well as the estate in general, and could, therefore, participate in the hearing. Accordingly, we find no merit in White's argument.

[3] We next address White's argument that the trial court erred in concluding that the proceeds from the federal court action were wrongful death proceeds that should have been distributed according to the laws of intestate succession. White asserts that the settlement amount represented proceeds resulting from Parrish's pain and suffering during his lifetime. The proceeds, White argues, were therefore estate assets, which she, as Parrish's residuary legatee, was allowed to distribute into her personal account. We disagree.

"An action for wrongful death did not exist at common law and rests entirely upon [a statute]." *Christenbury v. Hedrick*, 32 N.C. App. 708, 711, 234 S.E.2d 3, 5 (1977) (citation omitted). Prior to 1969, North Carolina's Wrongful Death Act limited the damages recoverable in wrongful death actions to those that represented "a

fair and just compensation for the pecuniary injury resulting from such death." N.C.G.S. § 28-174 (1957) (superseded by N.C.G.S. § 28A-18-2(b)). Recovery for pecuniary losses pursuant to the wrongful death statutes was based on the principle that "[a] cause of action for wrongful death, being conferred by statute at death, could never have belonged to the deceased." *Below*, 12 N.C. App. at 659, 184 S.E.2d at 380. Rather, such an action belonged to the decedent's heirs, the individuals who actually suffered a pecuniary loss. *Bowen v. Rental Co.*, 283 N.C. 395, 415, 196 S.E.2d 789, 803 (1973). To that end, our Wrongful Death Act specified that damages recoverable were not assets in decedent's estate, were to be distributed per the laws of intestate succession, and were not subject to estate debts. *Id.* at 413, 196 S.E.2d at 801.

Moreover, prior to 1969, actions for wrongful death were distinct and separate from actions for pain and suffering, and hospital treatment caused by tortious injury that eventually led to death. *Id.* at 412, 196 S.E.2d at 801. Actions for pain and suffering and hospital care, commonly known as "survival actions," belonged to the decedent and survived to his personal representative upon the decedent's death. *See id.* at 421, 196 S.E.2d at 806. Because survival actions yielded proceeds which, in essence, belonged to the decedent, unlike wrongful death proceeds, those proceeds were considered estate assets, passed under a decedent's will, and were subject to estate debts. *Id.*

In 1969, our General Assembly determined that pecuniary damages for wrongful death actions "severely limited recovery." *DiDonato v. Wortman*, 320 N.C. 423, 429, 358 S.E.2d 489, 492 (1987); *see also* 1969 N.C. Sess. Laws ch. 215 preamble. As such, the legislature amended our Wrongful Death Act to allow for recovery unrelated to decedent's income. *DiDonato*, 320 N.C. at 429, 358 S.E.2d at 492. With the exception of minor amendments and additions, the 1969 version of the wrongful death statutory provisions appeared as the wrongful death statute does today:

> When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent . . . . The amount recovered in such action is not liable to be applied as assets, in the payment of debts or

> legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses . . . incident to the injury resulting in death, . . . but shall be disposed of as provided in the Intestate Succession Act.

N.C.G.S. § 28A-18-2(a). According to the statute, "[d]amages recoverable for death by wrongful act [now] include" pecuniary losses, hospital expenses "incident to the injury resulting in death[,]" pain and suffering, funeral expenses, punitive damages, and nominal damages. N.C.G.S. § 28A-18-2(b).

The addition of damages previously recoverable only in survival actions to the list of damages recoverable in a wrongful death action created confusion as to the allocation of court action proceeds between a decedent's estate and those entitled to take under the laws of intestacy. *Bowen*, 283 N.C. at 422, 196 S.E.2d at 807. In *Forsyth County v. Barneycastle*, 18 N.C. App. 513, 197 S.E.2d 576, *cert. denied*, 283 N.C. 752, 198 S.E.2d 722 (1973), this Court indicated that none of the proceeds recovered in a wrongful death suit, whether for pain and suffering or pecuniary loss, are assets of a decedent's estate. We find guidance in *Forsyth County* as to the nature of the settlement proceeds in the case *sub judice*.

In *Forsyth County*, the decedent allegedly died as a result of an automobile accident occurring eight days prior to her death. The administratrix of the decedent's estate "negotiated a compromise settlement" with the insurance carrier "for the personal injuries to and death of decedent caused by the negligence of [the driver]." *Id.* at 514, 197 S.E.2d at 577. Forsyth County asserted a claim to the proceeds, based upon a debt of the decedent. The administratrix refused to pay the debt out of the settlement proceeds, claiming they were wrongful death proceeds, not subject to the debts of the decedent.

This Court found that although the proceeds constituted both damages for the decedent's personal injury and death, the settlement monies were wrongful death proceeds, according to the plain language of North Carolina's Wrongful Death Act. *Id.* at 516-17, 197 S.E.2d at 578-79. The Court stated:

> Under the present provisions of [the Wrongful Death Act] the conclusion seems inescapable that all of the items of damages which might conceivably have been set out in a claim for personal injuries prior to death are now includable [sic] in an action for damages for death by wrongful act. . . . All damages 'recoverable for death by wrongful act' as enumerated in G.S. [§ 28A-18-2(b)] are subject to the exemption conferred by G.S. [§ 28A-18-2(a)].

> The plain language of the [statute], in our judgment permits no other result. . . .
>
> . . . .
>
> If there is to be any change in [the Wrongful Death Act], which [is] now clear as written, it is a matter for the legislature, not the court.

Id. (citations omitted). The Court therefore concluded that because the county's claims were against the general assets of the estate and the settlement amount constituted funds recovered for wrongful death, the county was not entitled to any part of the wrongful death proceeds. *Id.* at 517, 197 S.E.2d at 579.

We must, therefore, determine whether the proceeds from the federal court action in the case *sub judice* were for damages related to Parrish's wrongful death or damages for Parrish's pain and suffering, somehow unrelated to his death. An examination of the complaint and related documents filed in federal court reveals that the federal action was an action for wrongful death, as specified by section 28A-18-2. The federal civil action cover sheet notes that the "lawsuit [arose] out of [a] wrongful death action due to medical malpractice." The federal complaint was entitled, "Medical Malpractice-Wrongful Death Action." The allegations in the complaint related only to the defendants' negligence allegedly resulting in Parrish's death. In the complaint's prayer for relief, White requested "all damages recoverable for [Parrish's] wrongful death."

The specific damages requested included compensation for Parrish's "severe mental and physical pain and anguish" along with

> a sum sufficient to compensate [the estate] for the present monetary value of [Parrish] to his family, represented by the income he would have received during his normal life expectancy, his physical, emotional and mental pain and suffering, his services, protection, care and assistance, society, companionship, security, comfort to his next of kin and for funeral, hospital, and medical bills, and punitive damages.

The damages pled by White are virtually identical to those available under the Wrongful Death Statute. *See* N.C.G.S. § 28A-18-2(b). Furthermore, White testified that she brought the action to recover damages related to both Parrish's pain and suffering and wrongful death. In accordance with *Forsyth County* and the plain

meaning of section 28A-18-2, because the action was for damages related to Parrish's death, and the damages sought were those listed in the statute, we conclude that the federal action settlement proceeds constituted wrongful death proceeds.

White's own actions in preparing to distribute the federal court action proceeds supports our aforementioned conclusion. White maintained in the original hearing before the Clerk that the proceeds were wrongful death proceeds, which she was not required to list in her accounting and out of which she could pay herself fees without the Clerk's approval. In fact, White testified that "in accordance with the [Wrongful Death] Statute," she requested that the beneficiaries sign a release concerning the federal action settlement, and even distributed at least a portion of the proceeds to one beneficiary. White further informed the beneficiaries of their share of the settlement.

White argues that under the statute, recovery of "wrongful death proceeds" is contingent upon affirmative proof or an admission by the defendants that a person's death resulted from their negligence. Therefore, White asserts, the language of the settlement agreement ("the agreement") in the case *sub judice* is tantamount to determining the nature of the proceeds. According to White, the agreement indicates that the federal action proceeds were not for wrongful death because it "refers only to claims arising out of personal injuries, treatments for such and for health care, and to associated expenses." White further notes that "[n]either the word 'death,' [nor] synonyms for it, appear anywhere in the text of the agreement[.]" With this argument, we cannot agree.

First, the statute governing the duties of a personal representative allows the representative to settle wrongful death actions, presumably without proof of or admission that wrongful actions led to a decedent's death. N.C.G.S. § 28A-13-3(a)(23); *Forsyth County*, 18 N.C. App. at 515, 197 S.E.2d at 577 (citations omitted) (stating that "money received by a compromise settlement stands on the same basis as if it had been recovered by litigation"). Second, the agreement referred to by White, actually entitled "FULL AND FINAL RELEASE & CONFIDENTIALITY AGREEMENT," does not specify, as White implies, that the settlement proceeds were for Parrish's injuries and not wrongful death. The agreement simply states that White "releas[ed]" defendants from all claims which she may have against them

> by reason of any injury, pain and suffering of the plaintiff, any and all medical, surgical, and other health-care treatment of any kind

whatsoever which anyone, including but not limited to the Released Parties, allegedly provided or failed to provide to [Parrish] at any time, and all expenses of any kind incurred by anyone for medical, surgical, health-care treatment, and hospitalization.

We recognize that in certain cases a settlement agreement may shed light upon the nature of proceeds recovered in an action. In examining the agreement *sub judice*, however, we find that it gives no indication as to the nature of the federal court action proceeds, but states only that the defendants were released from further litigation. Given the evidence in the record on appeal concerning the nature of the federal action—the federal court complaint and White's initial actions in preparing to distribute the federal court action proceeds, we conclude that the monies recovered were wrongful death proceeds and therefore, should have been distributed according to the Intestate Succession Act.

[4] White next argues that the trial court erred in refusing to recognize her right to compromise disputed or uncertain claims. White asserts that "[n]o evidence of any dishonesty or imprudence on her part was ever produced; merely suggestions and innuendo . . . that either she was somehow deliberately responsible for the failure to establish a wrongful death claim . . . or that she had lied to the other heirs about the nature of the recovery." White further asserts that "this must clearly be the basis" for the trial court's ruling. White also argues that she was entitled to a presumption that she acted in good faith in overseeing Parrish's estate. We cannot agree.

It is true that a personal representative has the right to compromise a disputed or doubtful wrongful death claim. N.C.G.S. § 28A-13-3(a)(23); *Forsyth County*, 18 N.C. App. at 515, 197 S.E.2d at 577. However, a review of the proceedings before the trial court does not support White's argument that there was "innuendo" or doubt concerning White's pursuit of and decision to settle the federal court claim. Furthermore, contrary to White's argument, neither her willingness to compromise nor her settlement of the wrongful death action was the basis of the court's decision. Rather, her failure to distribute the assets as wrongful death proceeds, along with her wavering position concerning the nature of the proceeds, were the basis of the trial court's decision. Following the hearing, the trial court concluded that "White [was] estopped from asserting that the proceeds recovered are not wrongful death proceeds by her actions and conduct as shown in the evidence presented to [the] [c]ourt."

Certainly, all that is required of a personal representative is that she "act in good faith." *McGill v. Freight*, 245 N.C. 469, 474-75, 96 S.E.2d 438, 443 (1957) (citation and internal quotation marks omitted). Despite this well-established principle, White is not entitled to a presumption of acting in good faith. A review of her own testimony reveals that she did not have an honest misunderstanding concerning the nature of the federal court action proceeds. Rather, the hearing is saturated with examples of someone who intentionally claimed the federal action proceeds were either wrongful death proceeds or estate assets, depending upon whichever characterization justified her actions. White explained that she did not report her personal representative commission to the Clerk because the wrongful death statute did not require her to do so. White further testified that she did not submit the federal court action proceeds to the Clerk pending appeal to the trial court because they were deemed wrongful death proceeds, not assets of the estate, over which the Clerk had no jurisdiction. However, White testified that it was her understanding that she was the sole beneficiary to the proceeds.

White was further questioned concerning a $15,000.00 check paid to one of Parrish's sisters out of the wrongful death proceeds after the Clerk's 1 April 1999 order. Although Parrish's sister was not an heir and thus, clearly not entitled to wrongful death proceeds, White testified, "Well, I think, you know, when you're doing the wrongful death statutes, you look at the loss to the beneficiaries, what their loss was. And my aunt was extremely close to my dad." Given White's blatant disregard for her duties, we find no merit in her argument.

[5] By her final assignment of error, White contends that the trial court erred in appointing the Public Administrator, rather than the testamentary alternative executor, to oversee Parrish's estate. Because White failed to argue any issues concerning the appointment of the Public Administrator at the trial court hearing, we conclude that she did not properly preserve her final assignment of error for appeal. *See* N.C.R. App. P. 10(b)(1). Even if White had properly preserved the aforementioned argument, we find the Clerk did not abuse her discretion in appointing the Public Administrator, rather than the testamentary alternative, to finalize the estate. *See* N.C.G.S. 28A-4-2(9) (1999) (stating that a person is not qualified to serve as a personal representative if he "[i]s a person whom the clerk of superior court finds otherwise unsuitable"); *In re Moore*, 292 N.C. 58, 65, 231 S.E.2d 849, 854 (1977).

For the foregoing reasons, we affirm the orders of the trial court.

Affirmed.

Judges MARTIN and THOMAS concur.

ERNESTINE DEMERY, EMPLOYEE, PLAINTIFF v. PERDUE FARMS, INC., EMPLOYER; SELF-INSURED/CRAWFORD & COMPANY, SERVICING AGENT, DEFENDANT

No. COA00-41

(Filed 1 May 2001)

Workers' Compensation— disability—capacity to work in any employment—sufficiency of evidence

A workers' compensation permanent total disability award was reversed where the record did not contain evidence showing that pain from plaintiff's carpel tunnel syndrome rendered her incapable of work in any employment (and no evidence was presented on the three alternative methods of showing a disability). Evidence of pain from a compensable injury must show that plaintiff is incapable of work in any employment to support a conclusion of disability and receiving payments from an employer funded disability plan is not evidence of disability within the meaning of the Workers' Compensation Act unless plaintiff was incapable of earning in any employment the wages she had earned before the injury.

Judge HUDSON dissenting.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission filed 19 November 1999. Heard in the Court of Appeals 13 February 2001.

Daniel F. Read for plaintiff-appellee.

Haynsworth Baldwin Johnson & Greaves LLC, by Brian M. Freedman, for defendant-appellant.

GREENE, Judge.

Defendant Perdue Farms, Inc. (Perdue) appeals an opinion and award of the Full Commission of the North Carolina Industrial Commission (the Commission) filed 19 November 1999 awarding Ernestine Demery (Plaintiff) permanent total disability compensation.

The record shows that at the time of her workers' compensation hearing, Plaintiff had been working for Perdue for thirteen years. Plaintiff testified her job with Perdue was the only job she had ever had. In 1992, Plaintiff's employment duties consisted of "hanging birds on the line." During this time period, Plaintiff began experiencing pain and numbness in her hands and arm, which she reported to Perdue. Perdue instructed Plaintiff to see Josephus Bloem, M.D. (Dr. Bloem), who diagnosed Plaintiff as having carpal tunnel syndrome in both of her hands. Plaintiff received medical treatment from Dr. Bloem, including an injection in one of her hands and prescription medication; however, she continued to experience pain in her arm, shoulder, and neck. In addition, Plaintiff could "hardly sleep at night" because of pain in her hands. In 1993, Plaintiff was seen by Thomas Bergfield, M.D. (Dr. Bergfield). At that time, she complained of pain related to carpel tunnel syndrome and she informed Dr. Bergfield that she had difficulty sleeping.

In 1995, Plaintiff's job duties at Perdue were changed to working "on the giblet machines." Working on the giblet machines required Plaintiff to use her hands to pick up hearts, gizzards, necks, and livers and place them into "slot[s]." This work required continuous use of Plaintiff's hands and Plaintiff testified that as a result of this work her hands "were hurting" and she experienced cramping in one of her hands. Plaintiff reported these problems to Perdue.

In February 1996, Perdue sent Plaintiff to see Robert Hansen, M.D. (Dr. Hansen), a board certified physician in neurology and clinical neurophysiology. Dr. Hansen worked on a contract basis with Perdue. After Dr. Hansen performed diagnostic testing on Plaintiff, including EMG tests, he diagnosed Plaintiff as having carpel tunnel syndrome and fibromyalgia which is "a syndrome in which people have pain in the axial muscles." Based on comparisons of EMG tests performed on Plaintiff in 1992 and 1996, Dr. Hansen determined there had been "some improvement" in Plaintiff's carpel tunnel syndrome and her condition was "not getting any worse." He testified the treatment Plaintiff had undergone prior to that time, which included mod-

ifying her work duties, was "successful in arresting the course of the illness." Dr. Hansen continued to treat Plaintiff by means of modifying her job duties, including rotating Plaintiff to various jobs and eliminating repetitious activities such as using knives and scissors. He also treated her with the use of medications and splints.

Dr. Hansen examined Plaintiff for a second time in April 1996 and Plaintiff complained at that time of pain in her wrists and forearm. Dr. Hansen determined Plaintiff's carpel tunnel syndrome was "stable" and "the pain she was having in her forearm was from tendonitis." Dr. Hansen prescribed anti-inflammatory medication to treat the tendonitis. In Dr. Hansen's opinion, Plaintiff was able to continue working with the previously recommended modifications. Dr. Hansen saw Plaintiff for follow-up visits in July 1996 and September 1996. Dr. Hansen believed there was "improvement" in Plaintiff's carpel tunnel syndrome at the time of the September visit, and he attributed this improvement to job modifications, medication, and the use of splints. In December 1996, Dr. Hansen prescribed physical therapy for Plaintiff with Bruce Tetalman, M.D. (Dr. Tetalman). After examining Plaintiff, Dr. Tetalman assigned permanent partial disability ratings of 7% to "both of [her] upper extremities."

When Dr. Hansen examined Plaintiff in 1997, he determined, based on EMGs performed on Plaintiff, that her carpel tunnel syndrome was continuing to improve. He believed her condition was "adequately managed with frequent job rotations and proper use of medications." In February 1998, Dr. Hansen examined Plaintiff and determined that with job modifications she was able to continue working at Perdue. He testified that although he believed Plaintiff had some pain, "[t]here was nothing that [he] saw in [her] that would have disqualified her from doing some sort of modified productive job at the plant." Dr. Hansen examined Plaintiff again in May 1998 and July 1998, and he did not believe at either of these times that there were any medical reasons Plaintiff was unable to work. Dr. Hansen testified he told Plaintiff that if " 'the mere fact of working in the plant produces all the pains' " that Plaintiff complained of, "then an option would be to stop working and to pursue Social Security Disability." When asked by Plaintiff's counsel whether it was "reasonable" for Plaintiff to decide at some point that she could no longer work, Dr. Hansen responded:

> I do not fault her for making that decision. . . . I would never tell somebody . . . they should do something that hurts them. But if you . . . ask me if there's a . . . medical reason why somebody

could not do the job, I'd have to say no. But I certainly have sympathy for the fact that she felt that it was uncomfortable enough for her that she no longer wanted to work.

Daniel Lee, M.D. (Dr. Lee), a board certified physician in neurology, psychiatry, and sleep disorder medicines, testified he examined Plaintiff on 30 May 1997. Dr. Lee testified he would recommend the following job restrictions for someone with Plaintiff's medical conditions: avoidance of duties requiring repetitive movement and avoidance of performing the same task for more than twenty minutes. Dr. Lee suggested such an employee should work in a position with rotating duties or, in the alternative, take a break for up to twenty minutes. Dr. Lee classified Plaintiff's carpel tunnel syndrome "as moderate to severe range." Dr. Lee stated that assuming Plaintiff's job duties at Perdue did not require repetitive motion or heavy lifting, she would have been capable of performing her job duties in 1997.

Fred Clark, Jr. (Clark) testified he was Plaintiff's supervisor at Perdue in 1998. At that time, Plaintiff's job title was "[g]iblet service." Clark was aware of Plaintiff's medical restrictions and her duties at Perdue complied with those restrictions. Clark described Plaintiff's duties as "doing hourly checks" on wrap, performing "temperature checks," and "putting livers in a cup." When Plaintiff was not performing these duties, "[t]here may [have been] some point in time that she . . . stood up there [against the wall] and . . . [did not do] very much."

In February 1998, Plaintiff went to see Meredith R. Anthony, M.D. (Dr. Anthony), who was Plaintiff's family physician. Plaintiff testified that at that time her job duties consisted of "odd-jobs" and she was unable to perform any "steady" job. Plaintiff testified Dr. Anthony "took [her] out of work because [she] told him [she] was hurting." Dr. Anthony did not testify and Plaintiff did not present evidence of her medical records from Dr. Anthony. The record, however, does contain copies of several notes signed by Dr. Anthony excusing Plaintiff from work. A note dated 6 March 1998 states, "[Plaintiff] will be unable to return to her previous work environment involving repetitive motion and cold exposure and should continue to refrain from these." Additionally, a note dated 5 May 1998 states Plaintiff "should continue to avoid repetitive motion, cold exposure and exacerbating activities."

Plaintiff stopped reporting to work on 7 February 1998. In March 1998, Plaintiff received a letter from Perdue notifying her that she

would be terminated if she did not return to work. Plaintiff testified that she returned to work; however, she was told to "go home" when she refused to leave the medication she had received from Dr. Anthony at the front desk while she was working. Plaintiff's last date of work with Perdue was in March 1998.

Subsequent to Plaintiff's hearing, the Commission made the following pertinent findings of fact:

> 1. At the time of the hearing, . . . [P]laintiff was a thirty-two year old high school graduate . . . .
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> . . . .
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> 14. On 1 April 1997, Dr. Tetalman found [P]laintiff to be at maximum medical improvement and rated . . . [P]laintiff as retaining a seven percent permanent partial impairment rating to each of her upper extremities.
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> . . . .
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> 18. On 2 February 1998, Dr. Hansen told [P]laintiff that her duties at the plant were minimal and he could not conceive of how they could be made any lighter. He further stated that if the job caused her so much pain, she had the option of stopping work and pursuing Social Security Disability.
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> 19. . . . [P]laintiff last worked for [Perdue] on 7 February 1998. In March of 1998, [Perdue] sent [P]laintiff a letter to return to work. However, when [P]laintiff returned to work with medications prescribed by Dr. Anthony, she was sent home. She did not return to work after that incident. She was unable to work because of the accepted carpel tunnel syndrome superimposed on fibromyalgia. She received short-term disability through an employer-funded plan . . . for twenty-six weeks.
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> 20. On 23 April 1998, an EMG showed continuing carpel tunnel syndrome with no significant worsening, although [P]laintiff was still presenting with pain and swelling. Dr. Hansen further opined that on the modified duty, [P]laintiff's carpel tunnel condition had stabilized and he did not believe anything further could be done for her.
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> . . . .
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> 23. Due to [P]laintiff's accepted compensable carpel tunnel syndrome superimposed on fibromyalgia, [P]laintiff is unable to

earn wages. This condition is not likely to improve and is likely to be permanent. Payment of disability under the company's disability income plan is also evidence of inability to earn wages.

24. Plaintiff is disabled by constant and debilitating pain. Dr. Hansen could not disagree with that and would not criticize her decision to stop working as of February 1998. Dr. Anthony has approved her medical absence from work. . . .

The Commission then concluded as a matter of law: "[P]laintiff is entitled to permanent total disability compensation at the rate of $200.01 per week from February 7, 1998, since she is unable to earn wages because of her compensable carpal tunnel syndrome and its interactions with fibromyalgia."

The dispositive issue is whether the Commission's finding of fact that "[d]ue to [P]laintiff's accepted compensable carpal tunnel syndrome superimposed on fibromyalgia, [P]laintiff is unable to earn wages" is supported by competent evidence.

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

"Disability," within the meaning of the of the North Carolina Workers' Compensation Act, is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. § 97-2(9) (1999). To show the existence of a disability under this Act, an employee has the burden of proving:

(1) that [she] was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in the same employment, (2) that [she] was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in any other employment, and (3) that [her] incapacity to earn was caused by [her] injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). The employee may meet her initial burden of production by producing:

> (1) . . . medical evidence that [she] is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) . . . evidence that [she] is capable of some work, but that [she] has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment; (3) . . . evidence that [she] is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) . . . evidence that [she] has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). Once an employee meets her initial burden of production, the burden of production shifts to the employer to show "that suitable jobs are available" and that the employee is capable of obtaining a suitable job "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). The burden of proving a disability, however, remains on the employee. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683. Whether a disability exists is a question of law. *Id.*

In this case, the Commission found as fact that "[d]ue to [P]laintiff's accepted compensable carpal tunnel syndrome superimposed on fibromyalgia, [P]laintiff is unable to earn wages." Initially, we note the Commission did not make any findings of fact that Plaintiff is unable to earn wages *in any employment*. *See Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Nevertheless, assuming the Commission did make such a finding, the issue before this Court is whether the record contains competent evidence to support such a finding. The record contains evidence Plaintiff suffered from pain as a result of her carpel tunnel syndrome while working for Defendant. Although evidence a plaintiff suffers from pain as a result of her compensable injury may be competent evidence to support a conclusion the plaintiff is disabled, *see Niple v. Seawell Realty & Insurance Co.*, 88 N.C. App. 136, 139, 362 S.E.2d 572, 574 (1987) (plaintiff's degree of pain may be considered when determining whether he or she is capable of work), *disc. review denied*, 321 N.C. 244, 365 S.E.2d 903 (1988), the evidence must show that pain renders the plaintiff incapable of work in any employment, *see, e.g., Errante v. Cumberland County Solid Waste Management*, 106 N.C. App. 114, 118, 415 S.E.2d 583, 585-86 (1992) (plaintiff's testimony he suffered from excessive pain, in conjunction with his physician's testimony plaintiff could not " 'do any kind of

gainful employment at this time, under any light duty of any kind' " is competent evidence plaintiff is permanently and totally disabled). In the case *sub judice*, the record does not contain any such evidence.[1] Plaintiff did not present any evidence from a medical doctor or vocational specialist that she is unable to work in any employment.[2] Additionally, Plaintiff did not testify she was incapable as a result of her pain of working in any employment. Moreover, evidence Plaintiff had a 7% permanent partial impairment rating on her upper extremities and that she had job restrictions is not medical evidence Plaintiff has a permanent total disability. *See Demery v. Converse, Inc.*, 138 N.C. App. 243, 250-52, 530 S.E.2d 871, 876-77 (2000) (evidence plaintiff had a 20% partial impairment to his back and evidence plaintiff had permanent work restrictions insufficient to support conclusion plaintiff suffered a permanent total disability); *Royce v. Rushco Food Stores, Inc.*, 139 N.C. App. 322, 331-32, 533 S.E.2d 284, 290 (2000) (Commission's findings of fact that " 'plaintiff is not capable of working in a job that requires standing from eight to ten hours a day,' " that plaintiff could " 'perform a seated job if she can keep her leg elevated most of the time,' " and that plaintiff " 'made no effort to find alternative employment within her restrictions after she reached maximum medical improvement' " support the Commission's conclusion plaintiff did not meet burden of showing it would be futile for her to seek other employment); *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 400-01, 368 S.E.2d 390-91 (evidence plaintiff was 61 years old with a fifth grade education, that he was skilled only in work that he was physically unable to perform, that he was afflicted with an easily aggravated breathing condition, and that he attempted but was unable to obtain employment is sufficient to show plaintiff has an impaired earning capacity), *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). Finally, evidence Plaintiff received payments pursuant to an employer-funded disability plan is not evidence Plaintiff is disabled within the meaning of the Workers' Compensation Act

1. Pursuant to *Russell*, Plaintiff could also meet her burden of production by presenting evidence: she is capable of some work but that after a reasonable effort on her part she has been unable to obtain employment; she is capable of some work but that because of pre-existing conditions, it would be futile for her to seek employment; or she has obtained other employment at a wage less than that earned prior to the injury. Plaintiff, however, did not present any evidence regarding these three alternative methods of showing a disability; thus, we do not address these alternative methods.

2. The dissent states Dr. Anthony's notes excusing Plaintiff from work with Defendant are competent evidence to support a finding Plaintiff was unable to work in any employment. We disagree. Dr. Anthony's notes, stating Plaintiff should not work in a position requiring repetitive motion or exposure to the cold, do not support a finding Plaintiff was unable to work in *any* employment.

unless the evidence shows those payments were made because Plaintiff was incapable, due to her carpel tunnel syndrome, of earning wages she had earned before this injury in the same or any other employment. Accordingly, the 19 November 1999 opinion and award of the Commission is reversed.

Because we reverse the opinion and award of the Commission, we need not address Perdue's additional assignments of error.

Reversed.

Judge McCULLOUGH concurs.

Judge HUDSON dissents.

HUDSON, Judge, dissenting.

I believe that the cases from the Supreme Court and from this Court addressing our role in reviewing the findings of the Industrial Commission, the plaintiff's burden in establishing disability, and the defendant's burden of proof in response, require us to affirm the Award of the Commission here. Therefore, I must dissent.

First, I do not believe that the standard of review as it is set forth in the majority opinion fully articulates the limited role of this Court in reviewing decisions of the Industrial Commission, as recently clarified by our Supreme Court. In *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), the Supreme Court stated the following regarding the role of the reviewing Court with respect to findings of the Industrial Commission:

> "The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). Thus, on appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson [v. Lincoln Constr. Co.]*, 265 N.C. at 434, 144 S.E.2d at 274.
>
> N.C.G.S. § 97-86 provides that "an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact." N.C.G.S. § 97-86 (1991). As we stated in *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 141 S.E.2d 632

> (1965), "[t]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Id.* at 402, 141 S.E.2d at 633. *The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence. Doggett v. South Atl. Warehouse Co.*, 212 N.C. 599, 194 S.E. 111 (1937).

Id. at 681, 509 S.E.2d at 414 (emphasis added). Applying these principles to the case before us, I believe that we are bound by the findings of the Commission—because the evidence supports these findings—and that the findings support the conclusions.

As the majority has noted, this Court has identified four ways in which a plaintiff may satisfy her initial burden of establishing the existence of a disability. *See Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). According to the *Russell* court, one route of proving disability is by coming forth with medical evidence that the individual is physically or mentally, as a consequence of the work-related injury, incapable of work in any employment. *See id.* The Commission in this case specifically made the following findings:

> 23. Due to plaintiff's accepted compensable carpal tunnel syndrome superimposed on fibromyalgia, plaintiff is unable to earn wages. This condition is not likely to improve and is likely to be permanent. Payment of disability under the company's disability income plan is also evidence of inability to earn wages.
>
> 24. Plaintiff is disabled by constant and debilitating pain. Dr. Hansen could not disagree with that and would not criticize her decision to stop working as of February 1998. Dr. Anthony has approved her medical absence from work. Plaintiff's carpal tunnel syndrome is part of this complex, along with fibromyalgia. Plaintiff's compensable occupational disease, carpal tunnel syndrome, in combination with her other medical problems, including fibromyalgia, now renders her effectively totally disabled and entitled to benefits under N.C. Gen. Stat. § 97-29.

The Commission further concluded that "plaintiff is entitled to permanent total disability compensation . . . since she is unable to earn wages because of her compensable carpal tunnel syndrome and its interactions with fibromyalgia." The medical evidence certainly

supports the Commission's findings that plaintiff's physical condition, combined with her pain, have rendered her unable to perform even the minimal duties of her last job, which the Commission found to be "make work." Furthermore, plaintiff's perception of "debilitating pain," with which her doctors could not disagree, in combination with her diagnosed physical conditions found by the Commission, constitute medically-documented "physical or mental" consequences of her occupational disease which render plaintiff incapable of work in any employment. Viewing the evidence in the light most favorable to plaintiff, and giving plaintiff the benefit of every reasonable inference to be drawn from that evidence, I believe the evidence supports the finding that plaintiff has established her disability pursuant to the first method in *Russell*.

Further, in support of these findings are documents from the defendant's own medical file on plaintiff. Contained therein are several "Medical Information Forms" showing that plaintiff was suffering from carpal tunnel syndrome, and that her carpel tunnel syndrome worsened and required increasing restrictions—meaning less strenuous duties—until plaintiff was unable to perform any meaningful job duties at all. The record reflects, and the Commission found, that she last actually worked on 7 February 1998. The defendant's medical file also contains notes, submitted in support of plaintiff's request for disability pay, dated 2/6/98, 3/6/98, 4/6/98 and 5/5/98 and signed by Dr. Anthony. These notes indicate that plaintiff should be excused from work because of increasing pain from her tendinitis and arthritis exacerbation, among other physical conditions. For example, three of the four notes state as follows:

> 2/6/98—Ms. Demery was seen in clinic today with worsening arm, back & knee pain due to tendonitis and osteoarthritis exacerbation. She should rest home until she improves (anticipate two-to-four weeks). Please excuse absences 2/8/98-3/8/98, inclusive?
>
> 3/6/98—Ms. Demery was seen in clinic follow-up today without any subjective improvement in pain in her hands, arms, back and left knee, despite meds and rest. She was unable to followup with neurology as directed due to financial constraints. She will be unable to return to her previous work environment involving repetitive motion and cold exposure and should continue to refrain from these. She will likely require rheumatology or orthopedic consultation. Please excuse absences from work? Return date is indeterminate.

> 5/5/98—Ms. Demery was seen today in clinic followup with persistent pain complaints bilateral hands and stiffness right side and upper extremity swelling. She has severe carpal tunnel syndrome and fibromyalgia and should continue to avoid repetitive motion, cold exposure and exacerbating activities. Please excuse absences from work? Return date is undetermined.

These notes were the basis for the approval of her application for disability benefits, which was also filled out and signed by Dr. Anthony, indicating that "Patient has been continuously disabled from work" since 8 February 1998. Accordingly, there is plentiful medical evidence to support the findings of the Commission that the plaintiff had proved her disability and had been continuously unable to earn wages since her last date of work.

Once plaintiff has proved her disability, as the Commission found in this case, the burden shifts to the employer to establish wage-earning capacity. In *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 487 S.E.2d 746 (1997), the Supreme Court explained at length the concepts which come into play in the determination of whether a defendant-employer, by providing a modified job to the plaintiff, has satisfied its burden of proving the plaintiff has regained wage-earning capacity. In *Saums*, the plaintiff sustained a back injury, underwent surgery twice, and received benefits following the entry and approval of a Form 21. The plaintiff returned to work at a modified light duty job ("quality control clerk") for more than a year, and then left her job with increased pain. After several months, the plaintiff underwent surgery a third time, at which point her benefits resumed. At the end of her recovery from the third surgery, her physician released her to return to the modified job, stating that he could not "find any hard reason why this patient should not be allowed to return to the job that was created by you which would eliminate any strenuous activities." She declined to return to the job and the defendant refused to restart her weekly benefits.

The Supreme Court held that the plaintiff was cloaked in the presumption of ongoing disability by virtue of the Form 21 agreement. *See id.* at 763, 487 S.E.2d at 749. "After the presumption attaches, 'the burden shifts to [the employer] to show that plaintiff is employable.' " *Id.* (quoting *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 284, 458 S.E.2d 251, 257, *disc. review denied and cert. denied*, 341 N.C. 647, 462 S.E.2d 507 (1995)). The Supreme Court went on to explain that:

> The employee need not present evidence at the hearing unless and until the employer, "claim[ing] that the plaintiff is capable of earning wages[,] . . . come[s] 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."

Id. at 763-64, 487 S.E.2d at 749 (quoting *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)). The Court then held that the defendant's evidence of an available job, created for and offered to the plaintiff, and within plaintiff's physical limitations, did not rebut the presumption of disability, since this "modified job" was not an accurate reflection of the plaintiff's earning ability in the competitive marketplace, and since there was no evidence that any employer other than the defendant would hire the plaintiff at that wage. *See id.* at 764-65, 487 S.E.2d at 750. Quoting its previous decision in *Peoples v. Cone Mills*, 316 N.C. 426, 342 S.E.2d 798 (1986), the *Saums* court explained why the evidence was insufficient to establish wage-earning capacity:

> If 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. . . .
>
> [T]he Workers' Compensation Act does not permit [defendant] to avoid its duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which [defendant] could terminate at will or, as noted above, for reasons beyond its control.
>
> *In this case, it has not been established that the quality control clerk position offered to plaintiff is an accurate measure of plaintiff's ability to earn wages in the competitive job market. There is no evidence that employers, other than de-*

fendant, would hire plaintiff to do a similar job at a comparable wage.

Saums, 346 N.C. at 764-65, 487 S.E.2d at 750 (internal quotation marks and citations omitted) (emphasis added).

There is no meaningful distinction between the evidence presented here and the evidence presented in *Peoples* or *Saums*, and the Commission here correctly held that the modified job held by plaintiff until 7 June 1998 did not reflect any ability to earn wages. The defendant's argument that the "duties" performed by the plaintiff in her last modified job (in which her supervisor testified that at times plaintiff "stood around and did not do very much") is nearly identical to the argument which was rejected by the Supreme Court in *Saums*.

We are required by *Adams* to view the evidence in the light most favorable to plaintiff and to give plaintiff the benefit of every reasonable inference that may be drawn from the evidence. Pursuant to this standard of review, I believe the evidence fully supports the Commission's findings and conclusions that plaintiff has no wage-earning capacity, that plaintiff was entitled to a presumption of ongoing disability, and that defendant failed to come forward with evidence to overcome the presumption of ongoing disability once it arose. Therefore, I vote to affirm.

NORTHEAST CONCERNED CITIZENS, INC., PLAINTIFF v. CITY OF HICKORY, TRICOR DEVELOPMENT CORPORATION, DEFENDANTS

No. COA00-35

(Filed 1 May 2001)

Zoning— community association—standing to challenge ordinance

The trial court properly granted summary judgment for defendants in an action by a nonprofit corporation challenging a rezoning ordinance where only 12 of plaintiff's 114 members/shareholders had a specific legal interest directly and adversely affected by the rezoning ordinance. The record did not contain any evidence that plaintiff has such an interest; therefore, plaintiff has standing only if all of its members/shareholders have the required interest.

Judge HUDSON concurring in the result.

Appeals by plaintiff from order dated 7 September 1999 by Judge James U. Downs in Catawba County Superior Court. Heard in the Court of Appeals 13 February 2001.

Tate, Young, Morphis, Bach & Taylor, LLP, by Thomas C. Morphis, Paul E. Culpepper, and Valerie R. Adams, for plaintiff-appellant.

Gaither, Gorham & Crone, by John W. Crone, III, for defendant-appellee City of Hickory; and The Brough Law Firm, by Michael B. Brough and Robert E. Hornik, Jr., for defendant-appellee Tricor Development Corporation.

GREENE, Judge.

Northeast Concerned Citizens, Inc. (Plaintiff) appeals an order filed 7 September 1999 granting summary judgment in favor of City of Hickory (the City) and Tricor Development Corporation (Tricor) (collectively, Defendants) and denying Plaintiff's motion for summary judgment.

Section 14.1 of the Hickory Zoning Ordinance (the Ordinance) provides for the establishment of Planned Development (PD) Districts. Zoning Ordinance, City of Hickory, N.C. § 14.1 (1993). PD Districts are zoning districts "established for specialized purposes where tracts, suitable in location, area[,] and character for the uses and structures proposed, are to be planned and developed on a unified basis." *Id.* The PD Districts permitted by Article 14 include PD Shopping Center Districts for community shopping centers. *Id.* § 14.8. The establishment of a PD District requires both the rezoning of the property at issue as a PD District and the approval of a Preliminary Development Concept Plan. The Preliminary Development Concept Plan consists of a plan for the specific use to be made of the property if the property is rezoned, and the plan must "include all data reasonably necessary for determining whether the proposed development meets the specific requirements and limitations, and the intent concerning a particular type of PD District." *Id.* § 14.5.1. To apply for the establishment of a PD District, a party must submit a rezoning request as well as a Preliminary Development Concept Plan to the Hickory Regional Planning Commission (Planning Commission). *Id.*

The record shows that in Spring 1998, Tricor filed an application with the Planning Commission to rezone approximately 29.5 acres of land located at the intersection of Springs Road and Kool Park Road

in Hickory (the property). At the time the application was submitted, a portion of the property was zoned residential, a portion of the property was zoned commercial, and a portion of the property was zoned PD Mobile Home Park. Tricor sought to have the property rezoned as a PD Shopping Center District for community shopping centers. Tricor's Preliminary Development Concept Plan stated its intent to construct a Wal-Mart on the property.

On 24 June 1998, the Planning Commission held a public hearing on Tricor's request to rezone the property. At the hearing, members of the public spoke both in opposition to and in favor of the rezoning request. At the conclusion of the hearing, the Planning Commission voted to recommend that the City Council for the City of Hickory (the City Council) deny Tricor's request to rezone the property.

On 21 July 1998, the City Council held a public hearing on the proposed rezoning of the property. At the conclusion of the hearing, the City Council approved Tricor's rezoning request by a 4-3 vote. On 18 August 1998, the rezoning ordinance was read for a second time, as required by the Hickory City Code. Subsequent to the reading, the rezoning ordinance was approved for a second time by a 4-3 vote and adopted by the City Council.

On 16 October 1998, Plaintiff filed a complaint in the Superior Court of Catawba County, alleging a cause of action against the City. Plaintiff's complaint stated, in pertinent part:

> 1. . . . Plaintiff . . . is a nonprofit corporation organized and existing under the laws of the State of North Carolina. The purpose for which the corporation was formed is to promote, preserve and protect the quality of living and land use in the City of Hickory . . . among said corporation[']s members and all residents of the City of Hickory . . . . In carrying out the purposes of the corporation this action has been instituted for the purpose of preserving the residential character of the neighborhood[,] the subject of this litigation. Many of the supporters and the people whose interest it represents are people who own property in the immediate vicinity of the proposed shopping center that is the subject of this litigation. Accordingly, the use and enjoyment of the properties owned by such people would be diminished and their property values would be lowered if the proposed shopping center were to be constructed, and therefore, such persons would suffer special damages that are different in degree and kind from

any adverse affects [sic] that may be suffered generally by other residents of the City of Hickory or Catawba County.

Plaintiff's complaint alleged that the City lacked authority to exercise zoning powers under N.C. Gen. Stat. § 160A-364 when it rezoned the property, the City Council acted with bias when it approved the rezoning of the property, the rezoning of the property was "unreasonable, arbitrary[,] and capricious," the City's actions were invalid because of Tricor's failure to "provide notice to all adjoining landowners of the [property]," and the rezoning of the property violated N.C. Gen. Stat. § 160A-382 (uniformity requirement throughout each district). Plaintiff requested the trial court "declare the zoning amendment adopted by the . . . City Council on August 18, 1998 to be invalid and of no effect."

In an order filed 1 February 1999, the trial court granted a motion by Tricor to intervene. The City and Tricor filed answers to Plaintiff's complaint, stating as a defense that Plaintiff lacked standing to bring an action to challenge the rezoning ordinance. Defendants then filed a motion for summary judgment dated 18 May 1999, stating "there is no genuine issue as to any material fact . . . and [Defendants] are entitled to judgment as a matter of law."

In an affidavit dated 24 June 1999, Walter D. Scharer (Scharer) stated that he "was one of the original founding members of [Plaintiff]." Scharer stated in his affidavit several ways in which the area surrounding the property would be affected if a Wal-Mart or any other shopping center were built on the property, including: there would be increases in traffic, crime, noise, and light, and "[t]he property values of the neighborhood and surrounding vicinity would decrease as a result of the increased commercialization of the neighborhood." Attached to Scharer's affidavit was an exhibit listing the names of 114 individuals who were present at the first meeting held by Plaintiff, and Scharer stated in his affidavit all of these individuals were accepted as members of Plaintiff at the meeting. In addition to Scharer's affidavit, Plaintiff submitted to the trial court affidavits of eleven other members of Plaintiff. These affidavits stated the same concerns as stated in Scharer's affidavit and included statements that if a Wal-Mart or a similar shopping center were built on the property, "[t]he property values of the neighborhood and surrounding vicinity would decrease as a result of the increased commercialization of the neighborhood." All of the parties who submitted affidavits stated they lived at addresses which are located in the neighborhood surrounding the property.

Tricor's First Set of Interrogatories to Plaintiff contained the following pertinent question: "Identify all persons who are members of [Plaintiff] and whom you contend own properties in such relationship to the property rezoned in this case that such persons would have standing as individuals to challenge this rezoning." In its response, Plaintiff listed the names of thirteen members.

Plaintiff filed a motion for summary judgment dated 1 July 1999. In an order dated 7 September 1999, the trial court denied Plaintiff's motion for summary judgment and granted summary judgment in favor of Defendants.

The dispositive issue is whether a corporation which does not have any legal interest in property affected by a zoning ordinance nevertheless has standing to challenge that zoning ordinance when the members/shareholders of the corporation have standing as individuals to challenge the zoning ordinance.

A zoning ordinance may be challenged by an action for declaratory judgment, *Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976), or by writ of certiorari, N.C.G.S. § 160A-388(e) (1999). A party seeking to challenge a zoning ordinance, however, must have standing to bring such a challenge. Standing exists to challenge a zoning ordinance by a declaratory judgment action when the plaintiff "has a specific personal and legal interest in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby." *Taylor*, 290 N.C. at 620, 227 S.E.2d at 583. Similarly, standing exists to challenge a zoning ordinance by writ of certiorari when the plaintiff is an "aggrieved party," N.C.G.S. § 160A-388(e), *i.e.*, the plaintiff will suffer damages "distinct from the rest of the community" as a result of the zoning ordinance, *Heery v. Zoning Board of Adjustment*, 61 N.C. App. 612, 614, 300 S.E.2d 869, 870 (1983). Further, when a plaintiff seeks to challenge a zoning ordinance by a writ of certiorari, the plaintiff must allege special damages in its complaint. *Id.*; *Village Creek Prop. Owners' Ass'n, Inc. v. Town of Edenton*, 135 N.C. App. 482, 485-86, 520 S.E.2d 793, 795-96 (1999). It thus follows a corporation has standing to challenge a zoning ordinance in a declaratory judgment action if the corporation has a specific legal interest directly and adversely affected by the zoning ordinance; and a corporation has standing to challenge a zoning ordinance by writ of certiorari if the corporation is an "aggrieved party" under section 160A-388(e). Additionally, a corporation has standing to challenge a zoning ordinance in a declaratory judgment action if all

of the members/shareholders of the corporation have a specific legal interest directly and adversely affected by the zoning ordinance; and a corporation has standing to challenge a zoning ordinance by writ of certiorari if all of the members/shareholders of the corporation are "aggrieved parties" under section 160A-388(e).[1] *See Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 63 N.C. App. 244, 247, 304 S.E.2d 251, 253 (1983) (property association has standing to challenge city council's approval of special use permit by writ of certiorari when individual members of property association would "clearly have an interest in the property affected").

In this case, Plaintiff brought a declaratory judgment action against the City, in which it requested that the trial court "declare the zoning amendment adopted by the . . . City Council on August 18, 1998 to be invalid and of no effect."[2] Defendants raised as a defense to this action that Plaintiff lacked standing to challenge the rezoning ordinance, and Defendants filed a motion for summary judgment on the ground no genuine issue of material fact existed. The record does not contain any evidence Plaintiff has a specific legal interest directly and adversely affected by the rezoning ordinance; therefore, Plaintiff has standing to challenge the rezoning ordinance only if all of its members/shareholders have a specific legal interest directly and adversely affected by the rezoning ordinance. The record shows, at best, only twelve of Plaintiff's 114 members have such an interest. Accordingly, the trial court properly granted summary judgment in favor of Defendants on the ground Plaintiff did not have standing to challenge the rezoning ordinance.

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1. The concurrence cites *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990), for the proposition that all individual members of an association do not have to have individual standing for the association to have standing to bring an action on behalf of the members when the association itself does not have standing. *River Birch*, however, is distinguishable from the case *sub judice* because at issue in *River Birch* was an association's standing to bring an action for unfair or deceptive trade practices and not an action to challenge a zoning ordinance. *Id.* at 129-31, 388 S.E.2d at 355-56. As North Carolina has created a specific test for standing that is applicable to actions challenging zoning ordinances, *see Taylor*, 290 N.C. at 620, 227 S.E.2d at 583; N.C.G.S. § 160A-388(e), the more general standing requirement for associations stated in *River Birch* is not applicable to the case *sub judice*.

2. Plaintiff's complaint does not state whether it seeks review under the Declaratory Judgment Act, N.C.G.S. ch. 1, art. 26 (1999), or by petition for writ of certiorari under section 160A-388(e). Because Plaintiff's complaint seeks to have the rezoning ordinance declared "invalid and of no effect," we treat Plaintiff's action as an action for declaratory judgment. *See Ferguson v. Killens*, 129 N.C. App. 131, 138, 497 S.E.2d 722, 726 (type of action brought by plaintiff is determined based on nature of relief requested), *disc. review denied and appeal dismissed*, 348 N.C. 496, 510 S.E.2d 382 (1998).

Because Defendants were entitled to summary judgment on the ground Plaintiff lacked standing, we need not address Plaintiff's additional assignments of error.

Affirmed.

Judge McCULLOUGH concurs.

Judge HUDSON concurs in the result with separate opinion.

HUDSON, Judge, concurring in result.

I disagree with the conclusion that a corporation has standing to challenge a zoning action only if "*all* of the members/shareholders of the corporation" would have individual standing to bring the action (emphasis added). Further, I believe that pertinent authority, including that cited in the majority opinion, compel a different conclusion on this issue. However, for reasons discussed below, I concur in the result reached by the majority.

In support of its holding, the majority cites *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 63 N.C. App. 244, 247, 304 S.E.2d 251, 253 (1983). In *Piney Mountain*, this Court held that a corporate petitioner which "has no property interest, but represents individuals who live in the affected area and who potentially will suffer injury" from a zoning action, has standing to challenge that action on behalf of its members. *Id.* The decision does not specify that *all* of the individual members of the neighborhood association were required to have individual standing in order for the association to have standing. Rather, it notes "the trend in other jurisdictions toward relaxing strict procedural requirements involving standing" and then proceeds to follow this trend by holding that the association involved did have standing. *Id.*

In *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990), the North Carolina Supreme Court addressed the standing of a homeowner's association to bring an unfair and deceptive trade practices suit on behalf of its members. The Court found: "To have standing the complaining association *or one of its members* must suffer some immediate or threatened injury." *Id.* at 129, 388 S.E.2d at 555 (emphasis added). As such, the Court adopted the federal rule for associational standing set forth in *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 342-43, 53 L. Ed. 2d 383, 393-94 (1977). *River Birch* sets forth the following test:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit.

326 N.C. at 130, 388 S.E.2d at 555 (quoting *Hunt*, 432 U.S. at 343, 53 L. Ed. 2d at 394). Thus, even though *River Birch* holds that an association's "members" must have standing in their own right in order for the association to have standing, it explains that not *all* of the members must have individual standing. For the same reason, I believe that *Piney Mountain*'s language to the effect that a corporate petitioner has standing to challenge a zoning action if it "represents individuals" who have standing, does not mean that *all* of the members of the association are required to have individual standing.

I agree with the majority that North Carolina has developed by statute and case law certain tests for determining standing in zoning actions. *See Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976); N.C.G.S. § 160A-388(e) (1999). However, *Taylor* delineates the basis for an individual to have standing to bring a zoning challenge; it does not address associational standing. While *River Birch* does not involve a zoning action, it is instructive as to *how many* of an association's members must have individual standing (under tests such as *Taylor* and N.C.G.S. § 160A-388(e)) in order to give the association standing to participate in litigation. In fact, *River Birch* cites *Piney Mountain*, a zoning case similar to the one before us, as an example of an association having standing to seek relief on behalf of its members. 326 N.C. at 130, 388 S.E.2d at 555.

This judge has been able to find no case in any jurisdiction which mandates that every single one of the individual members of an association must have standing on their own before an association itself may have standing to bring a zoning action. Rather, there are many cases which have found associational standing in zoning cases based upon the individual standing of one or several members. *See, e.g., Simons v. City of Los Angeles*, 161 Cal. Rptr. 67, 69 (Cal. Ct. App., 2d Distr. 1979) (standing found when "many" of association's members owned property in close proximity to site proposed to be rezoned); *Life of the Land v. Land Use Com'n*, 594 P.2d 1079, 1082 (Haw. 1979) (three of organization's members lived in immediate vicinity of land proposed to be rezoned; other members used land for recreation); *Ecology Action v. Van Cort*, 417 N.Y.S.2d 165, 169 (N.Y. Sup. Ct. 1979)

(association given standing had over 40 active members, several of whom lived near the proposed development); *1000 Friends of Oregon v. Multnomah County, Etc.*, 593 P.2d 1171, 1175 (Or. Ct. App. 1978) (organization had standing where one of its members had individual standing); *Save a Valuable Environment v. Bothell*, 576 P.2d 401, 404 (Wash. 1978) (a non-profit association has standing if "one or more of its members are specifically injured").

A seminal state court decision examining associational standing in zoning cases is *Douglaston Civic Association v. Galvin*, 324 N.E.2d 317, 321 (N.Y. 1974), which sets forth the following factors in determining whether an organization has standing:

> (1) the capacity of the organization to assume an adversary position, (2) the size and composition of the organization as reflecting a position fairly representative of the community or interests which it seeks to protect[,] (3) the adverse effect of the decision sought to be reviewed on the group represented by the organization as within the zone of interests sought to be protected[, and (4) whether] full participating membership in the representative organization [is] open to all residents and property owners in the relevant neighborhood.

Douglaston discusses the policy implications behind its holding:

> It should be readily apparent that a person desiring relaxation of zoning restrictions—such as a change from residential to business—has little to lose and much to gain if he can prevail. He is not reluctant to spend money in retaining special counsel and real estate appraisers if it will bring him the desired result. The individual owner of developed land in the neighborhood, on the other hand, may not, at the time, realize the impact the proposed change of zoning will have on his property, or, realizing the effect, may not have the financial resources to effectively oppose the proposed change. . . . By granting neighborhood and civic associations standing in such situations, the expense can be spread out over a number of property owners putting them on an economic parity with the developer.

Id. at 320.

One practical effect of the majority's opinion may be to drastically curtail North Carolina citizens' ability to challenge zoning changes in the areas where they live. As *Douglaston* recognized, few people can afford to bring such a lawsuit as individuals. However,

under the majority's decision, if citizens create a neighborhood association, they will have to carefully scrutinize each and every person who joins out of concern that if one person who does not have individual standing becomes a member, the entire group will lose standing to carry out one of its most important purposes. Such need for scrutiny might not be so harsh if a bright-line rule for determining when an individual has standing existed. In reality, whether a person has individual standing to challenge a zoning action is a subjective inquiry and can be a difficult determination for attorneys and judges, let alone lay people, to make. In this same vein, I also do not favor requiring our trial courts to engage in a full-scale inquiry regarding the individual standing of every member of an association seeking to challenge a zoning decision.

In conclusion, I believe our Supreme Court has already spoken to the requirements for associational standing in this state in *River Birch* and would require the trial court to apply the test set forth in *River Birch* to determine whether the association in this case has standing.

I must concur in the result reached by the majority, however, in that I do not believe plaintiff can prevail on the merits of its case. Plaintiff essentially makes two arguments before this Court: first, that Hickory's ordinance regarding the approval of Planned Development Districts is unduly vague; second, that certain members of the City Council were biased in favor of the rezoning before they heard and voted on the matter. Plaintiffs did not assert the vagueness of the ordinance in the trial court, and they may not present this issue for the first time on appeal. N.C.R. App. P. 10(b)(1); *River Birch Associates*, 326 N.C. at 131, 388 S.E.2d at 556.

Furthermore, the City Council, in voting to rezone the subject property as a Planned Development District, was acting in a legislative capacity. *See Brown v. Town of Davidson*, 113 N.C. App. 553, 556, 439 S.E.2d 206, 208 (1994) (zoning decisions are legislative acts). A predisposition to vote a certain way on a legislative matter does not amount to a due process violation. *Id.* I do not believe plaintiffs have demonstrated the City Council acted in an arbitrary and capricious manner in approving the subject rezoning.

MARSHALL EDWARD BLAND, ADMINISTRATOR C.T.A. OF THE ESTATE OF LELA B. BLAND; AND MARSHALL EDWARD BLAND, INDIVIDUALLY, PLAINTIFF v. BRANCH BANKING & TRUST CO., FRANKIE BLAND, TOMMY BLAND, SARAH BLAND, CHRIS GATES, JEFF BLAND, AND CHUCK BLAND, DEFENDANTS

No. COA00-113

(Filed 1 May 2001)

1. Civil Procedure— summary judgment—findings and conclusions in order

The trial court did not err in an action to disburse funds under a trust agreement by including findings and conclusions in its summary judgment order even though they are not necessary, because: (1) such findings and conclusions do not render a summary judgment void or voidable; (2) the order makes clear that the findings were merely a summary of the material facts not at issue which justified entry of judgment; and (3) the inclusion of the undisputed material facts and the conclusions provides helpful guidance in reviewing the order.

2. Trusts— established at savings and loan association—trust agreement—validity—common law

Although the tentative trust established at a savings and loan association failed to comply with the statutory provisions of N.C.G.S. § 54B-130 as it existed on 30 March 1990, the trust agreement established a valid trust under the common law because: (1) decedent transferred title to the savings account to herself as trustee, subjecting herself as trustee to equitable duties to deal with the property for the benefit of the named beneficiaries, which was a transfer of a present beneficial interest such that the instrument was not testamentary in nature; and (2) the instrument satisfied the three elements to establish a valid trust including sufficient words to show intention to create the trust, a definite subject, and an ascertained object.

3. Trusts— distribution of assets—present vested interest in each beneficiary

The trial court erred by concluding that the funds in the savings account establishing a tentative trust became the property of decedent's estate upon her death and should be distributed in accordance with the residuary clause of her will based on a failure to comply with N.C.G.S. § 54B-130 as it existed on 30 March 1990, and by instructing the bank to disburse the funds to dece-

dent's estate, because: (1) the trust agreement established a valid tentative trust under the common law; (2) upon creation of the trust each beneficiary received a present vested interest; and (3) upon the death of two of the three beneficiaries, their vested interests passed to their respective heirs, meaning each beneficiary received one-third of the assets.

Appeal by Plaintiff from order entered 21 October 1999 by Judge James D. Llewellyn in Lenoir County Superior Court. Heard in the Court of Appeals 20 February 2001.

Gerrans, Foster & Sargeant, P.A., by William W. Gerrans, for plaintiff-appellant.

William D. Spence for defendants-appellees.

HUDSON, Judge.

Lela B. Bland (decedent) died on 16 October 1998. Decedent's son, Marshall E. Bland (plaintiff), was appointed Administrator of decedent's estate. At the time of her death, decedent had funds in a savings account (the savings account) at Branch Banking & Trust Company (BB&T). The savings account had been opened on 13 March 1990. In connection with the savings account, decedent had signed and executed an instrument entitled "Discretionary Revocable Trust Agreement" (the trust agreement), also dated 13 March 1990. The trust agreement names decedent as trustee, and names her three sons as beneficiaries, all three of whom were living at the time: Marshall E. Bland, A. Frank Bland, and Charlie D. Bland. The trust agreement provides, in pertinent part:

> The funds in the account indicated on the reverse side of this instrument, together with earnings thereon, and any future additions thereto are conveyed to the trustee as indicated for the benefit of the beneficiary as indicated. The conditions of said trust are: (1) The trustee is authorized to hold, manage, pledge, invest and reinvest said funds in his sole discretion; (2) The undersigned grantor reserves the right to revoke said trust in part or in full at any time and any partial or complete withdrawal by the original trustee if he is the grantor shall be a revocation by the grantor to the extent of such withdrawal, but no other revocation shall be valid unless written notice is given to the institution named on the reverse side of this card; . . . (4) This trust, subject to the right of revocation, shall continue for the life of the grantor and there-

> after until the beneficiary is ___ [left blank] years of age, or until his death if he dies before such age, and then the proceeds may be delivered by the institution to the beneficiary, or to his heirs, or to the trustee on his or their behalf, and if the age of the beneficiary is not specified this trust is for twenty-one years.

At the time of decedent's death, plaintiff was the only one of the three named beneficiaries still living. The other two named beneficiaries, A. Frank Bland and Charlie D. Bland, were survived by their respective children. BB&T acknowledged the death of decedent and its obligation to pay the principal balance of the account plus interest. However, BB&T expressed to plaintiff that it was unable to determine the respective parties' entitlements to the funds. Therefore, on 14 May 1999, plaintiff filed a declaratory judgment action, naming as defendants BB&T, as well as the surviving children of A. Frank Bland and Charlie D. Bland (the individual defendants). The complaint seeks a declaratory judgment as to the rights and obligations of the parties, and specifically requests that the court instruct BB&T as to how it should distribute the funds in the account. BB&T and the individual defendants filed answers admitting each and every allegation of the complaint; thus, the pertinent facts are undisputed.

On 14 September 1999, plaintiff filed a motion for summary judgment pursuant to N.C.R. Civ. P. 56 (Rule 56). On 5 October 1999, the individual defendants also filed a motion for summary judgment pursuant to Rule 56. On 11 October 1999, plaintiff and the individual defendants appeared before the trial court for a hearing on the summary judgment motions. BB&T notified the parties that it would not appear at the hearing, and that it would distribute the funds as determined by the court. On 21 October 1999, the trial court entered an order setting forth nine findings, including a finding that decedent had opened the account with BB&T on 13 March 1990, and a finding that the residuary clause in decedent's will instructed that the residue of her property be distributed to her three sons. The order also sets forth two conclusions as a matter of law: (1) that the savings account at issue failed to comply with N.C.G.S. § 54B-130 (1999) ("Trust accounts") as that statute existed on 13 March 1990; and (2) that the funds in the savings account therefore became the property of decedent's estate upon her death and should be distributed in accordance with the residuary clause of her will. Thus, the order instructs BB&T to disburse the funds to decedent's estate, and further instructs the administrator of the estate to distribute one-third of the funds to the surviving children of A. Frank Bland, one-third to the surviving chil-

dren of Charlie D. Bland, and one-third to plaintiff, in accordance with the residuary clause of decedent's will. Plaintiff appeals from this order.

[1] On appeal, plaintiff raises six assignments of error. In his first and second assignments of error, plaintiff contends that the trial court was without authority to include findings and conclusions in its summary judgment order. Findings of fact and conclusions of law are not necessary in an order determining a motion for summary judgment. *See Mosley v. Finance Co.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147, *disc. review denied*, 295 N.C. 467, 246 S.E.2d 9 (1978). "However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment." *Id.* In the instant case, the findings in the order appear after an introductory statement that "[t]he following are material facts which are not at issue and upon which the Court has based its decision." The inclusion of such undisputed material facts does not constitute error since the order makes clear that the findings were merely a summary of the material facts not at issue which justified entry of judgment. *See Trust Co. v. Broadcasting Corp.*, 32 N.C. App. 655, 658, 233 S.E.2d 687, 689, *disc. review denied*, 292 N.C. 734, 235 S.E.2d 788 (1977). Furthermore, given the nature of this case, we believe the inclusion of the undisputed material facts and the trial court's conclusions provides helpful guidance for this Court in reviewing the Rule 56 order. Plaintiff's first and second assignments of error are overruled.

Plaintiff's four remaining assignments of error all essentially challenge the trial court's two conclusions of law: that decedent's savings account failed to comply with G.S. § 54B-130 as it existed on 13 March 1990, and that the funds in the account became the property of decedent's estate upon her death to be distributed in accordance with the residuary clause of her will. We therefore turn to an examination of whether the trial court's legal conclusions, and its order, were in accordance with applicable law.

[2] Plaintiff contends that decedent established a valid trust pursuant to either G.S. § 54B-130 or the common law. In general, when a savings account is established by a grantor to be held by the grantor as trustee for the benefit of another, the resulting trust is referred to as a "tentative trust" or a "Totten Trust." *See Baker v. Cox*, 77 N.C. App. 445, 446, 335 S.E.2d 71, 72 (1985), *disc. review denied*, 315 N.C. 389, 338 S.E.2d 877 (1986). North Carolina has expressly recognized such trusts, established at savings and loan associations, provided

that the trust conforms with the statutory provisions set forth in G.S. § 54B-130. *Id.* Among the many requirements set forth in G.S. § 54B-130, the person establishing the account must "execute a written agreement with the association containing a statement that it is executed pursuant to the provisions of this subsection." G.S. § 54B-130. The statute also limits the number of beneficiaries to "not more than one person." *Id.* Furthermore, the statute requires that:

> The person establishing an account under this subsection shall sign a statement containing language set forth in a conspicuous manner and substantially similar to the following: . . .
>
> I understand that by establishing a trust account under the provisions of North Carolina General Statute 54B-130(a) that:
>
> 1. During my lifetime I may withdraw the money in the account; and
>
> 2. By written direction to the savings and loan association . . . I may change the beneficiary; and
>
> 3. Upon my death the money remaining in the account will belong to the beneficiary, and the money will not be inherited by my heirs or be controlled by my will.

Id. The trust agreement here does not reference G.S. § 54B-130; it purports to name three beneficiaries rather than one; and it does not contain provisions substantially similar to either the change of beneficiary provision, or the provision that the funds in the account are not to be inherited by the grantor's heirs or controlled by the grantor's will. Thus, the purported trust agreement does not comply with G.S. § 54B-130.

However, G.S. § 54B-130 itself states in subdivision (a1):

> This section shall not be deemed exclusive. Deposit accounts not conforming to this section shall be governed by other applicable provisions of the General Statutes or the common law, as appropriate.

Id. As there are no other provisions of the General Statutes applicable to tentative trusts established at a savings and loan association, the issue is whether the trust agreement created a valid trust pursuant to the common law.

Defendants argue that a valid trust was not created by the trust agreement. Defendants rely primarily on two cases which have held

that a valid trust requires the transfer of a "present beneficial interest." In *Wescott v. Bank*, 227 N.C. 39, 40 S.E.2d 461 (1946), the decedent had deposited money in a bank account with written instructions to the bank as follows: "I would like to make this an 'in trust for' account so I am the only person who can withdraw from it. In case I become deceased I would like to make an agreement with you so as to make my beneficiary my grandfather . . . eligible to receive the money." *Id.* at 41, 40 S.E.2d at 462. The Court held that, since there was no evidence of a transfer of a "present beneficial interest" in the deposit, no trust was created. *Id.* at 43, 40 S.E.2d at 463. The Court explained this holding as follows:

> An express trust has been defined as "a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." . . . To constitute this relationship there must be a transfer of the title by the donor or settlor for the benefit of another. The gift must be executed rather than executory upon a contingency.

Id. at 42, 40 S.E.2d at 462-63 (citations omitted). Thus, the fact that the depositor directed that his grandfather was to have the money at the death of the depositor was insufficient to create a valid trust because title to the property had not been transferred by the deceased to a trustee to hold for the benefit of the intended beneficiary.

This Court reached a similar result in *Kyle v. Groce*, 50 N.C. App. 204, 272 S.E.2d 609 (1980). In *Kyle*, the decedent's application for a savings account with a savings and loan association contained the following statement under the decedent's name on the signature card: "Payable to Rose Z. Weaver, as survivor only." *Id.* at 205, 272 S.E.2d at 609. We held that "there was no evidence of a transfer or assignment of a present beneficial interest but only the expression of a desire that [Rose Z. Weaver] own the account at the death of the [decedent]." *Id.* at 205, 272 S.E.2d at 610. Thus, a valid trust was not created.

Defendants contend "[t]hese cases were based on common law principals which bar testamentary dispositions in the form of trusts unless the Wills Act is complied with," and further that these cases control the outcome in the instant case. However, defendants' assertion that testamentary dispositions must comply with the Wills Act, while correct, merely begs the question presented here: whether the

disposition was, in fact, "testamentary" in nature. A testamentary disposition is defined as a disposition that does not take effect until the testator's death. *See, e.g., In re Seymour's Will*, 184 N.C. 418, 114 S.E. 626 (1922); *In re Will of Thompson*, 196 N.C. 271, 145 S.E. 393 (1928). Stated in the converse, a disposition that transfers a present beneficial interest is, by definition, not testamentary in nature. Thus, if the trust agreement in the instant case failed to transfer a present beneficial interest, and took effect only upon decedent's death, then the disposition was testamentary and must fail for not complying with the Wills Act. On the other hand, if the trust agreement transferred some present beneficial interest at the time it was created, then it was not testamentary in nature and may constitute a valid trust.

In *Ridge v. Bright*, 244 N.C. 345, 93 S.E.2d 607 (1956), our Supreme Court held that an *inter vivos* trust established by a grantor for the benefit of another, in which the grantor names herself as trustee, is a valid trust, and that such an instrument is not testamentary despite the fact that the legal title to the property in trust is not to pass to the beneficiary until the death of the grantor. *Id.* at 352-53, 93 S.E.2d at 612-13. This is because such an instrument causes the immediate transfer of a "non-possessory interest" to the beneficiary. *Id.* at 352, 93 S.E.2d at 613. This non-possessory interest is the "present beneficial interest" described by the Court in *Wescott* that vests in a beneficiary when title to the trust property is transferred to the trustee who becomes subject to equitable duties to deal with the property for the benefit of the beneficiary. The Court in *Ridge* explained that such a trust may provide that the grantor will be entitled to possession of the property for life, or that the grantor shall be a life beneficiary of the trust. *Id.* The Court also explained that neither the reservation of a power to revoke the trust and take back the property, nor the retention of a power to modify the trust and change the beneficiaries, makes the instrument testamentary. *Id.* Rather, such provisions merely show that the present interest passing to the beneficiary is subject to divestment at the hands of the grantor. *Id.*

Here, decedent transferred title to the savings account to herself as trustee, subjecting herself as trustee to equitable duties to deal with the property for the benefit of the named beneficiaries. Thus, there was a transfer of a present beneficial interest such that the instrument was not testamentary in nature. Furthermore, the instrument satisfied the three elements necessary to establish a valid trust: (1) sufficient words to show intention to create the trust; (2) a

definite subject; and (3) an ascertained object. *See, e.g., Finch v. Honeycutt*, 246 N.C. 91, 97 S.E.2d 478 (1957). The instrument unequivocally manifests decedent's intention to create a trust. The trust property, consisting of the savings account, was clearly identified and was transferred into the custody of the trustee and the duties and powers of the trustee with respect to the trust assets were expressly defined. The beneficiaries were clearly designated and their respective interests were expressly set forth.

[3] Having determined that the trust agreement in question established a valid trust pursuant to the common law, the issue then becomes how the assets in the savings account should be distributed given that two of the three named beneficiaries pre-deceased decedent. The trust agreement, as we have stated, transferred a present beneficial interest, which interest vested in the beneficiaries upon the execution of the trust agreement. The interest was vested, rather than contingent, because the right of the beneficiaries to the savings account assets at the death of decedent did not depend upon the happening of some future, contingent event. From the very instant of the execution of the trust agreement, the possession of the trust assets by the beneficiaries was capable of taking effect upon the death of decadent. *See Power Co. v. Haywood*, 186 N.C. 313, 119 S.E. 500 (1923); *Canoy v. Canoy*, 135 N.C. App. 326, 520 S.E.2d 128 (1999). Because the interests were vested, they passed to the heirs and descendants of each deceased beneficiary upon each beneficiary's death. *See, e.g., Richardson v. Richardson*, 152 N.C. 705, 707, 68 S.E. 217, 218 (1910) (holding that person entitled to vested remainder has immediate fixed right of future enjoyment, and that such an estate may be transferred or alienated). Thus, upon the death of decedent, one-third of the assets in the savings account passed to plaintiff, one-third of the assets passed to the surviving heirs of A. Frank Bland, and one-third of the assets passed to the surviving heirs of Charlie D. Bland. We believe this result is consistent with the terms of the trust agreement itself ("This trust . . . shall continue for the life of the grantor and thereafter until the beneficiary is [twenty-one] years of age, or until his death if he dies before such age, and then the proceeds may be delivered by the institution to the beneficiary, *or to his heirs*") and with the common law of vested interests. We also believe this result, pursuant to which the trust account will be distributed in the same manner as the residuary assets under decedent's will, is the result intended by decedent. We also note that this is the result reached by various courts in other jurisdictions addressing similar circum-

stances. *See Detroit Bank and Trust Co. v. Grout*, 95 Mich.App. 253, 289 N.W.2d 898 (1980) (holding revocable *inter vivos* trust, which named trust company as trustee, provided grantor life estate in assets, and named president of trust company as beneficiary for one-twelfth of assets, created "vested remainder interest" in beneficiary upon creation of trust which passed to heirs of beneficiary at beneficiary's death prior to grantor, and entitled heirs to one-twelfth of trust property at death of grantor); *First Nat. Bank of Bar Harbor v. Anthony*, 557 A.2d 957 (Me., 1989) (holding revocable *inter vivos* trust, which provided income from account to grantor for life, followed by life estate to grantor's wife of income from account, and which named three grandchildren of grantor as beneficiaries of trust assets, created vested interests in grandchildren which passed to heirs of one grandchild when grandchild predeceased grantor); *First Nat. Bank of Cincinnati v. Tenney*, 165 Ohio St. 513, 138 N.E.2d 15 (1956) (holding revocable *inter vivos* trust, which named bank as trustee, provided grantor life estate in trust income, and named grantor's sister as beneficiary, created vested remainder interest in beneficiary which passed to defendant by bequeath in beneficiary's will upon death of beneficiary prior to death of grantor, entitling defendant to trust property at grantor's death); *First Galesburg National Bank & Trust Co. v. Robinson*, 149 Ill.App.3d 584, 102 Ill.Dec. 894, 500 N.E.2d 995 (1986) (holding revocable *inter vivos* trust, providing proceeds from family business to grantors for life, naming bank as trustee, and naming grantors' two sons as beneficiaries, created in each son a vested interest in the remainder upon creation of trust, which vested interest was subject to descent or devise and therefore passed to heirs of one son who predeceased grantors).

In sum, we agree with the trial court's preliminary conclusion of law that the savings account at issue failed to comply with G.S. § 54B-130 as that statute existed on March 30, 1990. However, we reverse the trial court's second conclusion of law that the funds in the savings account therefore became the property of decedent's estate upon her death and should be distributed in accordance with the residuary clause of her will. We also reverse the trial court's instruction to BB&T to disburse the funds to decedent's estate. We hold that the trust agreement established a valid tentative trust under the common law. We hold that upon creation of the trust, each beneficiary received a present vested interest, and that, upon the death of A. Frank Bland, and upon the death of Charlie D. Bland, their vested interests passed to their respective heirs. Thus, upon the death of

decedent, the trust assets, passing outside of decedent's estate, should be distributed by BB&T as follows: one-third of the assets to plaintiff, one-third of the assets to the surviving heirs of A. Frank Bland, and one-third of the assets to the surviving heirs of Charlie D. Bland. We reverse and remand for the trial court to enter conclusions of law and instructions to the parties consistent with this opinion.

Reversed.

Judges GREENE and McCULLOUGH concur.

BENNY BOWERS, ERNEST J. PERKINS AND WIFE NANCY S. PERKINS, DOUGLAS K. CONRAD, WILLIAM HINKLE, JOE D. CLINE AND WIFE GRETA CLINE, BILLY JOE HILL AND WIFE CAROLYN HILL, ROBERT CHAMBERS AND WIFE KIMBERLY CHAMBERS, PETITIONERS v. CITY OF THOMASVILLE, A MUNICIPAL CORPORATION, RESPONDENT

No. COA00-601

(Filed 1 May 2001)

1. Cities and Towns— annexation—timeliness of revision of ordinance after remand

The trial court did not err by granting summary judgment in favor of defendant city and by upholding the validity of the city's revised annexation ordinance even though the city failed to act within three months of the date the Court of Appeals filed an opinion on 1 December 1998 remanding the case for a revision of the ordinance to remove farm use tax-exempt land from the annexation area and to equalize the water rates for city and county customers, because: (1) the Court of Appeals' opinion indicated a remand to the superior court and then to the city council, meaning the matter was with the Court of Appeals until those steps were accomplished; and (2) the superior court was empowered to start the three-month period once it issued a remand order to the city council.

2. Cities and Towns— annexation—failure to formally adopt new services plan—equitable estoppel

Although the minutes of the city council's meeting do not reflect formal adoption of the amended annexation services plan

and its amendments, the city is bound by the terms of the services plans under principles of equitable estoppel, because: (1) the Court of Appeals remanded the city's annexation ordinance and instructed the city to exclude farm use tax-exempt land from the proposed annexation area and to equalize the water rates for newly annexed residents, but did not instruct the city to submit a new services plan; (2) the only significant change to the services plan was the scope of its coverage and the services for petitioners remained the same; (3) petitioners and everyone affected by the proposed annexation knew the nature and scope of the services they would receive based on the earlier services plan filed by the city; and (4) petitioners retain a statutory remedy against the city in the event of noncompliance with the requirements of Chapter 160A.

Appeal by petitioners from order entered 21 October 1999 by Judge Sanford L. Steelman, Jr., in Davidson County Superior Court. Heard in the Court of Appeals 26 March 2001.

Adams Hendon Carson Crow & Saenger, P.A., by S.J. Crow and Martin K. Reidinger, for petitioner appellants.

Thomasville City Attorney Paul Rush Mitchell; and Womble Carlyle Sandridge & Rice, PLLC, by Roddey M. Ligon, Jr., for respondent appellee.

McCULLOUGH, Judge.

In August 1996, the City of Thomasville prepared an Annexation Ordinance to annex two areas of land into its City Limits. These areas, the Hasty Community and the Pilot Community, combined to make up annexation area 96-A. The City unsuccessfully tried to annex area 96-A in 1995. However, when the Ordinance was challenged in court, the City decided to withdraw it, repeal it, and start the process anew, thereby developing the Annexation Ordinance that is disputed here. The petitioners in this case are concerned residents who own land in the annexation area and believe they are adversely affected by the current Annexation Ordinance.

The Ordinance that is the subject of this appeal was adopted by the Thomasville City Council on 12 August 1996. Petitioners challenged the Ordinance, alleging that it violated N.C.G.S. § 160A-50(g) (1999), because the annexation area included land that had been granted a "farm use" tax exemption and the City had

previously agreed not to annex such property. *See* 1993 N.C. Sess. Laws ch. 292 (describing an annexation agreement between Davidson County, the City of High Point, and the City of Thomasville). The Ordinance was also challenged, because annexation area 96-A included properties served by the County water provider and the City's Services Plan (which outlined municipal services for the City and any of its annexed areas) made no provisions for equalizing the water rates charged to the new City residents on the County system with the rates charged to annexed residents on the City's system.

Petitioners sued the City in April 1997, challenging the validity of the 1996 Annexation Ordinance. The Davidson County Superior Court upheld the validity of the Ordinance and granted the City's motion for summary judgment. Petitioners appealed. In an opinion filed 1 December 1998, this Court remanded the matter to the Davidson County Superior Court and instructed that the Annexation Ordinance could not include farm use tax-exempt properties, and any portions of the territory of the County water provider that remained in the annexation area would have to be served at the same rate as land in the annexation area that was served by the City's water provider. The City acknowledged that the Court of Appeals' opinion remanded the case

(a) For the deletion of property having farm use tax-exempt status and determining if the area qualifies with such property deleted; and

(b) For the elimination of any discrepancies between the water rates charged by the City and those charged by Davidson Water, Inc. to property owners being annexed.

The Supreme Court denied both petitioners' and respondent's petitions for discretionary review on 4 February 1999. The Davidson County Superior Court received this Court's instructions in December 1998, but failed to enter an order remanding the matter to the Thomasville City Council on its own; rather, the Thomasville City Attorney had to approach the superior court and request action. On 6 April 1999, Thomasville City Attorney Paul Mitchell obtained an *ex parte* order from the Davidson County Superior Court entitled "Remand Order in Conformity with the Decision of the North Carolina Court of Appeals." The Remand Order stated:

> Upon motion of the Respondent City of Thomasville ("City"), the above-styled matter is hereby remanded to the City's govern-

ing body for further proceedings in conformity with the decision of the North Carolina Court of Appeals which was filed on the first day of December 1998, with petitions for discretionary review being denied on February 4, 1999, and being certified to the Clerk of the Superior Court of Davidson County on February 10, 1999.

Pursuant to the provisions of North Carolina General Statute § 160A-50(g) the City shall have three (3) months from the date of this remand within which to conform to the decision of the North Carolina Court of Appeals, and if the City fails to do so the annexation proceedings shall be deemed null and void.

Thus, by the terms of the Remand Order, the City had from 6 April 1999 to 6 July 1999 to comply with this Court's instructions and preserve the validity of the Annexation Ordinance.

As part of its effort to comply with the Court of Appeals' instructions, the City adopted a new Ordinance which eliminated almost all of the Hasty Community from the annexation area. All areas served by Davidson Water, Inc. (the County water provider) were eliminated, thereby leaving all areas subject to annexation to be served by the City's water system. All farm use tax-exempt land in the Pilot Community was eliminated from the annexation plan, but areas around it were still subject to annexation. An amended Services Plan was not adopted, though the City did amend and adopt a new annexation description, map and qualifications. After all changes were incorporated, the City adopted the revised Annexation Ordinance on 21 June 1999.

Petitioners filed suit on 20 July 1999, challenging the City's month-old Ordinance. The City moved for summary judgment, which was granted on 21 October 1999. Petitioners appealed.

I. The Remand Order

During the previous disposition of this case in 1998, this Court remanded the case to the Davidson County Superior Court, with instructions that the City remedy certain aspects of its annexation plan so that it would meet the statutory guidelines in the relevant subsections of N.C. Gen. Stat. § 160A. Though we affirmed some of the issues in favor of the City, we also instructed the City to revise its Annexation Ordinance by removing farm use tax-exempt land from the annexation area and by equalizing the water rates for City and County customers. The Davidson County Superior Court did not act

until it was approached by the Thomasville City Attorney. The superior court issued a Remand Order on 6 April 1999, thereby remanding the case to the Thomasville City Council, the only body capable of actually revising the Annexation Ordinance.

The pertinent statute in this case is N.C. Gen. Stat. § 160A-50(g), which states:

> If any municipality shall fail to take action in accordance with the court's instructions *upon remand* within 90 days following entry of the order embodying the court's instructions, the annexation proceeding shall be deemed null and void.

(Emphasis added.)

[1] Petitioners first argue that the Annexation Ordinance is null and void because the City failed to act within three months of the date the Court of Appeals' opinion was filed, on 1 December 1998. The City maintains that the three-month period began when the superior court's Remand Order was received on 6 April 1999. N.C. Gen. Stat. § 160A-50(g) specifically refers to "the court's instructions upon remand." The City argues that it could act only after the case was remanded two times; first to the Davidson County Superior Court, and then to the City Council. The City calculates the start of the three-month period on 6 April 1999, the date of the superior court's Remand Order, because only then did the City have the power to revise the Annexation Ordinance. We agree with the City's calculation, and hold that the Annexation Ordinance was revised within the statutory three-month period.

The instructions from the Court of Appeals specifically stated:

> Accordingly, we remand the water distribution portion of the annexation services plan to the Davidson County Superior Court with instruction to remand to respondent for amendment to compensate for this price discrepancy.

Thus, the Court of Appeals' opinion indicated a remand from it, to the superior court, then to the City Council. Until those steps were accomplished, the matter was with this Court. The Court of Appeals does not ordinarily enter lower court orders; that is left to the superior or district courts. Here, the superior court was empowered to start the "clock" of the three-month period, not this Court. The receipt of instructions upon remand occurred when the remand occurred. It is true that the Court of Appeals developed the instruc-

tions, but those instructions were not received until the remand from the superior court to the City Council was completed.

Our judicial process consists of several steps, and there are particular actions that must be taken after an appeal has been decided. N.C. Gen. Stat. § 1-298 (1999) explains the procedure after determination of an appeal. It directs a certificate of determination of an appeal to be executed or modified by the court below (a superior or district court). The statute reads:

> In civil cases, at the first Session of the superior or district court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first Session after the receipt of the certificate from the Appellate Division.

Id.

As our Supreme Court stated in *Goodson v. Lehmon*, 225 N.C. 514, 517-18, 35 S.E.2d 623, 625 (1945):

> This Court may, of course, render a final judgment here in proper cases, and occasionally does so; but it is not the practice to render judgment here unless it may be necessary to protect some right of the litigant parties in danger of *ad interim* defeat, or where it is demanded by the public convenience or welfare. Ordinarily, the opinion of the Court is certified down to the Superior Court of the county whence the appeal came, where a judgment in accordance with the opinion is entered. In that event, while the certified decision is binding on the court of original jurisdiction, the cause is not terminated until the authority of that court has been exercised.

In *Lancaster v. Bland*, 168 N.C. 377, 378, 84 S.E. 529, 530 (1915) the Supreme Court stated:

> When judgment has been affirmed or reversed on appeal it is a live case till, on receipt of the certificate, judgment has been entered below in conformity therewith, unless final judgment is entered here.

See also R.R. v. Sanford, 188 N.C. 218, 124 S.E. 308 (1924) and *Johnston v. R.R.*, 109 N.C. 504, 13 S.E. 881 (1891).

The remand of this case from the Court of Appeals to the Davidson County Superior Court to the Thomasville City Council was orderly and proper. The matter was properly before the City Council only after the superior court issued a remand order. Simply stated, there were no instructions upon remand until there *was* a remand. The Court of Appeals' decision was fully effectuated after two remands took place, one from the Court of Appeals to the superior court, and another from the superior court to the City Council.

Thus, we hold that the statutory three-month period began when the Davidson County Superior Court issued its Remand Order on 6 April 1999. The City amended its Annexation Ordinance on 21 June 1999, well within the three-month period. Therefore, we conclude that the City's actions were timely, and that the revised Ordinance is valid.

II. The Services Plan

[2] Petitioners maintain that, even if the revised Ordinance was timely passed, the City's efforts to comply with the Court of Appeals' decision were still inadequate. Petitioners contend that the City failed to have in place a services plan for the area being annexed as required by N.C. Gen. Stat. §§ 160A-47 and -49(e) (1999). If the annexation area changes during subsequent revisions to an annexation ordinance, petitioners argue that N.C. Gen. Stat. § 160A-49(e) requires a new services plan to be filed. We do not agree.

N.C. Gen. Stat. § 160A-49(e) outlines the procedure for passage of an annexation ordinance. The statute explains that

> [t]he municipal governing board shall take into consideration facts presented at the public hearing and shall have authority to amend the report required by G.S. 160A-47 to make changes in the plans for serving the area proposed to be annexed so long as such changes meet the requirements of G.S. 160A-47, provided that if the annexation report is amended to show additional subsections of G.S. 160A-48(c) or (d) under which the annexation qualifies that were not listed in the original report, the city must hold an additional public hearing on the annexation not less than 30 nor more than 90 days after the date the report is amended, and notice of such new hearing shall be given at the first public hearing. At any regular or special meeting held no sooner than the tenth day following the public hearing and not later than 90 days following such public hearing, the governing board shall have

> authority to adopt an ordinance extending the corporate limits of the municipality to include all, or such part, of the area described in the notice of public hearing which meets the requirements of G.S. 160A-48 and which the governing board has concluded should be annexed.

The City's original Services Plan was filed with its 1996 Annexation Ordinance; the plan outlined police and fire protection, solid waste collection, and street maintenance services for the annexation area. The practical effect of the Services Plan was that all petitioners received the same services as City residents. When this case reached our Court in 1998, we instructed the City to exclude farm use tax-exempt land from the annexation area, and to equalize the water rates for newly annexed residents. We did not, however, instruct the City to submit a new services plan.

After revising its Annexation Ordinance to comply with this Court's opinion, the City filed a document entitled "Amended Annexation Services Plan, City of Thomasville, North Carolina, Area 96-A, Amended as of June 21, 1999." This amendment merely delineated the areas being annexed and stated that all residences and businesses within the annexed area would be provided with City water. Petitioners contend that the record on appeal does not indicate that this document and its amendments were ever formally adopted by the City Council.

We have examined the minutes of the 21 June 1999 meeting, which are contained in the record. Though the minutes do not reflect formal adoption of the Amended Annexation Services Plan and its amendments, the City is bound by the terms of the Services Plan under principles of equitable estoppel. We have previously explained that

> [e]quitable estoppel arises when an individual by his acts, representations, admissions or silence, when he has a duty to speak, intentionally or through culpable negligence, induces another to believe that certain facts exist and that other person rightfully relies on those facts to his detriment. Neither fraud, intentional or unintentional, bad faith nor an intent to deceive are necessary to invoke the doctrine of equitable estoppel . . . . When estoppel is based upon an affirmative representation and an inconsistent position subsequently taken, it is not necessary that the party to be estopped have any intent to mislead or deceive the party claiming the estoppel, or that the party to be estopped even be

aware of the falsity of the representation when it was made. Estoppel principles depend on the facts of each case.

Miller v. Talton, 112 N.C. App. 484, 488, 435 S.E.2d 793, 797 (1993) (citation omitted). In the present case, we hold the City to the terms of the Services Plan despite the absence of a formal adoption.

After careful consideration of the statutory scheme, we find that a services plan must exist under N.C. Gen. Stat. § 160A-47, but we do not find any provisions requiring the City to adopt a new services plan in a situation such as this. The City's revised annexation plan deleted all farm use tax-exempt land from the proposed annexation area and also ensured that all annexed areas would receive city water at the same rates as other city residents. In conjunction with the amended Annexation Ordinance, the City adopted an amended description of the land to be annexed and provided an amended map and amended qualifications to support it. The only significant change to the Services Plan was the scope of its coverage; the services for petitioners remained the same. From a practical standpoint, petitioners and everyone affected by the proposed annexation knew the nature and scope of the services they would receive, based on the earlier Services Plan filed by the City.

Lastly, we note that petitioners retain a statutory remedy against the City in the event of noncompliance with the requirements of Chapter 160A. N.C. Gen. Stat. § 160A-50 provides the appeals process for petitioners. The City must have an opportunity to provide the promised services, but petitioners are not without recourse.

The judgment affirming the validity of the amended Annexation Ordinance is

Affirmed.

Chief Judge EAGLES and Judge BRYANT concur.

LELA CHRISTINE SHEEHY SHERLOCK, PLAINTIFF v.
ROGER THOMAS SHERLOCK, DEFENDANT

No. COA00-356

(Filed 1 May 2001)

Jurisdiction— personal—long-arm statute—minimum contacts

The trial court did not err in an action for post-separation support, equitable distribution, attorney fees, alimony, and a restraining order barring defendant from disposing of marital assets, by denying defendant's motion to dismiss based on an alleged lack of personal jurisdiction even though defendant was served with the summons and complaint in Thailand, the parties frequently moved from one foreign country to another, and the parties failed to establish a home anywhere in the United States or abroad, because: (1) the long arm statute, of N.C.G.S. § 1-75.4(12), confers jurisdiction on any action under Chapter 50 that arises out of a marital relationship within North Carolina, notwithstanding subsequent departure from the state, if the other party to the marital relationship continues to reside in this state; (2) the parties were married in North Carolina, plaintiff continues to reside in North Carolina, and this action arises under Chapter 50; (3) defendant has had minimum contacts with this state so as to permit the exercise of personal jurisdiction over him without offense to his due process rights since Durham, North Carolina served as the home of defendant's legal and financial interests throughout his marriage even though he was seldom physically present within the state; and (4) plaintiff's residence in North Carolina is a legitimate factor for consideration although it is not dispositive.

Appeal by defendant from order entered 30 December 1999 by Judge Ann E. McKown in Durham County District Court. Heard in the Court of Appeals 21 February 2001.

William J. Cotter, for plaintiff-appellee.

Moore & Van Allen, PLLC, by Edward L. Embree, III, and Laura Keohane, for defendant-appellant.

BIGGS, Judge.

Roger Sherlock (defendant) appeals from an order denying his motion to dismiss plaintiff's action pursuant to N.C.R. Civ. P. 12(b)(2),

based on lack of personal jurisdiction. We find that the trial court properly concluded that grounds exist to assert personal jurisdiction over the defendant. Accordingly, we affirm the trial court's ruling.

Lela and Roger Sherlock were married in Durham, North Carolina, on 27 December 1983. They separated in June 1999, and on 6 July 1999, Lela Sherlock (plaintiff) instituted the present action, seeking post-separation support, equitable distribution, attorneys' fees, alimony, and a restraining order barring the defendant from disposing of marital assets. The defendant was properly served with the summons and complaint in Bangkok, Thailand, on 26 July 1999. On 23 August 1999, defendant filed a motion to dismiss plaintiff's complaint under Rule 12(b)(2), asserting the absence of personal jurisdiction. His motion was heard on 9 December 1999. The trial court ruled that grounds for jurisdiction were found under N.C.G.S. § 1-75.4(12) (1999), and that the defendant's due process rights were not offended by his being required to defend the suit in North Carolina. The trial court denied defendant's motion to dismiss, and from this ruling defendant appeals.

The denial of a defendant's motion to dismiss for lack of personal jurisdiction, though interlocutory, is immediately appealable. N.C.G.S. § 1-277(b) (1999); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982); *Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000). The burden is upon the plaintiff to establish by a preponderance of the evidence that personal jurisdiction exists. *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 541 S.E.2d 733 (2 January 2001); *Murphy v. Glafenhein*, 110 N.C. App. 830, 431 S.E.2d 241, *disc. review denied*, 335 N.C. 176, 436 S.E.2d 382 (1993). The court's determination that grounds exist for personal jurisdiction is a question of fact. *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E.2d 676 (1974); *Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 519 S.E.2d 317 (1999). Upon review by this Court, the trial court's findings of fact should be upheld if supported by competent evidence. *Hiwassee*, 135 N.C. App. at 24, 519 S.E.2d 317.

When a defendant challenges the court's exercise of personal jurisdiction, the court must undertake a two part inquiry. *Buck v. Heavner*, 93 N.C. App. 142, 377 S.E.2d 75 (1989). The court first determines whether North Carolina law provides a statutory basis for the assertion of personal jurisdiction. *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 541 S.E.2d 733 (2001); *Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000); *Schofield v. Schofield*, 78 N.C. App.

657, 338 S.E.2d 132 (1986). If the court concludes that there is a statutory basis for jurisdiction, it next must consider whether the exercise of personal jurisdiction complies with the due process requirements of the Fourteenth Amendment. *Bates v. Jarrett*, 135 N.C. App. 594, 521 S.E.2d 735 (1999); *Powers v. Parisher*, 104 N.C. App. 400, 409 S.E.2d 725 (1991), *disc. review denied*, 331 N.C. 286, 417 S.E.2d 254 (1992).

In the present case, the trial court found statutory grounds for jurisdiction under N.C.G.S. § 1-75.4 (1999). This statute confers jurisdiction over a wide range of cases, including:

> any action under Chapter 50 that arises out of the marital relationship within this State, notwithstanding subsequent departure from the State, if the other party to the marital relationship continues to reside in this state.

G.S. § 1-75.4(12). We agree with the trial court's conclusion that jurisdiction is proper under this statutory provision. The parties were married in North Carolina. Plaintiff "continues to reside" in North Carolina. The action arises under Chapter 50, "Divorce and Alimony," and seeks resolution solely of issues pertaining to the dissolution of their marriage. Under these circumstances, plaintiff's action is authorized under G.S. § 1-75.4(12). The defendant argues that this action does not "arise out of the marital relationship within this state" because, *e.g.*, the couple never established a permanent home in North Carolina, and the defendant has never owned property within the state. However, these factors do not necessarily render jurisdiction improper. Instead, they are relevant to our evaluation of defendant's connections with this state in regard to the due process implications of the exercise of personal jurisdiction over him.

The requirements for *in personam* jurisdiction were articulated by the United States Supreme Court in *International Shoe Company v. Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945), in which the Court held:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

Id. at 315, 90 L. Ed. at 102 (citations omitted). *International Shoe* remains the leading authority in this area, and decisions of this Court

have adhered to its principles. The plaintiff in this case sought to exercise jurisdiction over the defendant pursuant to G.S. § 1-75.4, often called the "long arm statute" in reference to its power to compel defense of a suit even by those located at a great distance, provided that the defendant has the requisite "minimum contacts" with North Carolina. This Court has noted that:

> Under our 'long arm' statute, North Carolina courts may obtain personal jurisdiction over a non-resident defendant to the full extent permitted by the Due Process Clause of the United States Constitution.

Saxon v. Smith, 125 N.C. App. 163, 173, 479 S.E.2d 788, 794 (1997) (citations omitted). *See also Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977). Therefore, when personal jurisdiction is alleged to exist pursuant to the long-arm statute, "the question of statutory authority collapses into the question of whether [the defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process." *Hanes Companies, Inc. v. Ronson*, 712 F.Supp. 1223, 1226 (M.D.N.C. 1988) (citations omitted); *Murphy v. Glafenhein*, 110 N.C. App. 830, 431 S.E.2d 241, *disc. review denied*, 335 N.C. 176, 436 S.E.2d 382 (1993).

Thus, the issue before this Court is whether Roger Sherlock has had "minimum contacts" with this State so as to permit the exercise of personal jurisdiction over him without offense to his due process rights. The resolution of this question "will vary with the quality and nature of the defendant's activity, but it is essential . . . that there be some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974) (citations omitted). Further, the relationship between defendant and North Carolina must be such that the defendant "should reasonably anticipate being haled into court" in this state. *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (citations omitted). As expressed by the United States Supreme Court:

> [the] purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, . . . or of the 'unilateral activity' of another party or a third person. . . . Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself*[.]

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 542 (1985) (citations omitted). This Court recently has summarized the aspects of a defendant's situation that have proven useful in an analysis of "minimum contacts" with a jurisdiction:

> Our courts have developed a list of factors helpful to determining the existence of minimum contacts. Such factors include, (1) the quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience of the parties. . . . The Court must also weigh and consider the interests of and fairness to the parties involved in the litigation.

Filmar Racing Inc. v. Stewart, 141 N.C. App. 668, 672, 541 S.E.2d 733, 737 (2001) (citations omitted). *See also Tutterrow v. Leach*, 107 N.C. App. 703, 421 S.E.2d 816 (1992); *Powers v. Parisher*, 104 N.C. App. 400, 409 S.E.2d 725 (1991) (stressing importance of the same factors).

Plaintiff and defendant were married in 1983, and lived together until 1999. They were married in Durham, but did not reside there. The couple never purchased a home or established a permanent residence in this country. In fact, a six month stay in Georgia was the only time during their marriage that they lived in the United States. Nor did they establish a permanent home in any other country. Rather, defendant's employment at all times dictated their place of residence. Roger Sherlock was employed during the marriage by Lucent Technologies and by ATT. These corporations shuttled defendant to various international locales, as need arose. Between 1983 and 1999, the Sherlocks resided in Egypt, Korea, the Philippines, India, Indonesia, Australia, and Thailand. There is no evidence in the record to suggest that either of the Sherlocks intended to become naturalized citizens or permanent residents of any of these countries.

After the Sherlocks married, they managed their concerns using both professional relationships and family connections in Durham. Despite their continuous travel, they administered their important legal, civic, personal, and financial affairs primarily from one location—Durham, North Carolina. The plaintiff's parents and her other relatives live in Durham. North Carolina clearly served as the couple's headquarters in the United States. The trial court in their order found that the defendant either initiated or participated in an array of actions in North Carolina, including the following: (1) their marriage

ceremony was performed in Durham, North Carolina. Consequently, their marriage license was filed there, and the provisions of Chapter 52, "Powers and Liabilities of Married Persons," governed various legal aspects of their relationship during the marriage; (2) while he was overseas, the defendant used his father-in-law's Durham address to receive important mail, including federal income tax documents; (3) between 1983 and 1989 the defendant's salary was directly deposited into a Wachovia bank account in Durham, North Carolina; (4) between 1984 and 1995 the defendant had a North Carolina drivers' license. To obtain a license, the defendant must have had at least a nominal "residence" in North Carolina; (5) in 1984, the defendant executed a Power of Attorney in Durham, and made Albert Sheehy, his father-in-law, his Attorney in Fact. This document was filed in the Durham County Registry; (6) in his capacity as Attorney in Fact, Mr. Sheehy conducted business on behalf of plaintiff and defendant while they were overseas; (7) in 1984, the defendant made a Last Will and Testament, naming Mr. Sheehy, of Durham, the executor of his will, and Mary Meschter, also of Durham, as alternate executor; (8) from 1992 to 1995 the defendant retained Frank Brown, a Durham accountant, to receive and pay bills on his behalf; and (9) in 1992, plaintiff and defendant opened an investment account with Edward D. Jones, Oxford, North Carolina, consisting of IRA accounts, money market funds, and mutual funds.

These findings are supported by competent evidence in the record, and thus should be upheld. We find that the record sufficiently establishes that the defendant "availed himself of the privilege of conducting activities within [North Carolina], thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958). We find that the defendant intentionally developed an assortment of financial, legal, and personal connections within North Carolina. These endeavors were sustained over a period of years, and appear intended to inure to his benefit. Defendant's purposeful conduct in this regard clearly separates this case from those in which personal jurisdiction is improper. *See, e.g., Shamley v. Shamley*, 117 N.C. App. 175, 455 S.E.2d 435 (1994) (defendant's only contact with North Carolina consisted of two brief visits); *Tompkins v. Tompkins*, 98 N.C. App. 299, 390 S.E.2d 766 (1990) (no evidence in record that defendant had conducted activities in this state or otherwise invoked the protection of North Carolina's laws); *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986) (parties did not share matrimonial domicile in North Carolina, and no indication that defendant had conducted business

or other activities here, or had invoked the protection of the State's laws).

Defendant contends that the fact that the plaintiff lives in Durham is irrelevant to our determination regarding personal jurisdiction. Defendant also stresses that he has never lived in North Carolina or purchased real estate here, and attempts to characterize plaintiff's move to North Carolina as the kind of "unilateral act" that precludes the exercise of jurisdiction. We disagree. While the plaintiff's residence is a legitimate factor for our consideration, it is not dispositive. *See Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977) (when plaintiff is resident of forum state, the fairness to plaintiff in permitting suit in her home state is a factor in determination of fairness to defendant of being required to defend the suit in that state). Moreover, the *defendant's* own actions sufficiently demonstrate his connections with this state, regardless of plaintiff's residence.

This Court recognizes that a state does not attain personal jurisdiction over a defendant "simply by being the 'center of gravity' of the controversy or the most convenient location for the trial of the action." *Miller v. Kite*, 313 N.C. 474, 477, 329 S.E.2d 663, 665 (1985) (citations omitted). In the ordinary divorce case, it might be improper to assert jurisdiction over a defendant who has spent so little time in the forum state. However, the Sherlocks' history is unusual; their frequent moves from one foreign country to another, and their failure to establish a permanent home anywhere in the United States or abroad, require this Court to evaluate their situation on its own merits. We note that:

> [T]he criteria by which we mark the boundary line between those activities which justify the subjection of [defendant] to suit, and those which do not, cannot be simply mechanical or quantitative.

International Shoe Co. v. Washington, 326 U.S. 310, 319, 90 L. Ed. 95, 103 (1945). This Court, upon review of the facts and circumstances of this case, determines that Durham, North Carolina has served as the home of defendant's legal and financial interests throughout his marriage, even though he was seldom physically present within the state. We find also that North Carolina has an interest in the resolution of the plaintiff's action, and that fairness to the parties supports the plaintiff's assertion of personal jurisdiction. The quantity and quality of defendant's contacts with North Carolina far exceed the "minimum contacts" required for jurisdiction, and thus his right to due process is not offended by this action.

For the reasons stated above, we affirm the trial court's denial of defendant's motion to dismiss.

Affirmed.

Judges WALKER and SMITH concur.

STATE OF NORTH CAROLINA v. WILLIAM DREYSHALL JOHNSON

No. COA00-308

(Filed 1 May 2001)

1. Search and Seizure— search warrant—probable cause

There was probable cause for a warrant to search defendant and an apartment for narcotics where there were two controlled purchases, information provided by several anonymous informants, and independent police corroboration and investigation.

2. Search and Seizure— narcotics—strip search—warrant not exceeded

Officers executing a search warrant for narcotics did not exceed the scope of the warrant by performing a strip search of defendant where the warrant was executed for the express purpose of finding controlled substances on the premises or the persons described in the warrant, including defendant; such substances could be readily concealed on the person; an officer testified that there is a trend toward hiding controlled substances in body cavities; the search of the premises had revealed electronic scales and an initial search of defendant had revealed almost $2,000 in small denominations; and the search was done in a reasonable manner in that defendant was taken into his bedroom by two male officers who did not touch him.

3. Search and Seizure— search warrant—knock and announce—conflicting testimony

The trial court did not err by finding that officers executing a search warrant complied with the "knock and announce" requirement where there was conflicting testimony; the court gave greater weight to an officer's testimony than to the testimony of defendant's relative, and the officer's testimony was

sufficient to support the finding that the officers complied with the requirement.

Appeal by defendant from judgment entered 15 November 1999 by Judge James R. Vosburgh in Orange County Superior Court. Heard in the Court of Appeals 6 February 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Douglas W. Hanna, for the State.

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

BIGGS, Judge.

This appeal arises out of the trial court's denial of defendant-appellant's motion to suppress evidence seized from his person pursuant to a search warrant. Based on the reasoning herein, we affirm the decision of the trial court.

The defendant, William Dreyshall Johnson, was indicted on 1 June 1999 for felonious possession with intent to sell and deliver cocaine, and maintaining a dwelling for keeping and selling cocaine. On 24 May 1999 he filed a motion to suppress physical evidence seized pursuant to a search warrant. The motion to suppress was denied, and on 9 November 1999 defendant filed a written notice appealing the denial of his motion. Reserving his right to appeal the denial of his motion to suppress, defendant pled guilty to charges in the indictment, and following the sentencing, defendant appealed to this Court. On appeal defendant argues three assignments of error. First he contends that the application for the search warrant was insufficient to establish probable cause; second, even if there was probable cause, the scope of the search of the defendant exceeded that contemplated by the warrant and was therefore unreasonable; and third, the trial court's order denying the motion to suppress is based on findings and conclusions that are not supported by the evidence and therefore inadequate as a matter of law. We find these contentions without merit.

On 15 March 1999, Investigator Kevin T. Burgess (Burgess) of the Chapel Hill Police Department submitted an application for a search warrant to District Court Judge Joe Buckner. The warrant identified K-2 Camelot Village Apartments as the property to be searched, and

William Dreyshall Johnson, as one of the persons to be searched. Judge Buckner reviewed the application and issued a warrant which was executed later that day by Burgess and a Special Entry Team (SWAT). During the search, the police recovered two pistol gripped 12 gauge shot guns and a pair of electronic scales from the defendant's apartment. An initial search of the defendant's person revealed almost $2,000.00 in small denominations. The police then asked the defendant to remove his clothing and to bend over at the waist. When he did, the officers saw a piece of plastic protruding from his anus. The officers asked the defendant to remove the package from his anus and found that it contained seventeen (17) individually packaged bags of what was later determined to be crack cocaine. Defendant was charged with possession with intent to sale and deliver cocaine in violation of N.C.G.S. § 90-95(a) (1999), and with intentionally maintaining a dwelling house for keeping and selling a controlled substance in violation of N.C.G.S. § 90-108(a)(7) (1999).

On 24 May 1999, the defendant filed a motion to suppress the evidence seized on the evening of 15 March 1999. Defendant alleged that the evidence was not competent because the warrant was invalid, as it did not establish probable cause for the search. Further, he alleged that the execution of the search warrant was carried out in an unlawful manner, and that the search exceeded the scope of the warrant as issued. The trial court conducted a pre-trial hearing on the motion to suppress evidence seized, and after hearing testimony from both sides, denied defendant's motion. Defendant subsequently pled guilty to all charges, pursuant to a plea bargain. From the order denying defendant's motion to suppress, defendant appeals.

I.

[1] First, defendant contends that Burgess's application failed to establish probable cause to support the issuance of a search warrant. Defendant maintains that the information contained in the affidavit was supplied by a confidential informant and other unnamed sources, and that hearsay of this nature is insufficient to establish probable cause. For these reasons, defendant insists that the evidence obtained in the search should have been excluded. We disagree.

In reviewing the denial of a motion to suppress, our evaluation is "limited to determining whether the trial court's findings of fact are supported by competent evidence and whether the findings of fact in turn support legally correct conclusions of law." *State v. Smith*, 118 N.C. App. 106, 111, 454 S.E.2d 680, 683, *rev'd on other grounds*, 342

N.C. 407, 464 S.E.2d 45 (1995) (citation omitted). In *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984), North Carolina adopted the "totality of the circumstances" analysis, for determining whether probable cause exists for the issuance of a search warrant which contains information from an informant. The standard applied is as follows:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.

Illinois v. Gates, 462 U.S. 213, 238-39, 76 L. E. 2d 527, 548 (1983) (citation omitted); *State v. Arrington*, 311 N.C. at 638, 319 S.E.2d at 257-58. Great deference should be given to the magistrate's determination of probable cause by the reviewing court. *State v. Arrington*, 311 N.C. at 638, 319 S.E.2d at 258.

"Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (quoting *Brinegar v. United States*, 338 U.S. 160, 93 L. Ed. 1879 (1949)). Probable cause does not demand the certainty we associate with a formal trial. *State v. Staley*, 7 N.C. App. 345, 349, 172 S.E.2d 293, 295 (1970). "Only the probability and not a *prima facie* showing of criminal activity is the standard of probable cause." *Id.* (citation omitted).

Burgess's application for a search warrant contained, in pertinent part, the following information: In April 1998, the Chapel Hill Police Department, Vice and Narcotics Division began receiving information from a number of anonymous sources that crack cocaine was being sold at K-2 Camelot Village Apartments on Estes Drive. One of these phone calls identified the defendant, William Johnson, as one of the sellers. The Vice and Narcotics Division received approximately ten (10) phone calls implicating this apartment in drug activity. On 28 April 1998, Officer Matt Tauber (Tauber) was dispatched to K-2 Camelot Village Apartments in reference to a drug complaint which

alleged that the defendant was in possession of one-half kilo of cocaine. Tauber went to the apartment to investigate but was denied entry; however, he noted that the defendant was extremely nervous and belligerent.

On 7 July 1998, Officer Will Quick took an anonymous report from a resident of Camelot Village Apartments which stated that the defendant was selling drugs from his apartment. The reportee went on to say that she had been awakened at all times of the night by suspicious persons knocking on the door of Apartment K-2 asking for "twenties."[1] The affidavit also contained information regarding a "controlled purchase"[2] of crack cocaine during the week of 7 March 1999.

Finally, the affidavit provided that on 12 March 1999, Burgess contacted Duke Power, which reported that electrical service for K-2 Camelot Village Apartments had been established in the name of William Drayshell [sic] Johnson since September 1997. Not more than seventy-two (72) hours before the warrant was issued, another "controlled purchase" of crack cocaine was made by a confidential informant at K-2 Camelot Village Apartments. The substance obtained tested positive for crack cocaine.

Applying the "totality of the circumstances" analysis and giving proper deference to the decision of the magistrate, we hold that the two controlled purchases, information provided by several anonymous informants, and independent police corroboration and investigation were sufficient to support the trial court's finding that there was a "substantial basis for concluding" that there was probable cause to issue a search warrant.

II.

[2] Defendant next argues that even if probable cause existed to issue the search warrant, the evidence seized should nevertheless be excluded because the officers exceeded the scope of the war-

1. Officer Burgess noted that "twenties", is a common term for one dosage unit of cocaine.

2. A "controlled purchase," as defined by Officer Burgess, consists of a "Confidential Reliable Informant being searched prior to entering a location by an officer to verify that no controlled substances, weapons, or currency are in his or her possession. The C[onfidential] I[nformant] is observed going into, entering, exiting, and coming back to the target location by a surveillance officer. The controlled substances are then transferred to the officer by the C[onfidential] I[nformant], and the C[onfidential] I[nformant] is once again searched for contraband."

rant when they performed a strip search requiring the defendant to move his genitals and spread his buttocks to exhibit his anal area. We disagree.

The Fourth Amendment of the United States Constitution and Article 1 § 20 of the North Carolina Constitution preclude only those intrusions into the privacy of the body which are unreasonable under the circumstances. *State v. Norman*, 100 N.C. App. 660, 663, 397 S.E.2d 647, 649 (1990), *disc. review denied*, 328 N.C. 273, 400 S.E.2d 459 (1991). Evidence obtained in violation of these constitutional rights must be excluded. *State v. Carter*, 322 N.C. 709, 719, 370 S.E.2d 553, 559 (1988). There is no precise definition or mechanical application to determine whether conduct was reasonable in executing the search of a defendant's person. *Bell v. Wolfish*, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 481 (1979). Each case requires a "balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* "Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

In the present case, a search warrant was issued which expressly authorized the search of the defendant. While it is true, as defendant argues, that Officer Burgess did not articulate specific reasons in this application why a strip search was necessary and reasonable under the circumstances; we disagree with defendant's conclusion that the strip search thereby exceeded the scope of the warrant[3]. We further disagree with defendant's contention that the strip search of the defendant and the manner in which it was conducted was outrageously degrading and unreasonable under the circumstance.

The scope of a search warrant is defined by the object of the search and place in which there is probable cause to believe the object will be found. *State v. Carr*, 61 N.C. App. 402, 408, 301 S.E.2d 430, 435, *disc. review denied*, 308 N.C. 545, 304 S.E.2d 239 (1983). The warrant in the case *sub judice*, was executed for the express purpose of procuring controlled substances likely to be found on the premises or on the persons described in the warrant, one of which was the defendant. Such substances could be readily concealed on the person

3. While not controlling, the Washington Court of Appeals in *State v. Colin*, 61 Wn. App. 111, 809 P.2d 228, *disc. review denied*, 117 Wash. 2d 1009, 816 P.2d. 1223 (1991), addressing the very same issue, held that a strip search of a suspect did not exceed the scope of the warrant authorizing officers to search a person described in the warrant, even though the warrant did not articulate reasons why a strip search was necessary and reasonable under the circumstances.

so that they would not be found without a strip search. Burgess testified at the suppression hearing that there is a trend toward hiding controlled substances in body cavities. In addition, an initial search of defendant revealed almost $2,000 in small denominations, and the search of the premises revealed electronic scales. The scope of the search, while more intrusive than a search of the defendant's outer clothing, was justified by the state's interest in obtaining criminal evidence. In balancing the scope of a search against exigent circumstances in determining reasonableness, the North Carolina Supreme Court has allowed highly intrusive warrantless searches. *See e.g.*, *State v. Smith*, 342 N.C. 407, 464 S.E.2d 45 (1995) (per curiam) (reversing the opinion of the Court of Appeals reported at 118 N.C. App. 106, 454 S.E.2d 680 based on dissent by Walker, J.) (where search involved pulling down defendant's pants far enough that officers could see the corner of a towel underneath defendant's scrotum and where the search took place in the middle of an intersection).

While some states have required a heightened standard to conduct strip searches, neither our Supreme Court nor the United States Supreme Court has articulated such a standard. *See e.g.*, *Hughes v. Commonwealth*, 31 Va. App. 447, 524 S.E.2d 155 (2000) (requiring "special justification" to conduct a strip search); *see also*, *U.S. v. Holtz*, 479 F.2d 89 (9th Cir. 1973) (requiring objective articulable facts and real suspicion directed specifically at the person to be searched to justify a strip search). Accordingly, we find that the warrant in this case authorized a search of defendant for illegal drugs, and it was not unreasonable under the totality of the circumstances to conduct a strip search.

Moreover, the search was conducted in a reasonable manner. The defendant was taken into his bedroom and searched by two male officers. The officers did not touch defendant, rather they instructed him to bend over and observed as the defendant spread his buttocks and moved his genitals. When the officers observed plastic protruding from the defendant, they asked that he remove the plastic which turned out to contain illegal contraband.

We therefore find that in balancing the need for the search in this case against the defendant's personal rights, the search of the defendant did not exceed the scope of the warrant and was conducted in a reasonable manner.

III.

[3] Finally, defendant asserts that the execution of the warrant was unlawful because the officers did not comply with the "knock and announce" requirement. Additionally, the defendant claims that the trial court made no findings of fact regarding this issue and the case should therefore be remanded for consideration on this issue. We disagree.

When executing a warrant, law enforcement officials are required to "knock and announce" their presence before entering the premises unless exigent circumstances exist to justify entry without first knocking. *Wilson v. Arkansas*, 514 U.S. 927, 131 L. Ed. 2d 976 (1995). "If the method of entry by police officers renders a search illegal, the evidence obtained thereby is not competent evidence at the defendant's trial." *State v. Marshall*, 94 N.C. App. 20, 29, 380 S.E.2d 360, 366, *disc. review denied*, 325 N.C. 275, 384 S.E.2d 526 (1989). Upon a motion to dismiss, the trial court hears evidence from both sides to determine whether to admit the evidence seized. N.C.G.S. § 15A-977(d) (1999). "If the motion [to suppress] is not determined summarily the judge must make the determination after a hearing and finding of facts. *Id.* The appellate court's review is limited to determining whether these findings of fact were supported by competent evidence in the record. *State v. Smith*, 118 N.C. App. at 111, 454 S.E.2d at 683.

At the pre-trial motion hearing, Burgess testified that he observed the SWAT team knock on the door and announce their presence and identity, by yelling, "Chapel Hill Police, search warrant." The SWAT team then waited approximately eight to ten seconds before entering the apartment. The officers were dressed in camouflage fatigue bottoms and black shirts that had "Police" written all over the shirts. Michelle Edwards, the defendant's aunt-in-law, testified on behalf of the defendant. She stated that she was sitting near the door when the officer's entered, and that they did not knock or announce their presence before entering the defendant's apartment.

We find that the trial court did in fact make a finding of fact with regard to the execution of the warrant. In the trial court's order denying defendant's motion to suppress evidence, the trial court stated, "[a]nd hearing the testimony of both the police officer and Ms. Edwards, the Court finds that the actual procedure was lawful and reasonable." Further, we find the testimony of Burgess, under this set of facts, was sufficient to support the trial court's finding that the offi-

cers complied with the "knock and announce" requirements. The trial court simply gave greater weight to the testimony of Burgess.

For the reasons stated herein, we affirm the decision of the trial court.

Affirm.

Judges WYNN and McGEE concur.

MARTIN J. GRAHAM AND LORENE M. TEMPLETON, PLAINTIFFS-APPELLANTS v. FRED L. MOCK AND THE DAVIDSON COUNTY BOARD OF EDUCATION, DEFENDANTS-APPELLEES

No. COA00-549

(Filed 1 May 2001)

1. Schools and Education— domicile—residing with uncle

A fourteen-year-old child was not entitled to be enrolled in the school system in Davidson County under N.C.G.S. § 115C-366(a3) where she was sent to live with an uncle in Davidson County because the mother felt that North Carolina would be safer than her Chicago neighborhood. An unemancipated minor may not establish a domicile different from her parents and none of the criteria in N.C.G.S. § 115C-366(a3)(1)(a)-(e) applies in this case to allow an exception.

2. Schools and Education— domicile—policy constitutional

Defendant board of education's enrollment policy requiring domicile in the county did not violate a student's constitutional rights. N.C.G.S. § 115C-366 et seq. carefully addresses the circumstances under which a minor may enroll in a school system within this State, the policy is supported by a rational basis and enables the school system to deal with a parent or legal custodian in all matters involving the minor, and the policy is uniformly applied.

Appeal by plaintiffs from judgment dated 31 March 2000 and filed 5 April 2000 by Judge L. Todd Burke in Davidson County Superior Court. Heard in the Court of Appeals 5 February 2001.

Central Carolina Legal Services, by Stanley B. Sprague and Richard W. Wells, for plaintiffs-appellants.

Brinkley Walser, PLLC, by David E. Inabinett, for defendants-appellees.

WALKER, Judge.

This action arises from the denial of enrollment of Lorene Templeton (Templeton), a female then fourteen years of age, into the public school system (school system) of Davidson County, North Carolina. On behalf of the Davidson County Board of Education (defendants), School Superintendent Fred L. Mock denied Templeton's admission on the ground that she was not domiciled in a school administrative unit in Davidson County as required by N.C. Gen. Stat. § 115C-366(a) (1999) and did not meet the statutory requirements for admission for non-domiciled students pursuant to N.C. Gen. Stat. §§ 115C-366(a3) or 115C-366.2 (1999).

Templeton's mother, Ms. Graham, sent her to reside with her uncle in Davidson County and to attend school there. Ms. Graham felt this state would be a safer place since Templeton had been the victim of an attempted sexual assault in her Chicago neighborhood. From the trial court's denial of plaintiff's motion for summary judgment and from the granting of defendants' motion for summary judgment, plaintiffs appeal.

In support of their argument that the trial court erred by denying their motion for summary judgment and in granting defendants' motion for summary judgment, plaintiffs assert: (1) since domicile is not defined in N.C. Gen. Stat. § 115C-366, this Court should adopt a "rebuttable presumption" of domicile being that of Templeton's mother; and (2) defendants' policy, based upon their interpretation of N.C. Gen. Stat. § 115C-366 et seq. violates Templeton's due process and equal protection rights.

Regarding domicile, N.C. Gen. Stat. § 115C-366(a) provides "[a]ll students under the age of 21 years who are *domiciled* in a school administrative unit . . . are entitled to all the privileges and advantages of the public schools to which they are assigned by the local boards of education . . . ." (emphasis added). However, exceptions to this requirement are provided for in N.C. Gen. Stat. § 115C-366(a3) as follows:

(a3) A student who is not a domiciliary of a local school administrative unit may attend, without the payment of tuition, the public schools of that unit if:

(1) The student resides with an adult, who is a domiciliary of that unit, as a result of:

a. The death, serious illness, or incarceration of a parent or legal guardian,

b. The abandonment by a parent or legal guardian of the complete control of the student as evidenced by the failure to provide substantial financial support and parental guidance,

c. Abuse or neglect by the parent or legal guardian,

d. The physical or mental condition of the parent or legal guardian is such that he or she cannot provide adequate care and supervision of the student, or

e. The loss or uninhabitability of the student's home as the result of a natural disaster.

N.C. Gen. Stat. § 115C-366(a3)(1).

If the student meets one of the criteria set forth above, then affidavits must be filed which comport with the following:

(3) The adult with whom the student resides and the student's parent, guardian, or legal custodian have each completed and signed separate affidavits that:

a. Confirm the qualifications set out in this subsection establishing the student's residency,

b. Attest that the student's claim of residency in the unit is not primarily related to attendance at a particular school within the unit, and

c. Attest that the adult with whom the student is residing has been given and accepts responsibility for educational decisions for the child, including receiving notices of discipline under G.S. 115C-391, attending conferences with school personnel, granting permission for school-related

> activities, and taking appropriate action in connection with student records . . . .

N.C. Gen. Stat. § 115C-366(a3)(3).

In addition, N.C. Gen. Stat. § 115C-366.2 provides:

> For the purposes of G.S. 115C-366 and 115C-366.1 for any person who is a resident of a place which is not the person's place of domicile, because: . . . (iii) the child resides with a legal custodian who is not the child's parent or guardian, those sections shall be applied by substituting the word "residing" for the word "domiciled," by substituting the word "residence" for the word "domicile," and by substituting the word "residents" for the word "domiciliaries." For purposes of this section, "legal custodian" means the person or agency that has been awarded legal custody of the child by a court.

Our Supreme Court has defined "domicile" as "one's permanent, established home as distinguished from a temporary, although actual, place of residence[,]" and as distinguished from "residence" which "simply indicates a person's actual place of abode, whether permanent or temporary." *Hall v. Board of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972). Although a minor may have a different residence from that of his parent(s), "[an] unemancipated minor may not establish a domicile different from his parents, surviving parents, or legal guardian[.]" *Chapel Hill-Carrboro City Schools System v. Chavioux*, 116 N.C. App. 131, 133, 446 S.E.2d 612 (1994), *citing In re Hall*, 235 N.C. 697, 702, 71 S.E.2d 140, 143 (1952). *See also Craven County Bd. of Education v. Willoughby*, 121 N.C. App. 495, 466 S.E.2d 334 (1996). In addition, an unemancipated minor "cannot of his own volition select, acquire, or change his domicile." *Hall* at 608, 187 S.E.2d at 57 (citations omitted).

[1] Plaintiffs first argue that if the domicile of a minor under N.C. Gen. Stat. § 115C-366(a) is presumed to be that of his parents, then "this presumption may be rebutted when the child moves to a new location to live with another adult caretaker with the consent of the parent and the parent intends that the child will stay there for the indefinite future."

At the time Templeton sought enrollment into the school system, she was residing with her uncle in Davidson County. However, as an unemancipated minor, Templeton's domicile remained as that of her mother who was residing at the time in Chicago, Illinois. Plaintiffs

recognize that this Court has held an unemancipated minor may not establish a domicile different from his parents. *See Chapel Hill Schools*, 116 N.C. App. 131, 446 S.E.2d 612; *Craven Board of Education*, 121 N.C. App. 495, 466 S.E.2d 334. However, plaintiffs contend our Court has not been presented with the theory they now advance. Aside from the exception provided for in N.C. Gen. Stat. § 115C-366(a3) *et seq.*, existing law appears to be based on sound public policy. Any change in the domicile requirements by unemancipated minors is within the prerogative of our Legislature. Furthermore, plaintiffs concede that none of the criteria contained in N.C. Gen. Stat. § 115C-366(a3)(1)(a)-(e) applies in this case, which would allow for an exception from the requirement of domicile. Therefore, Templeton was not entitled to be enrolled in the school system under this statute.

[2] We next consider whether defendants' enrollment policy violates Templeton's due process and equal protection rights. Templeton contends defendants' policy, based on their interpretation of the statutes, is violative of her constitutional rights because it impermissibly creates an "irrebuttable presumption" that a minor who lives within the school system can never be domiciled and attend school there unless the following requirements are met: (1) the minor child lives within the school district with a parent, a court-appointed legal custodian or legal guardian; and (2) the factual affidavit requirements of N.C. Gen. Stat. § 115C-366(a3) are met. She further contends defendants' policy violates this State's constitutional right to a free education afforded to a minor living within it.

We first note our United States Supreme Court has decided a line of cases which hold that "[p]ublic education is not a 'right' granted to individuals by the Constitution." *Plyler v. Doe*, 457 U.S. 202, 221, 72 L. Ed. 2d, 786, 801, *reh'g denied*, 458 U.S. 1131, 73 L. Ed. 2d 1401 (1982), *quoting San Antonio Independent School Dist. v. Rodriguez*, 441 U.S. 1, 35, 36 L. Ed. 2d 16, 44 (1973). However, our State Constitution provides "equal access to participation in our public school system is a fundamental right . . . . Where that right is threatened with restrictions, the basic fairness of the procedures employed must be evaluated in light of the particular parties, the subject matter and the circumstances involved." *Sneed v. Board of Education*, 299 N.C. 609, 618, 264 S.E.2d 106, 113 (1980) (citations omitted). Although the "United States Supreme Court has not considered the constitutionality of a domicile requirement as it affects elementary and secondary education, it has held that a Texas residency statute was

facially constitutional." *Harris v. Hall*, 572 F. Supp. 1054, 1056 (E.D.N.C. 1983), *citing Martinez v. Bynum*, 461 U.S. 321, 75 L. Ed. 2d 879 (1983).

In *Martinez*, the United States Supreme Court upheld the constitutionality of a state statute which conditioned public school enrollment on residency within the school district or proof that enrollment was not being sought for the sole purpose of attending school within the district. *Martinez*, 461 U.S. 321, 75 L. Ed. 2d 879. The Court explained in a footnote the constitutional test for such requirements: "A bona fide residence requirement implicates no 'suspect' classification, and therefore is not subject to strict scrutiny. Indeed, there is nothing individiously discriminatory about a bona fide residence requirement if it is uniformly applied. Thus the question is simply whether there is a rational basis for it." *Id.* at 328, 75 L. Ed. 2d at 887.

However, plaintiffs argue that the United States Supreme Court has relied on due process guarantees to strike down presumptions which irrebuttably deny government benefits. Plaintiffs cite *Vlandis v. Kline*, 412 U.S. 441, 37 L. Ed. 2d 63 (1973), where the Court struck down a statute which presumed that a college student, who had an out-of-state address when applying to a Connecticut state university, would always be a non-resident for state university tuition purposes. The Court noted that "a permanent irrebuttable presumption of nonresidence . . . is violative of the Due Process Clause, because it provides no opportunity for students who applied from out[-]of[-]state to demonstrate that they have become bona fide Connecticut residents." *Id.* at 453, 37 L. Ed. 2d at 72. The plaintiffs fail to point out that the Court in *Vlandis* also recognized the State's legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis. *Id.* at 452-53, 37 L. Ed. 2d at 72. Further, the Court cited with approval the state attorney general's more rigorous "domicile" test that had been promulgated as a "reasonable standard for determining the residential status of a student." *Id.* at 454, 37 L. Ed. 2d at 72-73.

Similar to the instant case is *Harris*, *supra*, which cites with approval *Martinez*, *supra*. In *Harris*, an unemancipated minor was denied admission to the school system in Cumberland County, North Carolina. *Id.* at 1055. The minor lived with his mother in New York and came to Cumberland County to live temporarily with his great aunt. *Id.* However, his legal custody remained with his mother. *Id.*

The minor's challenge to the constitutionality of N.C. Gen. Stat. § 115C-366 was denied. *Id.* The Court stated "[i]n light of *Martinez*, *Vlandis* and prior case law upholding domicile standards in higher education, it is a logical extension of *Martinez* to hold that a domicile requirement, which otherwise satisfies the Constitution, is a reasonable standard for determining the residential status of students in the public schools." *Id.* at 1057. The *Harris* court examined the statutes at issue under a rational basis test, i.e., whether the statutes provide "reasonable standards for determining the residential status of a student[.]" *Id.*

In applying the rational basis test, the *Harris* court determined that "[a]lthough [N.C. Gen. Stat. § 115C-366] does not define the term domicile explicitly, the language of the statute makes clear who is a domiciliary and who is not . . . . Moreover, the definition of domicile as established by North Carolina case law is a traditional criterion which springs from well-recognized legal precedent." *Id.* at 1058, *citing Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979). The Court also found N.C. Gen. Stat. § 115C-366 to be "uniformly applied[,]" since it "grants the benefit of a free public school education to those who satisfy the traditional requirements of domicile . . ." and "creates neither an irrebuttable presumption nor a durational residency requirement." *Id.* Moreover, the Court held the effect of N.C. Gen. Stat. §§ 115C-366 and 115C-366.1(a)(1) to be supported by a rational basis, including: (1) the county tax base reduction which occurs when a non-domiciled minor attends school but pays no tuition; and (2) requiring that a student who lives away from his parents reside with a guardian or with one having legal custody, so school officials "may deal with effectively and authoritatively in matters of punishment, educational progress and medical needs." *Id.*

When we apply the rational basis test to defendants' policy based upon the applicable statutes, we agree with the *Harris* court that N.C. Gen. Stat. § 115C-366 *et seq.* carefully addresses the circumstances under which a minor may enroll in a school system within this State. The policy resulting from these statutes is uniformly applied, providing the same requirements and exceptions to all minors. Thus, the policy is supported by a rational basis and enables the school system to deal with a parent or legal custodian in all matters involving the minor.

We have carefully considered the plaintiffs' remaining assignments of error and find them to be without merit.

We conclude the trial court properly determined that there were no genuine issues of material fact and defendants were entitled to summary judgment.

Affirmed.

Judges HUNTER and CAMPBELL concur.

JEAN COOPER, PLAINTIFF-APPELLEE v. PAUL D. COOPER, DEFENDANT-APPELLANT

No. COA00-518

(Filed 1 May 2001)

1. Divorce— equitable distribution—marital debts—social security disability benefits—401(k) account

The trial court erred in an equitable distribution case by awarding an equal division of the marital assets between the parties and the case is remanded because: (1) the trial court must make clarified findings as to the actual value of the marital debts and their division between the parties; (2) defendant husband's social security disability benefits should not have been valued in the marital estate since the benefits were not pension, retirement, and other deferred compensation rights under N.C.G.S. § 50-20(b)(1), and were not the result of any marital labor; and (3) a 401(k) account in defendant's name which was valued at $44,084.58 at the time defendant made a post-separation unilateral withdrawal of funds should not have been valued in the marital estate since the 401(k) account should not be assigned a marital estate value other than its value on the date of separation.

2. Divorce— equitable distribution—interest on distributive award—discretion of trial judge

The trial court did not err in an equitable distribution case by awarding interest on a distributive award to plaintiff wife because the decision lies within the discretion of the trial judge.

Appeal by defendant from judgment entered 31 August 1999 by Judge Peter Roda in Buncombe County District Court. Heard in the Court of Appeals 15 March 2001.

Robert E. Riddle, PA, by Robert E. Riddle, for plaintiff-appellee.

Hyler & Lopez, P.A., by George B. Hyler, Jr. and Ann Logan Swearingen, for defendant-appellant.

TYSON, Judge.

Paul D. Cooper ("defendant"), appeals the trial court's equitable distribution judgment awarding an equal division of marital assets between defendant and Jean Cooper ("plaintiff").

The parties were married 17 April 1989. No children were born of the marriage. On 12 June 1998, the parties divorced, and plaintiff filed an action seeking equitable distribution. The matter was heard on 20 July 1999. The trial court entered an equitable distribution judgment dividing the marital property equally on 31 August 1999. The trial court made the following findings regarding the value of the marital property:

> 7. That during the marriage the parties acquired certain property as marital property and the court finds the marital estate to consist of the following assets with the following values . . .
>
> (I) Debts to Wachovia Bank and First USA Bank Card totaling $10,985.31 . . .
>
> (k) Certain Social Security benefits due the Defendant as retroactive payments in the amount of $2,600.00
>
> (l) A 401k [sic] Account in the Husband's name with Cooper Enterprises containing $44,084.58 at the time of Defendant's withdrawal of said funds . . .
>
> 8. That the total value of the marital estate is $87,980.56 . . .
>
> 10. That the parties had two credit card debts at the time of the separation, Wachovia Bank Card in the balance of $7,653.00, and First USA Bank Card in the balance of $9,095.00. The total of the two debts was $16,845.00 . . .
>
> 11. That following the separation of the parties the Wife serviced the two Credit Cards, Wachovia Bank and First USA and made payments on the date of separation balances in the amount of $3,401.00; that the Defendant made payment on said debts in the amount of $233.00 following the separation.

With respect to the division of assets, the trial court made the following findings of fact:

17. . . . that the Defendant has an income of $3,215.00 per month net income as compared to the Plaintiff's taxable income of approximately $23,000 in 1998. The Court has considered the length of the marriage, to wit: 8 years . . . . The [Defendant] is 50 years of age and disabled but receiving Social Security Disability. The [Plaintiff] is 47 years of age and is in generally good health. The plaintiff obtained a real estate license during the marriage but did her classes at night while she was working and earning an income. The Plaintiff offered evidence of her contributions to the marital estate by way of assuming most of the household responsibilities and the Defendant's unilateral withdraw of the 401k [sic] funds. Considering all of these factors the Court finds that they do not weigh in either parties' favor and that an equal division of the marital estate is equitable.

[1] Defendant argues that the trial court's findings of fact with respect to the marital debts, Social Security benefits, 401(k) plan, and total value of the marital estate are erroneous, and are unsupported by competent and substantial evidence in the record. We agree and remand for further findings on the value of the marital estate to be divided.

Valuation of the Marital Estate

A trial court is "vested with wide discretion in family law cases, including equitable distribution cases." *Wall v. Wall*, 140 N.C. App. 303, 307, 536 S.E.2d 647, 650 (2000) (citing *Beightol v. Beightol*, 90 N.C. App. 58, 60, 367 S.E.2d 347, 348, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988)). The trial court's decision regarding distribution of a marital estate " 'will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' " *Khajanchi v. Khajanchi*, 140 N.C. App. —, —, 537 S.E.2d 845, 849 (2000) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

We agree with defendant that the trial court's findings of fact regarding marital debts, Social Security disability benefits, and the 401(k) account are erroneous. We vacate those portions of the judgment and remand for further findings as set forth below.

1. Marital Debts

In finding of fact number 10, the trial court finds that, at the time of separation, the parties had two credit card debts: (1) Wachovia Bank Card with a balance of $7,653.00; and (2) First USA Bank Card

with a balance of $9,095.00. The trial court determines the total of the two debts to be $16,845.00. In fact, the sum of these debts is $16,748.00. Aside from this apparent clerical error, the trial court's finding of fact 7(I) values the marital debt as, "[d]ebts to Wachovia Bank and First USA Bank Card totaling $10,985.31."

It is unclear from the record why there is a discrepancy in the trial court's findings of fact regarding the parties' marital debt. The difference in the amounts in findings of fact 7(I) and 10 is approximately $5,760.00, a significant sum that affects the outcome of the distribution.

Moreover, the trial court distributed to plaintiff $10,895.31 in marital debts. The trial court distributed to defendant $7,727.31 in marital debts. The total of these amounts is $18,622.62. This amount is inconsistent with the trial court's finding as to the total value of marital debts in either finding of fact 10 or 7(I). We remand this matter to the trial court for clarified findings as to the actual value of the marital debts and their division between the parties.

2. Social Security Disability Benefits

Defendant further argues that the trial court erred in valuing defendant's Social Security disability benefits within the marital estate, and distributing the benefits as part of the marital estate. We agree.

In *Johnson v. Johnson*, 117 N.C. App. 410, 450 S.E.2d 923 (1994), the defendant-wife argued that the plaintiff-husband's State "disability retirement benefits" should be classified as marital property for purposes of equitable distribution. *Id.* at 411-12, 450 S.E.2d at 925. We noted that G.S. § 50-20(b)(1) classifies vested " 'pension, retirement, and other deferred compensation rights' " as marital property. *Id.*

The issue in *Johnson* of whether disability retirement benefits fell within the definition of marital property was an issue of first impression in this State. *Id.* We stated:

> Cases from other jurisdictions are divided as to how disability benefits should be allocated. 'Some states have held that they are similar in nature to personal injury awards and should be categorized under the same rules.' Lawrence J. Golden, Equitable Distribution of Property, § 6.11 n. 123 (1983 & Brett R. Turner, Supp.1993). Other states perceive the benefits as replacing lost earnings and as marital property. J. Thomas Oldham, Divorce,

> Separation And The Distribution Of Property, § 8.03[1] (1994). We agree with the states finding that disability benefits which truly compensate for disability are separate property.

Id. at 414, 450 S.E.2d at 926.

The court in *Johnson* held that disability benefits which "are truly 'disability' benefits," intended to replace loss of earning capacity, should be the separate property of the disabled spouse:

> When a spouse contributes a portion of his monthly salary to a retirement fund, both spouses actually contribute marital labor to this fund. If the spouse retires early and begins receiving retirement benefits, it follows that if the spouses divorce, the non-retired spouse still is entitled to a portion of those retirement benefits because that spouse contributed to their acquisition. Here, no marital labor contributed to plaintiff's acquisition of the 'disability retirement benefits.' Plaintiff did not contribute money specifically to a disability fund. Disability benefits are personal to the spouse who receives them and are that person's separate property.

Id. at 414-15, 450 S.E.2d at 927 (emphasis supplied).

In this case, the Social Security Notice of Decision contained in the record establishes that defendant's benefits were awarded for "severe" physical disabilities such as liver disease, a right shoulder injury, and depression. This Decision, issued 23 February 1998, finds that defendant's disabilities prevented him "from performing substantial gainful activity of a sustained basis." The Decision further states that, based on defendant's "residual functional capacity, and vocational factors, there are no jobs existing in significant numbers which he can perform," and concludes that defendant is entitled to continued payments beginning retroactively on 31 July 1996. It further notes that defendant "is undergoing treatment and medical improvement is anticipated." Thus, re-evaluation of defendant's disability award was warranted within two years thereafter.

The record is clear that defendant's Social Security benefits were not " 'pension, retirement, and other deferred compensation rights' " under G.S. § 50-20(b)(1). The benefits were disability benefits intended to replace defendant's loss of earning capacity, and were not the result of any marital labor. Under the reasoning in *Johnson*, such benefits are separate property. The evidence does not support the trial court's finding that defendant's disability benefits were marital

property. We reverse this finding, and hold that such benefits may not be considered a part of the marital estate on remand.

3. Value of 401(k) Account

We also hold that the trial court erred in its finding of fact 7(l), stating that the marital assets consisted of a 401(k) account in defendant's name which was valued at $44,084.58 at the time defendant made a post-separation unilateral withdrawal of funds. The trial court did not make a finding of fact with respect to the value of the 401(k) account on the date of the parties' separation.

Marital property is defined as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties." N.C. Gen. Stat. § 50-20 (b)(1) (emphasis supplied). The trial court must make a finding on the value of the marital asset on the date of separation. Any post-separation appreciation of a marital asset "is not marital property and therefore cannot be distributed by the trial court." *Fox v. Fox*, 114 N.C. App. 125, 130, 441 S.E.2d 613, 616 (1994) (citing *Gum v. Gum*, 107 N.C. App. 734, 737-38, 421 S.E.2d 788, 790 (1992)). The appreciation is a "distributional factor which the court must consider in resolving what division of the marital property would be equitable." *Id.* (citing N.C. Gen. Stat. § 50-20(c)(11a) or (c)(12) (1987)).

The trial court erred in assigning a marital estate value to the 401(k) account other than its value on the date of separation. The trial court could have considered the post-separation appreciation of the account as a distributional factor. On remand, the trial court must make appropriate findings as to the date-of-separation value of the 401(k) account for classification under "marital property."

[2] We reject defendant's argument that the trial court did not have authority to award interest on a distributive award to plaintiff. "[T]he decision of whether to order the payment of interest on a distributive award is one that lies within the discretion of the trial judge." *Mrozek v. Mrozek*, 129 N.C. App. 43, 49, 496 S.E.2d 836, 840 (1998).

Those portions of the judgment finding the value of the marital debts, Social Security disability benefits, and 401(k), are vacated. This matter is remanded to the trial court for entry of further findings as to the value of the marital assets to be divided. "On remand, the trial court should enter a new judgment consistent with this opinion, relying upon the existing record . . . and receiving additional evidence

and entertaining argument only as necessary to correct the errors identified herein." *Fox*, 114 N.C. App. at 138, 441 S.E.2d at 621.

In light of our holding, we do not address defendant's remaining arguments regarding the manner in which the trial court ordered that the marital property be divided. On remand, consistent with this opinion, the trial court must reassess the identity of the assets and liabilities as separate or marital property, and then reconsider the distribution of the marital estate.

Vacated in part and remanded.

Judges MARTIN and TIMMONS-GOODSON concur.

NANCY ELIZABETH BURGER AND N.C. FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFFS v. JOHN DOE, RICHARD SKEENS AND ALICE ANN SKEENS, DEFENDANTS

No. COA00-259

(Filed 1 May 2001)

Insurance— uninsured motorist—arbitration and settlement by carrier—binding on tortfeasors—admissible in action against tortfeasors

In an action brought by an automobile accident victim and her uninsured motorist carrier after defendant tortfeasors' liability carrier denied coverage, the victim demanded arbitration with her uninsured motorist carrier, and her carrier paid the victim the $19,000 awarded to her by the arbitration panel, the trial court erred by refusing to give plaintiffs' requested instruction that if the jury found that the victim was injured by defendants' negligence and that the arbitration settlement was entered in good faith and was fair and reasonable, the amount of damages would be $19,000. The uninsured motorist carrier could bind a tortfeasor for the amount the carrier paid the injured plaintiff pursuant to arbitration. Furthermore, it is implicit that plaintiffs on remand may present evidence concerning the arbitration proceeding since the jury may evaluate the reasonableness and good faith of the arbitration settlement.

Appeal by plaintiffs from judgment entered 15 September 1999 by Judge Steven A. Balog in Alamance County Superior Court. Heard in the Court of Appeals 22 January 2001.

Pinto Coates Kyre & Brown, PLLC, by Paul D. Coates and John I. Malone, Jr., for plaintiff-appellant North Carolina Farm Bureau Mutual Insurance Company.

Teague, Rotenstreich & Stanaland, L.L.P., by Kenneth B. Rotenstreich and Paul A. Daniels, for defendant-appellees.

EAGLES, Chief Judge.

This case presents questions of whether an uninsured motorist coverage carrier may bind a tort-feasor for the amount the uninsured carrier paid the victim pursuant to an arbitration proceeding.

Plaintiff, Nancy Burger, was involved in an automobile accident with a car owned by defendant Alice Ann Skeens. Defendants claimed that they did not know who was driving the car at the time of the accident. Based on this assertion, the defendants' insurance carrier Allstate denied coverage. Plaintiff Burger had an automobile insurance policy with plaintiff Farm Bureau which included uninsured motorist coverage.

Allstate's denial of coverage allowed the defendants' automobile to be considered an "uninsured motor vehicle" under the Farm Bureau policy. After the denial of coverage, Burger demanded arbitration of her claim under the Farm Bureau policy. After the demand but prior to the hearing, plaintiffs filed a complaint against the defendants to protect the plaintiffs' rights under the statute of limitations.

On 13 October 1998, Farm Bureau and Burger arbitrated her uninsured motorist claim before an arbitration panel. The panel awarded Burger $19,000 for her personal injuries caused by the accident. The trial court later confirmed the award. The plaintiffs gave the defendants timely notice of the arbitration hearing. Defendants' counsel attended but did not participate in the arbitration proceeding.

At trial of this matter, the parties agreed to bifurcate the proceedings. In the first phase, the jury concluded that, contrary to his assertion, defendant Richard Skeens was operating the vehicle in question at the time of the collision. A second portion of the trial was held on 9 August 1999 to determine proximate cause and damages. On

the morning of trial, the court made two rulings concerning the admissibility of the arbitration. The court determined that the plaintiffs could present evidence that Farm Bureau had paid Burger the $19,000 arbitration award. However, the trial court also ruled that Farm Bureau could not introduce any evidence as to the arbitration itself and the methods by which the arbitrators arrived at their award.

At the close of plaintiffs' case, the defendants declined to put on evidence and the trial court denied plaintiffs' motion for a directed verdict. The trial court also denied the plaintiffs' request to submit issues from *Nationwide Mutual Insurance Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977), regarding the amount of damages that plaintiffs were entitled to recover. Specifically, plaintiffs asked the trial court to instruct the jury in the following manner.

> Issues in this case would be was Nancy Elizabeth Burger injured and damaged by the negligence of the defendants Alice Ann Skeens and Richard Skeens? Was the plaintiff North Carolina Farm Bureau's settlement with Nancy Burger made in good faith? . . . Was the plaintiff North Carolina Farm Bureau's settlement with Nancy Burger fair and reasonable? . . . What amount is the plaintiff North Carolina Farm Bureau entitled to recover? And I believe that if the jury would come back with the Issues 1 and 2 being yes, and answer the third issue yes, the case would be ended and the trial judge would enter a judgment in the amount of $19,000 in favor of the plaintiff, North Carolina Farm Bureau. Only if they answer the third issue no, should the trial judge instruct the jury that they should proceed to answer the fourth issue.

The court denied the plaintiffs' request and instructed the jury, "[y]ou're not required to accept the amount of damages suggested by the parties or their attorneys or the amount paid by Farm Bureau to Nancy Burger." After deliberation, the jury awarded Burger $7,000. The trial court then denied plaintiffs' motions for directed verdict and new trial. Plaintiffs appeal.

The central issues of this appeal are (1) whether the trial court should have allowed the jury to decide whether the defendants were bound by results of the arbitration proceeding and (2) whether evidence of the arbitration proceeding was admissible. We hold that under *Chantos*, the answer to both questions must be yes.

Like the present case, *Chantos* arose out of an automobile accident. *Id.* at 433, 238 S.E.2d at 600. The plaintiff insurance company provided coverage to an automobile owned by a third party. *Id.* The third party allowed the defendant to drive the vehicle. *Id.* While operating the automobile, defendant negligently caused a collision with the victim. *Id.* The victim suffered serious personal injuries and substantial property damage. *Id.* Plaintiff settled the claim and then brought an action against the defendant for indemnity. *Id.* The Supreme Court agreed that the insurance company had a right to indemnity and held that the defendant could be bound by the amount of settlement. *Id.* at 442, 238 S.E.2d at 605.

In reaching this holding, the Supreme Court noted that the Financial Responsibility Act requires mandatory compliance with its terms. *Id.* at 440, 238 S.E.2d at 604. The Act's provisions are written into every policy and the Act's terms will prevail over a conflicting contractual term. *Id.* at 441, 238 S.E.2d at 604. The purpose is to protect innocent victims injured by financially irresponsible motorists. *Id.* at 440, 238 S.E.2d at 604. The victims' rights are purely statutory in nature as opposed to a voluntary contract. *Id.* Therefore, while the *Chantos* defendant was not an "insured" under the contract, the Supreme Court held that the Financial Responsibility Act made him an "insured" for the public's protection. *Id.* at 441, 238 S.E.2d at 604. The insurance company's liability did not arise out of its own conduct but rather out of the Financial Responsibility Act and the defendant's negligence. *Id.*

The Supreme Court then went on to analogize this situation to the public policy that imposes "liability upon an employer for the tortious conduct of his employee." *Id.* at 441, 238 S.E.2d at 604. The Supreme Court then stated:

> It has long been established that where liability has been imposed upon an employer because of the negligence of his employee and he incurs such liability solely under the doctrine of *respondeat superior*, the employer, having discharged the liability, may recover full indemnity from the employee. This rule of indemnity has also been applied to joint tort-feasors. The general rule of common law is that there is no right of indemnity between joint tort-feasors. This rule is modified by the doctrine that a party secondarily liable is entitled to indemnity from the party primarily liable even when both parties are denominated joint tort-feasors. For example, when the active negligence of one tort-feasor and the passive negligence of another combine to proxi-

> mately cause injury to a third party, the passively negligent tort-feasor who is compelled to pay damages to the injured party is entitled to indemnity from the actively negligent tort-feasor.

Id. at 441-42, 238 S.E.2d at 604 (citations omitted). The Supreme Court reasoned that it was unfair for the *Chantos* defendant to gratuitously reap the benefits of the insurance policy. According to the Court, the General Assembly did not intend to enact a statutory scheme that allowed a wrongdoer to benefit from an insurance policy without being liable to indemnify the insurer who became liable solely by virtue of the Financial Responsibility Act. *Id.* at 442, 238 S.E.2d at 605. Therefore, the insurance company in *Chantos* had a right to complete indemnification.

On remand, the *Chantos* Court ordered that the trial court had to submit the following issues to the jury: "(1) Was [the victim] injured and damaged by the negligence of the defendant?; (2) Was plaintiff's settlement with [the victim] made in good faith?; (3) Was plaintiff's settlement with [the victim] fair and reasonable?; (4) What amount is plaintiff entitled to recover?" *Id.* at 446, 238 S.E.2d at 607. The Court noted that if the jury answered the first three questions "yes" then the trial court should enter judgment in the amount of the settlement. *Id.* at 447, 238 S.E.2d at 607.

We now hold that the relief sought by Farm Bureau here is the same relief sought by the plaintiff in *Chantos*. Once Allstate denied coverage, the defendants became uninsured motorists. The Financial Responsibility Act requires insurers to provide uninsured motorist coverage. G.S. § 20-279.21(b)(3) (1999). Therefore, plaintiff Burger obtained her right to recover as a matter of law. Like the defendant in *Chantos*, the Financial Responsibility Act makes the defendants here "insureds" under the policy for the public's protection. Accordingly, Farm Bureau may seek recovery from the defendants and defendants may be bound by the results of the arbitration proceeding.

Like *Chantos*, on remand the trial court should utilize the following issues:

1. Was the Plaintiff Nancy Elizabeth Burger, injured or damaged by the negligence of the Defendants Richard Skeens and Alice Ann Skeens?

2. Was the Plaintiffs' arbitration settlement entered in good faith?

3. Was the amount of plaintiffs' arbitration settlement fair and reasonable?

4. What amount are the plaintiffs entitled to recover?

If the jury answers the first three questions "yes," then the case is over and the trial court should enter judgment for $19,000 for Farm Bureau.

We note that much of the parties' focus on this appeal has been on the arbitration proceeding. It is accurate to state that the arbitration proceeding itself was solely a product of Burger's contract with Farm Bureau and not required by the Financial Responsibility Act. However, in both *Chantos* and the present case, the insurance company's liability arose out of the Financial Responsibility Act. Unlike the present case, the *Chantos* insurance company settled with the victim of the tort-feasor's misfeasance instead of sending the case to arbitration. The *Chantos* plaintiff simply used a different method of resolving its own liability than Farm Bureau did here. If anything, the fact that there was an arbitration proceeding here adds more credence to the settlement between the insurance company and the victim. However, there is no difference between the ultimate effect of an arbitration settlement and a settlement reached through means other than arbitration for purposes of this case.

The holding urged by the defendants would have led to untoward results. If we refused to bind the defendants, the uninsured motorist insurance carrier would be left to pay off the entire claim when it became liable solely by virtue of the Financial Responsibility Act. It would in effect have no fair method of recovery. Further, the defendants' position would encourage the tort-feasor and his potential carrier to deny coverage and force the uninsured carrier to go to arbitration. This would give the tort-feasor's carrier and the tort-feasor an opportunity to go through a free discovery process while allowing the uninsured carrier to suffer all the costs. We do not believe that the General Assembly intended such a result.

Since we have held that the jury may evaluate the reasonableness and good faith of the arbitration settlement, it is implicit that the plaintiffs may present evidence concerning the arbitration proceeding itself. On remand, the trial court should allow them to do so.

Based on the foregoing, we conclude that the trial court erred in refusing to give the plaintiffs' requested instructions. Accordingly we

reverse and remand for a new trial. Since we have ordered a new trial, we decline to address the remaining assignments of error.

Reversed and remanded for a new trial.

Judges HUDSON and SMITH concur.

M. JAY DEVANEY AND MATTHEW W. DEVANEY, PLAINTIFFS v. CITY OF BURLINGTON, DEFENDANT

No. COA00-240

(Filed 1 May 2001)

1. **Zoning— city council decision—quasi-judicial rather than legislative**

The trial court erred by affirming the Burlington City Council's decision to deny an application for a Manufactured Housing Overlay District (MHOD) where the City Council clearly believed (and the trial court explicitly found) that the Council was involved in a legislative decision. Rather than applying the criteria of the zoning ordinance in a quasi-judicial proceeding, the Council used the hearing as an opportunity to solicit the opinion of neighboring property owners and made no findings for the Superior Court to review. This procedure is inconsistent with *Northfield Dev. Co. v. City of Burlington*, 136 N.C. App. 272.

2. **Zoning— authority of City Council—Manufactured Housing Overlay District**

Plaintiffs seeking a Manufactured Housing Overlay District (MHOD) from the Burlington City Council were not entitled to approval of their application as a matter of right, despite a provision in the Burlington City Code providing that MHODs are permitted by right in certain districts, because it has been held previously that the City Council retains the discretion to make the designation.

Appeal by plaintiffs from order and judgment entered 16 August 1999 by Judge James C. Spencer, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 13 March 2001.

Adams, Kleemeier, Hagan, Hannah & Fouts, by David S. Pokela, for plaintiff-appellants.

Robert M. Ward, Burlington City Attorney, and Thomas, Ferguson & Charns, L.L.P., by Jay H. Ferguson, for defendant-appellee.

HUDSON, Judge.

Plaintiffs appeal an "Order and Judgment" of the Alamance County Superior Court affirming the Burlington City Council's denial of their application for a Manufactured Housing Overlay District. Plaintiffs filed a complaint alleging the following: in November 1997, they contracted to purchase approximately 30 acres of property located in Burlington's extra-territorial zoning jurisdiction. On 18 December 1997, plaintiffs submitted an application to the City of Burlington (the City) for approval of their property as a Manufactured Housing Overlay District [MHOD]. N.C.G.S. § 160A-383.1 (1999) permits cities to designate MHODs within their residential districts in order to facilitate the public's access to affordable housing.

MHODs are authorized by Section 32.2R of the Burlington City Code, which provides that MHODs may "overlay R-6, R-9 and R-12 Residential Districts." Section 32.2R includes a list of requirements that a manufactured housing district and the homes within it must meet. A table contained in Section 32.9 of the City Code indicates that MHODs are "permitted by right" within its R-6, R-9, and R-12 zoning districts. Plaintiffs' property is located in an R-9 district. Section 32.2R(3)(C) of the Code further provides: "The Burlington City Council shall have the authority to designate, amend or repeal [MHODs] and/or subdivisions. Requests regarding [MHODs] shall be processed in accordance with the provisions of the Burlington Zoning Ordinance."

On 23 February 1998, the City's Planning Commission denied plaintiff's application for an MHOD. On appeal, a public hearing was held before the City Council, which voted to deny the application as well.

Plaintiffs filed the present suit in Alamance County Superior Court requesting that the City be ordered to approve their application, as the Burlington City Code provides that MHODs are "permitted by right" in R-9 districts. Plaintiffs also alleged the City "has violated the terms and spirit of its own Ordinance and N.C.G.S. § 160A-383.1 by consistently denying applications for [MHODs]."

N.C.G.S. § 160A-383.1(c) mandates that a "city may not adopt or enforce zoning regulations or other provisions which have the effect of excluding manufactured homes from the entire zoning jurisdiction." Finally, plaintiffs alleged that the denial of their application was arbitrary and capricious and violated their equal protection rights in violation of Article 1, Section 19, of the North Carolina Constitution.

After an evidentiary hearing, the trial court rendered an "Order and Judgment" concluding that there is no entitlement to the grant of an MHOD permit as a matter of right under the Burlington City Code, and that plaintiffs had not demonstrated the City had excluded manufactured housing from its zoning jurisdiction in violation of G.S. § 160A-383.1(c). It furthermore concluded:

> 3. The grant or denial of such MHOD is in the nature of a zoning classification and as such is legislative in character.
>
> 4. The determination respecting the grant or denial of an application for a MHOD being a legislative, rather than a quasi-judicial function, the Court is not free to substitute its judgment for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body (the Burlington City Council).
>
> 5. Whether the City Council's determination to deny the plaintiffs' application for the MHOD was arbitrary or capricious is at least fairly debatable and the Court cannot say that the Council's determination was not rationally related to a legitimate governmental objective respecting the interests of the public health, safety, morals or general welfare.

Thus, the trial court ruled for the City on all claims brought by plaintiffs. Plaintiffs thereafter filed notice of appeal to this Court.

[1] Plaintiffs contend the trial court erred in deciding that the actions of the City Council in denying their application for an MHOD were not arbitrary and capricious. This Court has previously addressed a situation in which the Burlington City Council considered and denied an appellant's application for an MHOD. *See Northfield Dev. Co. v. City of Burlington*, 136 N.C. App. 272, 523 S.E.2d 743, *aff'd in part and review dismissed in part*, 352 N.C. 671, 535 S.E.2d 32 (2000). (The hearing before the City Council and the entry of the Superior Court's judgment in this case both predated the *Northfield* decision.) In *Northfield*, we determined that the City Council's action in deciding whether to approve an MHOD is quasi-judicial, in that it involves the

application of set policies to an individual situation. *See* 136 N.C. App. at 282, 523 S.E.2d at 750. In this way, decisions on MHODs are analogous to decisions to grant or deny variances or special use permits. *See id.*

> When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record. In no other way can the reviewing court determine whether the application has been decided upon the evidence and the law or upon arbitrary or extra legal considerations.

Refining Co. v. Board of Aldermen, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974) (citations omitted). Furthermore,

> due process requirements for quasi-judicial zoning decisions mandate that all fair trial standards be observed when these decisions are made. This includes an evidentiary hearing with the right of the parties to offer evidence; cross-examine adverse witnesses; inspect documents; have sworn testimony; and have written findings of fact supported by competent, substantial, and material evidence.

County of Lancaster v. Mecklenburg County, 334 N.C. 496, 507-08, 434 S.E.2d 604, 612 (1993).

In the present case, a public hearing was held before the City Council on 5 May 1998 to determine whether to grant plaintiffs' application for an MHOD. The two plaintiffs made arguments in favor of granting their application, and a number of people living near the property proposed for the MHOD expressed their views against it. At one point, the mayor asked for a show of hands of people present who were opposed to the MHOD. The City Council ultimately voted to deny the application. It did not make any findings of fact to support its decision.

> Before making a quasi-judicial decision, the citizen board involved must conduct a fair evidentiary hearing to gather the necessary evidence on which to base a decision. The purpose of this hearing is to gather evidence in order to establish sufficient facts to apply the ordinance. *The purpose is not to gather public opinion about the desirability of the project involved.*

David W. Owens, *Introduction to Zoning* 50 (Institute of Government, University of North Carolina at Chapel Hill 1995) (emphasis in original).

Not having the benefit of the *Northfield* decision, the City Council in this instance clearly believed, and the Superior Court reviewing its actions explicitly found as fact, that the Council was involved in a legislative decision. Rather than attempt to apply the criteria of the City's zoning ordinance to the situation at hand in a quasi-judicial proceeding, the City Council used the hearing as an opportunity to solicit the opinion of neighboring property owners on the propriety of approving the MHOD. Furthermore, the City Council made no findings of fact for the Superior Court to review. As such, this procedure was clearly inconsistent with *Northfield*, and the Superior Court's "Order and Judgment" affirming the City Council's decision must be vacated.

[2] Plaintiffs additionally argue they were entitled to approval of their application for an MHOD permit as a matter of right. Burlington City Code Section 32.9 provides that MHODs are "permitted by right" in R-9 districts. This Court has previously held that Section 32.9 does not obligate the Burlington City Council to approve MHODs; rather, under Section 32.2R(3)(C), which provides that the "City Council shall have the authority to designate" MHODs, it "retains the discretion to make the designation." *Northfield Dev. Co.*, 136 N.C. App. at 281, 523 S.E.2d at 749. Indeed, the making of quasi-judicial decisions involves "the exercise of some discretion in applying the standards of the ordinance." *County of Lancaster*, 334 N.C. at 507, 434 S.E.2d at 612.

Given that we have decided the City Council used the incorrect standard in making a decision on plaintiffs' application for an MHOD, we decline to address plaintiffs' argument that the City has enforced its zoning regulations in such a manner as to violate N.C.G.S. § 160A-383.1(c). Furthermore, we need not address the trial court's refusal to allow plaintiffs to elicit certain testimony from the City's planning director in their effort to establish that the City Council acted in an arbitrary and capricious manner.

In conclusion, we vacate the trial court's "Order and Judgment" and remand to the Superior Court to remand to the City for the determination in a quasi-judicial hearing of the propriety of granting plaintiffs' application.

Vacated and remanded.

Judges GREENE and McCULLOUGH concur.

SAMUEL J. MORRIS, EMPLOYEE, PLAINTIFF v. L.G. DEWITT TRUCKING, INC., EMPLOYER; SELF-INSURED, (CAROLINA RISK MANAGERS, INC.), DEFENDANT

No. COA00-127

(Filed 1 May 2001)

Workers' Compensation— settlement agreement—timeliness of payment

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee was not entitled to a ten percent penalty under N.C.G.S. § 97-18(g) based on defendant employer's alleged failure to provide timely payment within thirty-nine days from receipt of the order approving the parties' settlement agreement as required by N.C.G.S. § 97-17 because: (1) the thirty-ninth day fell on a Sunday and defendant tendered payment the next day on Monday; and (2) when the last day of a period falls on a Saturday, Sunday, or legal holiday for purposes of computing time periods prescribed by the Workers' Compensation Act, the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

Appeal by plaintiff from opinion and award filed 20 September 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 February 2001.

Poisson, Poisson, Bower & Clodfelter, by Fred D. Poisson, Jr., for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bruce A. Hamilton and Tracey L. Jones, for defendant-appellee.

GREENE, Judge.

Samuel J. Morris (Plaintiff) appeals an opinion and award of the Full Commission of the North Carolina Industrial Commission (the Commission) filed 20 September 1999 in favor of L.G. Dewitt Trucking, Inc., Self-Insured (Defendant).

The undisputed facts show that Plaintiff suffered a compensable injury on 4 March 1993. On 16 December 1997, Plaintiff and Defendant entered into an "AGREEMENT ON FINAL SETTLEMENT AND RELEASE" (the Agreement). The Agreement, which provided Plaintiff would receive a lump sum settlement payment of $375,000.00 from Defendant, was approved by the Executive Secretary of the Commission on 30 December 1997. The Agreement contained the following pertinent language: "This [A]greement is made expressly subject to the approval of the North Carolina Industrial Commission by its award duly issued and the same shall be binding upon all parties when approved by said Commission." Defendant received the order approving the Agreement on 31 December 1997. On Monday, 9 February 1998, 40 days subsequent to Defendant's receipt of the order, Plaintiff's counsel received payment in the amount of $375,000.00 from Defendant.

In a petition dated 9 February 1998, Plaintiff requested the Commission order Defendant to pay a 10% late penalty, pursuant to N.C. Gen. Stat. § 97-18(g), based on Defendant's alleged late payment of funds due under the Agreement. In an opinion and award filed 20 September 1999, the Commission made the following pertinent findings of fact:

> 3. On December 30, 1997, the Industrial Commission entered an Order approving the . . . Agreement. Defendant received this Order on December 31, 1997.
>
> . . . .
>
> 5. Counsel for [P]laintiff received [payment pursuant to the Agreement] on Monday, February 9, 1998.
>
> 6. The thirty-ninth day following [D]efendant's receipt of the Order [approving the Agreement] fell on February 8, 1998 (a Sunday).

Based on these findings of fact, the Commission made the following pertinent conclusions of law:

> 3. Defendant had thirty-nine days from receipt of the Order [approving the Agreement] to tender payment to . . . [P]laintiff. . . . Since the thirty-ninth day in this case fell on a Sunday, [D]efendant had until Monday, February 9, 1998 to tender the settlement funds to . . . [P]laintiff. Rule 609(8) of the Rules of the Industrial Commission.

4. Because [D]efendant made timely payment of compensation within fourteen (14) days after it became due, [P]laintiff is not entitled to a ten percent (10%) penalty pursuant to N.C. Gen. Stat. § 97-18(g).

The Commission, therefore, denied Plaintiff's petition for an order requiring Defendant to pay a 10% penalty pursuant to section 97-18(g).

The dispositive issue is the number of days within which a defendant must pay a compromise settlement entered into with a plaintiff pursuant to N.C. Gen. Stat. § 97-17 before the defendant may be assessed a penalty pursuant to N.C. Gen. Stat. § 97-18(g).

N.C. Gen. Stat. § 97-17 provides that parties to a workers' compensation action may enter into a settlement agreement, and any such agreement must be "filed by [the] employer with and approved by the Industrial Commission." N.C.G.S. § 97-17 (1999). Rule 502 of the Workers' Compensation Rules provides that if a settlement is reached in a case which is "currently calendared for hearing before a Commissioner or Deputy Commissioner," then the settlement agreement "shall be sent [for approval] directly to that Commissioner or Deputy Commissioner at the Industrial Commission." Workers' Comp. R. N.C. Indus. Comm'n 502(4), 2001 Ann. R. N.C. 754-55. If, however, a settlement is reached in a case "[b]efore a case is calendared, or once a case has been continued, or removed, or after the filing of an Opinion and Award, all compromise settlement agreements shall be directed to the Executive Secretary of the Industrial Commission." *Id.* Thus, depending on whether a case has been calendared at the time a settlement agreement is sent to the Industrial Commission for approval, approval of the settlement agreement may be considered by the Executive Secretary or by a deputy commissioner or commissioner before which a hearing has been calendared.

N.C. Gen. Stat. § 97-18(g) provides: "If any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof . . . ." N.C.G.S. § 97-18(g) (1999). In *Felmet v. Duke Power Co.*, 131 N.C. App. 87, 91, 504 S.E.2d 815, 817 (1998), *disc. review denied*, 350 N.C. 94, 527 S.E.2d 666 (1999), this Court set forth the following formula for determining when payment under a compromise settlement entered into pursuant to section 97-17 "becomes due" for the purposes of section 97-18(g): "(1) allow the fifteen day

appeal time set forth in N.C. Gen. Stat. § 97-85 [or Rule 703(1)[1]]; (2) then add ten days pursuant to N.C. Gen. Stat. § 97-18(e); and (3) finally, add fourteen days as required under N.C. Gen. Stat. § 97-18(g)." Pursuant to this formula, the *Felmet* Court held a defendant who is party to a compromise settlement has thirty-nine days from the date notice of the order approving the compromise settlement is given to the defendant to make any payment due pursuant to the compromise settlement without incurring a penalty under section 97-18(g).[2] *Id.*

In this case, the Commission found as fact that Defendant received the order from the Executive Secretary of the Industrial Commission approving the Agreement on 31 December 1997. Defendant, therefore, had thirty-nine days from 31 December 1997 to make the payment required by the Agreement without being assessed a 10% penalty under section 97-18(g). As 8 February 1998, the thirty-ninth day following 31 December 1997, fell on a Sunday, Defendant

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1. The fifteen day time limit for appealing an award under section 97-85 or for appealing an order made in "summary manner" under Rule 703(1) begins to run from the date notice of the award or order is given. N.C.G.S. § 97-85 (1999); Workers' Comp. R. N.C. Indus. Comm'n 703(1), 2001 Ann. R. N.C. 765.

Although section 97-17 provides that "no party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of the matters therein set forth," N.C.G.S. § 97-17, we do not read section 97-17 as denying a party to a settlement agreement the right to appeal from an order entered by the Industrial Commission approving that settlement agreement. In *Felmet*, this Court held a party does not, by entering into a settlement agreement pursuant to section 97-17, waive his right to appeal from an order approving that settlement agreement. *Felmet*, 131 N.C. App. at 92, 504 S.E.2d at 818. Moreover, the Workers' Compensation Rules specifically provide that a party to a settlement agreement approved by the Executive Secretary has the right to appeal from the order approving the settlement agreement. Workers' Comp. R. N.C. Indus. Comm'n 703(1), 2001 Ann. R. N.C. 764-65.

Plaintiff argues in his brief to this Court that the Agreement "contained language that it was binding on the parties upon approval by the North Carolina Industrial Commission," therefore, the Agreement constituted a waiver of the right to appeal from the order approving the Agreement. We disagree. While the parties to a settlement agreement may waive their right to appeal the order approving that agreement, *see* N.C.G.S. § 97-18(e) (1999), the language of the settlement agreement must specifically state the parties are waiving the right to appeal in order to constitute a waiver. Thus, general language that the terms of the settlement agreement are binding on the parties upon approval of the settlement agreement does not constitute a waiver of the right to appeal from the order approving the settlement agreement.

2. Plaintiff argues in his brief to this Court that "[t]he *Felmet* decision . . . should be reconsidered and overruled." This Court, however, is bound by a prior decision of another panel of this Court addressing the same question but in another case. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, we are bound by this Court's holding in *Felmet*.

had until 9 February 1998 to pay Plaintiff without incurring a penalty. *See* Workers' Comp. R. N.C. Indus. Comm'n 609(8), 2001 Ann. R. N.C. 759-60 (when last day of period falls on a Saturday, Sunday, or legal holiday for purposes of computing time period prescribed by Workers' Compensation Act, the "period runs until the end of the next day which is not a Saturday, Sunday or a legal holiday"). Defendant's payment under the Agreement, which was received on 9 February 1998, was, therefore, timely for the purposes of section 97-18(g). Accordingly, the Commission properly denied Plaintiff's petition for an order requiring Defendant to pay a 10% penalty under section 97-18(g).

Affirmed.

Judges McCULLOUGH and HUDSON concur.

RUG DOCTOR, L.P. v. JAMES PRATE

No. COA00-572

(Filed 1 May 2001)

Appeal and Error— appealability—preliminary injunction—covenant not to compete—mootness

Plaintiff employer's appeal from the denial of its motion for a preliminary injunction involving a covenant not to compete is dismissed as moot, because the twelve-month prohibition imposed by the covenant has expired.

Appeal by plaintiff from the order entered 10 December 1999 by Judge James R. Vosburgh in Guilford County Superior Court. Heard in the Court of Appeals 6 February 2001.

Forman, Rossabi, Black, Marth, Iddings & Albright, P.A., by Paul E. Marth, for plaintiff-appellant.

Craige, Brawley, Liipfert & Walker, L.L.P., by William W. Walker, for defendant-appellee.

BIGGS, Judge.

This appeal arises from the trial court's denial of plaintiff-appellant's motion for preliminary injunction involving a covenant not to compete. We find that as of the filing of this opinion, the twelve month prohibition imposed by the covenant has expired, thus rendering the issues raised by the plaintiff-appellant moot. Accordingly, we dismiss the appeal.

In July 1997, James Prate (Prate) was hired as a district manager for Industrial Clean Management (ICM), a division of Rug Doctor, L.P. (Rug Doctor). As a condition of employment, Prate was required to sign a non-compete agreement which read in pertinent part as follows:

> Employee agrees that Employee shall not, for a period of one year immediately following the termination of employment with Rug Doctor, either directly or indirectly, solicit business, as to products or services competitive with those of Rug Doctor, from any of Rug Doctor's customers with whom Employee had contact within one year prior to Employee's termination.

On 12 April 1999, Prate was terminated. Soon after leaving ICM, Prate and his wife formed Contract Management Professionals (CMP), which provides commercial management maintenance services, substantially similar to those provided by ICM. In July 1999, CMP submitted a bid to Food Lion, which had been a major customer of Prate's while employed with ICM. The bid was to clean sixty-nine stores located in Food Lion's District 3, Section 5, an area that ICM had never serviced. CMP's bid was accepted. ICM indirectly bid on this particular Food Lion contract when it submitted a bid for the whole Food Lion chain; however, their bid was rejected because it was too high.

On 30 August 1999, Rug Doctor, of which ICM was a division, filed a complaint and a motion for a preliminary injunction, maintaining that Prate violated the terms of the non-compete agreement when he bid on the Food Lion contract. Rug Doctor alleged that it had, and would continue to suffer irreparable harm if a preliminary injunction was not issued to enjoin Prate from soliciting Rug Doctor's customers within the time and territory prescribed by the contract.

At the 6 December 1999, Civil Session of Guilford County Superior Court, the Honorable James R. Vosburgh conducted a hearing regarding Rug Doctor's motion for a preliminary injunction. Judge

Vosburg denied Rug Doctor's motion, holding that it did not carry its burden as to either success on the merits or irreparable loss. Judge Vosburgh then transferred the case to Forsyth County for adjudication on the merits, pursuant to Prate's motion for change of venue. Rug Doctor now appeals the denial of its motion for injunctive relief.

A preliminary injunction is interlocutory in nature and no appeal lies from such order unless it deprives the appellant of a substantial right which he would lose absent review prior to final determination. *A.E.P. Industries v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983); *see also*, N.C.G.S. § 7A-27(d)(1) (1999). Such equitable relief is an extraordinary measure taken by the courts to preserve the status quo on the subject matter involved until a trial can be held on the merits. *A.E.P. Industries* at 393, 401, 302 S.E.2d at 759; *see also*, *Telephone Co. v. Plastics, Inc.*, 287 N.C. 232, 235, 214 S.E.2d 49, 51 (1975). However, in the case of a covenant not to compete, a plaintiff can only seek to enforce the covenant for the period of time within which the covenant proscribes. In *Herff Jones Co. v. Allegood*, where a one year covenant not to compete expired while the case was on appeal, this Court held that,

> [w]hen pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.

35 N.C. App. 475, 479, 241 S.E.2d 700, 702 (1978) (quoting *Parent-Teacher Assoc. v. Bd. of Education*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969)). *A.E.P. Industries*, 308 N.C. 393, 400, 302 S.E.2d 754, 759, is another case in which a plaintiff sought to enforce a covenant not to compete where the term expired pending appeal. Our Supreme Court stated that in cases "where time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute. The parties would be better advised to seek a final determination on the merits at the earliest possible time." *A.E.P. Industries*, 308 N.C. at 401, 302 S.E.2d at 759. The majority in *A.E.P.* nevertheless chose to address the merits of the appeal even though the term of the covenant not to compete had expired. The court stated, "because this case presents an important question affecting the respective rights of employers and employees who choose to exe-

cute agreements involving covenants not to compete, we have determined to address the issues." *Id.*[1]

In the case *sub judice*, the covenant not to compete sought to prohibit the employee from soliciting customers and employees for a period of one year following termination of employment. Prate was terminated on 12 April 1999, and therefore the prohibition expired 12 April 2000. Consequently, when this case was heard in the Court of Appeals on 6 February 2001, the covenant buttressing the plaintiff's claim had expired and there was nothing to support the issuance of the injunction. Therefore, questions raised by the defendant, Rug Doctor, regarding injunctive relief have been rendered moot by the passage of time. Although Rug Doctor is foreclosed from injunctive relief, there remains the underlying cause of action in which they can seek damages for harm caused by Prate's alleged breach provided, of course, they are successful on the merits.

For the reasons set forth, we dismiss this appeal.

Appeal dismissed.

Judges WYNN and McGEE concur.

1. Justice Martin dissented with two other justices, arguing that the questions raised by the appeal were moot and thus the appeal should be dismissed.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 1 May 2001

BISSETTE v. RUSSELL No. 00-349	Randolph (99CVS744)	Dismissed
BROWN v. WOODRUN ASS'N, INC. No. 00-185	Montgomery (98CVS0323)	Dismissed
CITY OF HILLSBOROUGH v. WILLIAMS No. 00-538	Orange (97CVS630)	No Error
DEMARCO v. EAST CAROLINA UNIV. No. 00-372	Wake (98CVS11775)	Affirmed
DOLLEY v. PRICE No. 00-39	New Hanover (98CVS356)	Affirmed
IN RE JONES No. 00-842	Mecklenburg (98J640) (98J641)	Affirmed
INGLES MKTS., INC. v. PAULCO, INC. No. 00-597	Buncombe (99CVS3455)	Affirmed
McLAWHORN v. R.B.R.&S.T. No. 00-522	Pitt (97CVS2304)	Reversed
SPEARMAN v. SPEARMAN No. 00-473	Forsyth (96CVD3235)	Affirmed
STATE v. BOYD No. 00-377	Guilford (98CRS57057) (98CRS51856) (98CRS23393) (98CRS23754)	No error
STATE v. CANADY No. 00-126	Wilson (97CRS11852)	No error

RICKY JOHNSON, EMPLOYEE, PLAINTIFF v. LOWE'S COMPANIES, INC., EMPLOYER, SELF INSURED (GAB ROBINS, SERVICING AGENT), DEFENDANT

No. COA00-124

(Filed 15 May 2001)

Workers' Compensation— presumption of continuing disability—rebutted—medical and other evidence—fraud

The Industrial Commission did not err in a workers' compensation case by failing to apply the presumption arising from a Form 21 agreement that plaintiff employee's disability continued until he returned to work at the same wage earned prior to his injury, because any presumptions existing in favor of plaintiff have been rebutted by defendants through medical and other evidence including witness testimony, videotaped surveillance of plaintiff working on a regular basis, as well as strong evidence of fraud regarding the physical limitations of plaintiff's injury and his capacity to engage in work-related activities.

Judge HUDSON dissenting.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 2 November 1999. Heard in the Court of Appeals 20 February 2001.

Franklin Smith for plaintiff appellant.

McElwee Firm, P.L.L.C., by Karen Inscore McElwee, for defendant appellees.

McCULLOUGH, Judge.

On 16 February 1993, plaintiff Ricky Johnson injured his knee while working for defendant Lowe's Companies, Inc., when he slipped in a puddle of oil and twisted his leg. Plaintiff sustained a thirty percent permanent partial impairment to his right knee. Plaintiff and defendant-employer entered into a Form 21 Agreement for Compensation for Disability, which was approved by the Industrial Commission on 3 May 1993. On 26 November 1997, defendants deposed plaintiff in an effort to determine his ability to engage in employment and other activities. Plaintiff testified at his deposition that his knee problems had intensified such that his everyday activities were extremely restricted. Specifically, plaintiff stated that he could not crouch down, kneel, squat or stand for more than twenty minutes.

Following a criminal indictment of plaintiff on 10 December 1997 for fraudulently obtaining workers' compensation benefits and for perjury, defendants filed a Form 24 Application to Terminate or Suspend Payment of Compensation with the Industrial Commission, claiming that plaintiff had "fraudulently misrepresented his condition that he was unable to work." Plaintiff, responding through counsel, contested the termination of benefits, stating that he had "been given total and permanent disability by his treating physician, Dr. Walton W. Curl on February 7, 1994[,]" and that "after completing the treatment provided for him by his employer and after finishing a rehabilitation program, he [was] still unable to stand on his right leg for any prolonged period of time."

On 27 August 1998, the matter was heard before a deputy commissioner of the Industrial Commission, whose opinion and award was later adopted by the Full Commission (Commission). Upon reviewing the testimony of numerous witnesses, as well as videotaped surveillance of plaintiff conducted by both defendants' and the Industrial Commission's investigators, the Commission found that "[p]laintiff has consistently misrepresented his knee condition and his physical capacity to work to his health care providers, including Dr. Curl, and his employer[,]" and that "plaintiff has repeatedly demonstrated the capacity to engage in activities through which he could earn wages. He is able to work as an auto mechanic. He is able to work in logging. He is capable of standing, walking, kneeling, stooping, and bending on a continuous basis. He is capable of lifting more than just a light load or more than 30 pounds, on an occasional basis." The Commission concluded that defendants had rebutted the presumption of an ongoing disability arising from the Form 21 Agreement, and that plaintiff had the capacity to earn wages in gainful and suitable employment. The Commission further awarded defendants attorney's fees "incurred as a result of plaintiff's unfounded litigiousness." Plaintiff appealed to this Court.

Plaintiff argues that the Commission erred by failing to apply the presumption that plaintiff's disability continued until he returned to work at the same wage earned prior to the injury. Plaintiff also contends that defendants failed to prove that plaintiff was employable, and that plaintiff's medical evidence as to his infirmity outweighs the testimony of numerous witnesses and videotaped surveillance of plaintiff regarding his ability to engage in physical activity.

On appeal of cases from the Industrial Commission, our review is limited to two issues: " '[W]hether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact.' " *In re Stone v. G & G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 367 (1997) (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)). Because it is the fact-finding body, the Commission is " 'the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). The Commission's findings of fact are conclusive on appeal if they are supported by any competent evidence. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). Accordingly, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274. In the instant case, we conclude that the Commission's findings of fact are supported by competent evidence that in turn justifies the Commission's conclusions of law.

In order to qualify for compensation under the Workers' Compensation Act, a claimant must prove both the existence and the extent of disability. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). In the context of a claim for workers' compensation, disability refers to the impairment of the injured employee's earning capacity. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 804 (1986). "If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work . . . ." *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971). As stated in Rule 404(1) of the Workers' Compensation Rules of the North Carolina Industrial Commission and noted by our Supreme Court in *In re Stone*, however, "this presumption of continued disability is rebuttable." *In re Stone*, 346 N.C. at 157, 484 S.E.2d at 367. In the instant case, any presumptions existing in favor of plaintiff-employee have been rebutted by defendants through witness testimony, videotaped surveillance of plaintiff, as well as medical evidence and strong evidence of fraud.

In *Stone v. G & G Builders*, 121 N.C. App. 671, 674, 468 S.E.2d 510, 512, *disc. review allowed*, 343 N.C. 757, 473 S.E.2d 627 (1996),

reversed, 346 N.C. 154, 484 S.E.2d 365 (1997), this Court determined that the defendant-employer failed to rebut the presumption of an ongoing disability raised by a Form 21 Agreement, even though the Industrial Commission had found that plaintiff-employee was capable of returning to work at his regular job. "[I]t does not necessarily follow that an employee who returns to his 'regular job' will earn the same wages he earned before his injury." *Stone*, 121 N.C. App. at 674, 468 S.E.2d at 512. Reversing this decision, our Supreme Court held that the defendant- employer had successfully rebutted the presumption of plaintiff's disability "through medical and other evidence." *In re Stone*, 346 N.C. at 157, 484 S.E.2d at 368. The Court noted that defendants had introduced videotaped surveillance of plaintiff performing various activities, including painting overhead with a roller, lifting and carrying plywood, trimming overhead branches, and throwing horseshoes. Defendants also introduced medical evidence that plaintiff retained no permanent partial impairment to his back, and that plaintiff could return to regular employment with certain restrictions. The Court further observed that the Industrial Commission found plaintiff's testimony regarding his inability to engage in the same or any other employment at the same wages neither credible nor convincing. Because defendants had successfully rebutted the presumption of plaintiff's disability, the Court reinstated the Industrial Commission's opinion and award for defendants.

Harrington v. Adams-Robinson Enterprises, 128 N.C. App. 496, 495 S.E.2d 377, *reversed*, 349 N.C. 218, 504 S.E.2d 786 (1998) (*Harrington* I), further illustrates an employer's successful rebuttal of a presumption of disability arising from a Form 21 Agreement where there is evidence of fraud by the employee. In that case, plaintiff-employee and defendant-employer entered into a Form 21 Agreement after plaintiff suffered compensable injuries while in the scope of his employment. Although he sustained permanent partial impairment to his back, plaintiff was eventually released to work by his physician, at which time defendant filed to terminate benefits. The Industrial Commission agreed with defendant that plaintiff had no further claim for workers' compensation benefits and terminated such benefits. On appeal to this Court, plaintiff argued that the Industrial Commission erred in concluding that defendant had rebutted the presumption of disability because defendant had presented no evidence concerning plaintiff's wage-earning capacity. Plaintiff contended that, because defendant had not offered him a job, nor had it shown that there were any jobs available which plaintiff could perform, defendant had not shown that plaintiff was capa-

ble of earning wages greater than or at the level he was earning at the time of his injury. A divided panel of this Court agreed with plaintiff, holding that defendant had not met its burden of disproving plaintiff's disability. The Court stated that "[u]pon a showing of disability by the employee, the employer must produce evidence that suitable jobs are available for the employee and that the employee is capable of getting a job." *Harrington* I, 128 N.C. App. at 498, 495 S.E.2d at 378. Because there was "no evidence to support a finding that the plaintiff retained any earning capacity after he was released by his doctors[,]" defendant failed to rebut the presumption of plaintiff's disability. *Id.* at 499, 495 S.E.2d at 379.

Quoting *Stone*, Judge Walker dissented from the majority, asserting that, " 'as stated in Rule 404(1) of the Workers' Compensation Rules of the North Carolina Industrial Commission, [the] presumption of continuing disability [until the employee returns to work] is rebuttable.' " *Harrington* I, 128 N.C. App. at 500, 495 S.E.2d at 380 (quoting *In re Stone*, 346 N.C. at 157, 484 S.E.2d at 367) (Walker, J., dissenting). Noting that the Industrial Commission found that plaintiff's testimony of continuing pain was not credible, and that he had been released to work, Judge Walker concluded that "the presumption existing in favor of the plaintiff was rebutted by the defendant through medical and other evidence." *Harrington* I, 128 N.C. App. at 501, 495 S.E.2d at 380.

Defendant appealed to our Supreme Court, arguing that, because it had adequately rebutted the presumption of plaintiff's disability, the decision by the Court of Appeals in favor of plaintiff should be reversed. Plaintiff again rejoined that, because defendant had not rehired plaintiff, nor provided vocational assistance, nor shown suitable and available job opportunities for plaintiff, defendant had not proven that plaintiff was capable of earning wages greater than or at the level he was earning at the time of his injury. Our Supreme Court, writing *per curiam*, rejected plaintiff's argument, again reversing the Court of Appeals "[f]or the reasons stated in the dissenting opinion of Judge Walker[.]" *Harrington v. Adams-Robinson Enterprises*, 349 N.C. 218, 504 S.E.2d 786 (1998) (*Harrington* II).

In re Stone and *Harrington* II make clear that, although a Form 21 agreement creates a presumption that an employee is disabled until he returns to work, the presumption of disability may be rebutted by an employer through medical and other evidence. *See In re Stone*, 346 N.C. at 157, 484 S.E.2d at 367; *Harrington* I, 128 N.C. App. at 500, 495 S.E.2d at 380; Workers' Comp. R. of the N.C. Indus.

Comm'n 404(1), 2001 Ann. R. (N.C.) 745. Such "other evidence" includes evidence that the employee is capable of obtaining suitable and available employment. *Davis v. Embree-Reed, Inc.*, 135 N.C. App. 80, 84, 519 S.E.2d 763, 765, *disc. review denied*, 351 N.C. 102, 541 S.E.2d 143 (1999); *see also Stamey v. N.C. Self-Insurance Guar. Ass'n*, 131 N.C. App. 662, 665, 507 S.E.2d 596, 599 (1998) ("The employer may rebut the presumption of continuing disability 'through medical and other evidence,' including evidence 'that suitable jobs are available to the employee . . . .' ") *Id.* (citation omitted). The issue now before this Court is whether strong evidence of fraud, coupled with evidence that plaintiff-employee is, in fact, working, is enough to rebut the presumption of plaintiff's continuing disability. We believe that, under the facts of this case, such evidence is sufficient.

In the instant case, defendants presented medical evidence that plaintiff had been released to work, albeit with restrictions, by his physician, Dr. Walton Curl. Dr. Curl opined that plaintiff was physically capable of "get[ting] a job working on cars. He seems to be comfortable doing that." Contrary to plaintiff's claim in his response to defendants' application to terminate benefits, Dr. Curl's 7 February 1994 note did not state that plaintiff suffered from "total and permanent disability," but rather that plaintiff was "permanently disabled." Dr. Curl testified that he did not mean to imply with his note that plaintiff was totally and permanently disabled, only that plaintiff had sustained a permanent impairment to his knee. Further, after viewing videotaped surveillance of plaintiff, Dr. Curl admitted that, based upon plaintiff's subjective presentation of his injury during the course of treatment, plaintiff's videotaped activities exceeded the level of performance of which he thought plaintiff capable.

In addition to the medical evidence, defendants also presented lengthy videotaped surveillance of plaintiff. One of the videotapes, dated October 1997, shows plaintiff working at a logging operation, cutting felled trees with a chain saw. Plaintiff's filmed activities include prolonged standing, walking, stooping, kneeling, and lifting. The private investigator who filmed plaintiff testified that plaintiff worked continuously for over four hours, showing no signs of physical distress. Evidence showed that, during October and November 1997, plaintiff worked at the logging operation on approximately twelve occasions for four to eight hours a day. Plaintiff received about two hundred dollars for his work from Mr. Doug Williams, who claimed that the money was reimbursement for plaintiff's expenses.

Further videotaped surveillance shows plaintiff loading and unloading various items from the bed of his pickup truck, climbing ladders, shoveling sand or dirt, carrying piles of clothing and large boxes, and repairing automobiles. This evidence directly contradicts plaintiff's assertion in his deposition that he could not crouch down, kneel, squat or stand for more than twenty minutes.

Defendants presented numerous witnesses who testified as to plaintiff's physical capabilities. Ken Whapham, a private investigator, testified that in July and August 1994, he observed plaintiff working at an automobile service station, repairing a Mustang. Plaintiff had "grease and dirt on his arms" and at the time was wearing a "dark blue . . . shirt and pants that appeared to be a local work type uniform[.]" Mike Volin, a manager with Lowe's, testified that on 9 April 1996, he observed plaintiff "in the back of a small light tan pickup truck bending down lifting . . . cinder blocks that you build—to build a foundation to another gentleman that was outside of the truck." Mr. Volin watched plaintiff unload the bed of the pickup truck for approximately fifteen minutes. R. Dee Mitchell, an employee at Lowe's, testified that, on 24 October 1995, he drove by a garage on Union Methodist Church Road and observed plaintiff and another man "carrying what appeared to be a complete rear-end [assembly of an automobile]." Mr. Mitchell further testified that he observed plaintiff squatting, carrying heavy objects, and working on vehicles at the same garage on numerous occasions. Two other witnesses testified that they observed plaintiff walking in a smooth, natural manner until plaintiff became aware of their presence, whereupon plaintiff began noticeably limping.

Defendants also presented evidence of their efforts to assist plaintiff in locating employment. When Mr. McIntosh, Lowe's Human Resource Manager, suggested "that GAB would probably want to assign a rehab nurse to assist [plaintiff] in looking for employment[,]" plaintiff replied that "they had done that and for over a year[,]" and that "[i]t didn't do any good, that when [plaintiff] talked to employers and told them about his knee . . . no one wanted to give him a job." Mr. McIntosh also testified that plaintiff consistently told him that "he was unable to do anything based on his knee problem[,]" and that plaintiff's attitude was one of "permanent disability." Because of plaintiff's statements, Mr. McIntosh concluded that Lowe's did not have any work for plaintiff. Moreover, when asked what sort of vocational training he might find helpful, plaintiff stated that "I can't think of anything, because I don't—I've never been one to want to stay inside."

Ray Young, an investigator with the Fraud Division of the Industrial Commission, testified that the Commission had received a fraud complaint regarding plaintiff. Pursuant to the complaint, the Commission conducted an investigation and presented the results to a screening committee, which subsequently referred the case to the District Attorney for prosecution. District Attorney Tom Horner authorized criminal prosecution against plaintiff for fraudulently obtaining Workers' Compensation benefits and for perjury, crimes for which plaintiff was indicted. Plaintiff ultimately pled no contest to the charges, and a prayer for judgment was entered.

Like the plaintiffs in *Stone* and *Harrington* I, plaintiff in the instant case suffered compensable injuries for which he was compensated. Like Mr. Harrington, Mr. Johnson was released by his physician to work, even though he sustained a permanent partial impairment to his knee. Like Mr. Stone, Mr. Johnson was filmed engaging in strenuous physical activities. Further, like the *Stone* and *Harrington* I plaintiffs, the Industrial Commission specifically found that "[p]laintiff's testimony regarding his knee condition is not credible."

We hold that the Commission's findings adequately established that the presumption existing in favor of plaintiff was rebutted by defendants through medical and other evidence. Where there is overwhelming evidence of fraud by the employee regarding both the physical limitations of his injury and his capacity to engage in work-related activities, as well as strong evidence that the employee is actually working on a regular basis, such evidence rebuts the presumption of continuing disability arising from the employee's original injury. *See In re Stone*, 346 N.C. at 157, 484 S.E.2d at 367; *Harrington* I, 128 N.C. App. at 500, 495 S.E.2d at 380 (Walker, J., dissenting). Moreover, we determine that the Commission did not abuse its discretion in awarding defendants attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 (1999). Because we find that the Industrial Commission's findings of fact and conclusions of law were supported by competent evidence, the opinion and award by the Commission, including the award of attorney's fees, is hereby

Affirmed.

Judge GREENE concurs.

Judge HUDSON dissents.

HUDSON, Judge, dissenting.

The majority, relying upon *In re Stone v. G & G Builders*, 346 N.C. 154, 484 S.E.2d 365 (1997), and *Harrington v. Adams-Robinson Enterprises*, 128 N.C. App. 496, 495 S.E.2d 377, *rev'd*, 349 N.C. 218, 504 S.E.2d 786 (1998), concludes that "strong evidence of fraud, coupled with evidence that plaintiff-employee is, in fact, working, is enough to rebut the presumption of plaintiff's continuing disability." I disagree with this narrow interpretation of the holdings in *Stone* and *Harrington*, and I further believe that defendants here have not come forward with the necessary proof to overcome the presumption of plaintiff's ongoing disability arising from the approval of a Form 21.

In my opinion, the Supreme Court in *Stone* and *Harrington* determined that the employers in those cases had rebutted the presumption of disability as a result of a number of different factors, and not simply based on evidence of fraud coupled with evidence that the plaintiff was capable of engaging in various physical tasks. I believe that both *Stone* and *Harrington* can be distinguished from the present case on the grounds that those cases involved at least four significant factors which are not present here. I further believe that the absence of these factors in this case warrants the determination that the presumption of disability has not been rebutted here.

First, in both *Stone* and *Harrington* there was evidence, and the Industrial Commission found, that the plaintiffs had either no permanent physical impairment at all, or, at most, minimal physical impairment. *See Stone*, 346 N.C. at 155, 484 S.E.2d at 366 (no permanent partial disability); *Harrington*, 128 N.C. App. at 497, 495 S.E.2d at 378 (5% permanent partial impairment). Here, on the other hand, plaintiff had knee surgery twice, and was finally released with a 30% permanent impairment rating to the right lower extremity "based upon his problem with severe chondromalacia of his medial femoral condyle and absent medial meniscus as well as his lack of motion." Second, in neither *Stone* nor *Harrington* was the plaintiff under any work restrictions other than general lifting restrictions which applied to all employees. *See Stone*, 346 N.C. at 155, 484 S.E.2d at 366-67 (plaintiff could return to regular employment with "routine weight lifting guidelines"); *Harrington*, 128 N.C. App. at 500, 495 S.E.2d at 380 (plaintiff released to return to unrestricted work). Here, on the contrary, plaintiff was released from treatment with *permanent* restrictions of "no bending, stooping, climbing and no lifting over 30 lb," and was undergoing ongoing medical treatment and supervision.

Third, and most significantly, the plaintiffs in both *Stone* and *Harrington* were found to have been released to return to any job, specifically including their original jobs, and I believe such a finding constitutes some evidence of a particular job being available to the plaintiff. *See Stone*, 346 N.C. at 156, 484 S.E.2d at 367 ("plaintiff has been capable of returning to work at his regular job with [G & G Builders]"); *Harrington*, 128 N.C. App. at 500, 495 S.E.2d at 380 ("plaintiff has remained capable of returning to unrestricted work, including his regular carpenter's job"). Here, there was no such evidence, and, in fact, there was significant evidence to the contrary. The record reflects that plaintiff's doctor, instead of releasing plaintiff to return to his regular job, or any specific job, recommended that "he is an excellent candidate for vocational rehabilitation to retrain him in a sedentary type of position." Furthermore, the record contains a notation made by defendants on plaintiff's restriction form stating "no light duty available." Although the doctor later noted that "I think he can get a job working on cars," there was no evidence and no finding that such a job was available, nor that plaintiff would be hired at such a job, nor any finding regarding any potential wages that plaintiff could earn if he were so hired.

Fourth, in both *Stone* and *Harrington* there was medical and other evidence that although jobs were available to the plaintiffs, the plaintiffs did not make any efforts to return to work after their injuries. *See Stone*, 346 N.C. at 156, 484 S.E.2d at 367 ("plaintiff has not made a reasonable effort under the circumstances to obtain gainful employment"); *Harrington*, 128 N.C. App. at 500, 495 S.E.2d at 380 (although plaintiff was released to unrestricted work, he did not apply for work because he claimed he was incapable of heavy work and light work did not pay enough). Here, there was no evidence that any specific job was available to plaintiff, or that he failed to make efforts to return to work. Although the Commission found as fact that plaintiff had failed to cooperate with job-seeking efforts provided by defendants, the record, in fact, reveals just the opposite. Defendants hired a rehabilitation specialist to work with plaintiff until November 1997. The evidence established that, for a period of several years, the rehabilitation counselor worked with plaintiff only to coordinate medical treatment and to help him regain functional status. This work continued until the "Closure Report," dated 12 November 1997. In that report and in her testimony, the rehabilitation specialist specifically noted that defendants never requested that she assist plaintiff with any job placement efforts. Thus, the counseling was in the nature of medical rehabilitation rather than vocational. *See* N.C.

Indus. Comm'n Rules for Rehabilitation Professionals IIID and E, 2001 Ann. R. N.C. 810. There was no evidence that defendants made any effort to help plaintiff obtain work suitable for him in light of his injuries, age, education and job skills.[1]

It is important to note here that any determination of the adequacy of defendants' evidence to rebut the presumption of disability is difficult because there is no finding at all of what plaintiff's regular job entailed, other than the stipulation that he worked for defendants and earned $211.45 per week. The testimony from defendants' own Human Resources manager, Mitchell MacIntosh, was that plaintiff was terminated "because of company policy after he was unable to return to work pursuant to doctor's orders within twelve months after he was injured," that he did not have a position that "Mr. Johnson could perform taking into consideration both his physical limitations as well as his academic or educational skills," and that he "didn't see an appropriate job that retraining would accomplish [plaintiff's] return to work." Thus, defendants have simply failed to set forth any evidence that plaintiff had regained any wage-earning capacity at all. I believe, therefore, that the distinctions between this case and *Stone* and *Harrington*, especially in light of the additional cases discussed below, support the conclusion that defendants here have failed to present sufficient evidence to overcome plaintiff's presumption of ongoing disability. I do not believe that the record supports any finding that plaintiff had regained wage-earning capacity, as that concept is defined by the Supreme Court of North Carolina.

I also disagree with the general proposition that a defendant may rebut the presumption of disability by simply showing that the plaintiff is capable of performing a few potentially job-related activities, and that there may be some fraud on the plaintiff's part with regard to the extent of his injuries.[2] The majority takes the position that

1. In the event that the Commission believed that plaintiff had failed to cooperate with vocational rehabilitation efforts, the appropriate remedy would have been to *suspend*, rather than terminate, his benefits until such time as he began to cooperate. *See Scurlock v. Durham County Gen. Hosp.*, 136 N.C. App. 144, 148, 523 S.E.2d 439, 441 (1999).

2. Here, the Opinion and Award of the Commission focused on videotapes of various physical activities that appeared inconsistent with plaintiff's restrictions, and which the Commission held "demonstrated the capacity to engage in activities through which [plaintiff] could earn wages." However, when asked about the videotaped activities, plaintiff's doctor specifically declined to change either his rating or his restrictions, and emphasized that "on a sustained basis . . . I really honestly don't think he can do more than light duty."

such evidence is generally sufficient to rebut a presumption of disability, even in the absence of any evidence that there is a specific, identifiable job that the plaintiff is able to perform. This interpretation is inconsistent with Supreme Court precedent by which we are bound, and, indeed, with the most basic underlying principles of the workers' compensation scheme.

The Supreme Court and this Court alike have frequently noted that the statutory system of workers' compensation payments is a wage-replacement scheme, and is a limited and exclusive remedy. *See Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E.2d 336 (1986). It compensates an injured or ill worker only for permanent injury or loss of wage-earning capacity, whichever is the more favorable remedy for the worker. *See id.*; *Gupton v. Builders Transport*, 320 N.C. 38, 357 S.E.2d 674 (1987). Furthermore, it is well-established that the Workers' Compensation Act is to be "liberally construed to benefit the employee." *Rorie v. Holly Farms*, 306 N.C. 706, 709, 295 S.E.2d 458, 461 (1982); *see also Barnhardt v. Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966).

In *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 487 S.E.2d 746 (1998), the Supreme Court explained at length the concepts which come into play in the determination of whether a defendant-employer has presented evidence sufficient to rebut a presumption of disability arising from a Form 21 agreement. In *Saums*, the plaintiff sustained a back injury, underwent surgery twice, and received benefits following the entry and approval of a Form 21. The plaintiff returned to work at a modified light duty job ("quality control clerk") for more than a year, and then left her job with increased pain. After several months, the plaintiff underwent surgery a third time, at which point her benefits resumed. At the end of her recovery from the third surgery, her physician released her to return to the modified job, stating that he could not "find any hard reason why this patient should not be allowed to return to the job that was created by you which would eliminate any strenuous activities." She declined to return to the job and the defendant refused to restart her weekly benefits.

The Supreme Court held that the plaintiff was cloaked in the presumption of ongoing disability by virtue of the Form 21 agreement. *See id.* at 763, 487 S.E.2d at 749. "After the presumption attaches, 'the burden shifts to [the employer] to show that plaintiff is employable.' " *Id.* (quoting *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 284, 458 S.E.2d 251, 257, *disc. review denied and cert. denied*,

341 N.C. 647, 462 S.E.2d 507 (1995)). The Supreme Court went on to explain that:

> The employee need not present evidence at the hearing unless and until the employer, "claim[ing] that the plaintiff is capable of earning wages[,] . . . come[s] 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."

Id. at 763-64, 487 S.E.2d at 749 (quoting *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)). The Court then held that the defendant's evidence of an available job, created for and offered to the plaintiff, and within plaintiff's physical limitations, did not rebut the presumption of disability, since this "modified job" was not an accurate reflection of the plaintiff's earning ability in the competitive marketplace, and since there was no evidence that any employer other than the defendant would hire the plaintiff at that wage. *See id.* at 764-65, 487 S.E.2d at 750. Quoting its previous decision in *Peoples v. Cone Mills*, 316 N.C. 426, 342 S.E.2d 798 (1986), the *Saums* court explained why the evidence was insufficient to establish wage-earning capacity:

> If 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. . . .
>
> [T]he Workers' Compensation Act does not permit [defendant] to avoid its duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which [defendant] could terminate at will or, as noted above, for reasons beyond its control.
>
> *In this case, it has not been established that the quality control clerk position offered to plaintiff is an accurate measure*

of plaintiff's ability to earn wages in the competitive job market. There is no evidence that employers, other than defendant, would hire plaintiff to do a similar job at a comparable wage.

Saums, 346 N.C. at 764-65, 487 S.E.2d at 750 (internal quotation marks and citations omitted) (emphasis added).

The evidence presented in the case before the Court is not nearly as strong as the evidence presented in *Saums*, in that defendants here presented no evidence at all that any job existed for plaintiff, let alone one that he could have obtained and that accurately reflected his wage-earning capacity in the competitive job market. Evidence, such as the videotapes presented by defendants in this case, tending to show that a plaintiff on occasion may be capable of performing particular tasks which sometimes might be included among the duties of an unspecified job, even taken together with evidence that a plaintiff may have been less than candid about the extent of his symptoms, does not satisfy the very clear requirements of *Saums*. Such evidence does not establish wage-earning capacity, and is therefore insufficient to overcome the presumption of ongoing disability.

I would reverse the order of the Commission to the extent the Commission found that defendants had rebutted the presumption of ongoing disability. I would further hold that plaintiff had reasonable ground to defend against defendants' Form 24 Application to Terminate Benefits, and that, therefore, the Commission abused its discretion in awarding attorney's fees to defendants pursuant to N.C.G.S. § 97-88.1 (1999). For these reasons, I dissent.

CHRISTOPHER SODERLUND, PLAINTIFF v. RICHARD KUCH AND RICHARD GAIN, DEFENDANTS

No. COA00-361

(Filed 15 May 2001)

1. Emotional Distress— intentional and negligent—expiration of statute of limitations

The trial court did not err by granting summary judgment in favor of two faculty members for plaintiff former students's claims of intentional and negligent infliction of emotional dis-

tress filed on 19 July 1995 based on the expiration of the three-year statute of limitations under N.C.G.S. § 1-52(5), because: (1) there is no genuine issue of material fact concerning when plaintiff manifested signs of severe emotional distress when he admitted it occurred following his 1986 departure from school; (2) while it may be true that until diagnosis plaintiff was not aware he suffered from post-traumatic stress disorder (PTSD) by that name, plaintiff's admissions show he did know for some years after leaving school in 1986 that he was suffering from some sort of emotional distress; (3) plaintiff's emotional distress was not latent since it could have been generally recognized and diagnosed as PTSD by a medical professional in 1986, meaning the pertinent statute expired at the end of the summer of 1989; and (4) plaintiff does not get the benefit of postponing the accrual of his cause of action until 1992 when he had a conversation with his mother about defendants' wrongful conduct or until 1993 when plaintiff was diagnosed with having PTSD.

2. Emotional Distress— intentional and negligent—applicable statute of limitations

The three-year statute of limitations under N.C.G.S. § 1-52(16) is not applicable to plaintiff former student's action for intentional and negligent infliction of emotional distress against two faculty members, because: (1) N.C.G.S. § 1-52(16) protects a potential plaintiff in the case of a latent injury; (2) plaintiff's injuries were apparent to plaintiff by his own admissions and his post-traumatic stress disorder could have been generally recognized and diagnosed by a medical professional in 1986; and (3) the accrual of emotional distress claims does not necessarily begin at the time of diagnosis, nor is an actual diagnosis always necessary to trigger accrual.

3. Emotional Distress— intentional and negligent—tolling of statute of limitations not required—no showing of incompetency

The trial court did not err in an action for intentional and negligent infliction of emotional distress by plaintiff former student against two faculty members when the trial court failed to toll the applicable statute of limitations based on plaintiff's alleged incompetence as defined under N.C.G.S. § 35A-1101(7), because: (1) plaintiff has not established that he was incompetent when his only allegation of incompetency is that his mental condition caused him to be incapable of understanding his legal rights,

making or communicating important decisions about those rights or bringing a lawsuit when the term "affairs" in N.C.G.S. § 35-1101(7) encompasses more than just one transaction; and (2) evidence showed that since leaving school in 1986, plaintiff could and did manage his own affairs and did make important decisions concerning his person and property.

4. Appeal and Error— mootness—sufficiency of evidence—claim already barred by statute of limitations

Although plaintiff former student contends the trial court erred by granting summary judgment in favor of two faculty members on plaintiff's claims of intentional and negligent infliction of emotional distress filed on 19 July 1995 based on an alleged insufficiency of evidence, this argument is rendered moot since the three-year statute of limitations of N.C.G.S. § 1-52(5) bars plaintiff's claims.

Appeal by plaintiff from an order entered 30 December 1999 by Judge Judson D. DeRamus, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 26 January 2001.

Elliott, Pishko, Gelbin & Morgan, P.A., by J. Griffin Morgan and Ellen R. Gelbin, for plaintiff-appellant.

Wells Jenkins Lucas & Jenkins, by Susan H. Gray, for defendant-appellees.

HUNTER, Judge.

Christopher Soderlund ("plaintiff") appeals from an order granting summary judgment in favor of Richard Kuch and Richard Gain (collectively "defendants") dismissing plaintiff's claims for intentional and negligent infliction of emotional distress. Plaintiff assigns error to the trial court's grant of defendants' summary judgment motion on three grounds: (1) the applicable statute of limitations had not expired, (2) plaintiff's alleged incompetence tolled the applicable statute of limitations, and (3) plaintiff forecasted sufficient evidence that established each essential element of his claims of intentional and negligent infliction of emotional distress. After a careful review of the record, briefs, and arguments, we disagree with plaintiff's contentions, and therefore, we affirm the trial court.

The relevant allegations of the complaint show that in 1983, plaintiff, then age fifteen (15), was admitted to the North Carolina School

of the Arts ("NCSA"), where he began his studies as a ballet major. Sexual relationships between students and teachers were common knowledge at NCSA, and plaintiff believed that such relationships were a normal and acceptable part of studying at the school. In the spring of 1984, plaintiff, then age sixteen (16), began a sexual relationship with Gain, a NCSA faculty member in the modern dance department. During the relationship, Kuch, a NCSA assistant dean and faculty member, encouraged plaintiff to sexually submit to Gain, humiliated plaintiff by making suggestive remarks to him in front of other students, and then publicized plaintiff's sexual relationship with Gain. Later during the spring of 1984, Gain ended the relationship with plaintiff. Thereafter, defendants ridiculed plaintiff about his appearance and dancing skills. As a result, plaintiff became emotionally upset, and began over-eating, drinking excessively, and smoking.

At the end of the school year in 1984, plaintiff was informed that he was not going to be invited back for the next school year. In an attempt to continue his studies at NCSA, plaintiff requested and was allowed to transfer to the modern dance department for the summer semester. During this time, defendants flirted with plaintiff on some occasions and ridiculed him on others. Finally, when the summer session was complete, Kuch refused to allow plaintiff back into school for the fall semester.

Approximately two years passed when in 1986, plaintiff, then eighteen (18) years of age, returned to NCSA for a summer session in hopes of earning the respect and praise of defendants. During the summer, however, Gain did not speak to plaintiff, and Kuch verbally abused him.

As a result of defendants' treatment, plaintiff felt severe guilt and shame, and for the next seven years of his life, continued on a self-destructive course. During these years, plaintiff suffered several mental breakdowns, contemplated suicide, and was unable to lead a normal life or to form mature, healthy relationships. Ultimately, on 22 July 1992, plaintiff told his mother about his relationship with defendants. Based on this conversation, plaintiff allegedly understood for the first time that defendants' actions were improper. Subsequently in the fall of 1993, plaintiff was evaluated by a psychologist who diagnosed him with post-traumatic stress disorder ("PTSD") directly caused by the actions of defendants. The psychologist determined that until plaintiff told his mother about defendants' actions and the diagnosis was made, plaintiff was not aware that defendants' actions were improper, that there was a link between defendants' actions and

his mental condition, and that he had a cause of action against defendants.

On 19 July 1995, plaintiff filed suit against Kuch, Gain, NCSA, and the University of North Carolina ("UNC") alleging intentional, reckless, and negligent infliction of emotional distress, negligence, constitutional violations, and seeking punitive damages. All defendants filed motions to dismiss which the trial court granted pursuant to N.C.R. Civ. P. 12(b)(1), (2), and (6) (1999). Plaintiff appealed the dismissal of his claims against Kuch and Gain, but he subsequently abandoned his civil claims against NCSA and UNC, and instead pursued them for negligence under the Tort Claims Act, N.C. Gen. Stat. § 143-291(a) (1996).

This case first came before us in *Soderlund v. N.C. School of the Arts*, 125 N.C. App. 386, 481 S.E.2d 336 (1997), after the trial court's grant of defendants' motions to dismiss pursuant to N.C.R. Civ. P. 12(b)(1), (2), and (6). In our previous opinion, this Court found that defendants had sufficient notice from the allegations in plaintiff's complaint that he may have been prevented from filing his claims due to his alleged incompetence, as defined in N.C. Gen. Stat. § 35A-1101(7) (1999). *Soderlund*, 125 N.C. App. 386, 481 S.E.2d 336. Therefore, we reversed the trial court's dismissal and remanded the case for a determination of whether plaintiff's condition rose to the level of incompetence as defined in § 35A-1101(7), thus tolling the applicable statute of limitations. *Id.*

Upon remand, discovery was conducted. Then, on 16 April 1999, defendants filed a motion for summary judgment. The motion was heard at the 23 August 1999 Civil Session of Forsyth County Superior Court, the Honorable Judson D. DeRamus, Jr. presiding. By order dated 30 December 1999, Judge DeRamus granted defendants' summary judgment motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 (1999). With respect to the applicability of the statute of limitations and the existence of all necessary elements of both intentional and negligent infliction of emotional distress, the trial court found that plaintiff's claim lacked a genuine issue of material fact. In finding no genuine issue of material fact as to the statute of limitations, we conclude that Judge DeRamus was necessarily ruling that plaintiff's alleged incompetence did not rise to the level of incompetence, as defined in § 35A-1101(7), necessary to toll the statute of limitations. Judge DeRamus thereby dismissed plaintiff's claims with prejudice, and plaintiff now appeals to this Court.

[1] In his first assignment of error, plaintiff claims that the trial court erred when it granted summary judgment based on the expiration of the applicable statute of limitations. Plaintiff argues that his causes of action for intentional and negligent infliction of emotional distress did not accrue, thus the statute of limitations did not begin to run until his injury became apparent or ought reasonably to have become apparent to him—which was only after his conversation with his mother in 1992 or his diagnosis by his psychologist in 1993. We disagree.

"At the outset, we note that the standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Furthermore, "the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Id.* Therefore, summary judgment is only 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. Gen. Stat. § 1A-1, Rule 56(c) (1999).

"Generally, whether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 508, 317 S.E.2d 41, 43 (1984), *aff'd*, 313 N.C. 488, 329 S.E.2d 350 (1985). However, when "the statute of limitations is properly pleaded, and the facts with reference to it are not in conflict, it becomes a matter of law, and summary judgment is appropriate." *Id.* (citation omitted). Here, defendants filed, and the trial court granted, a motion for summary judgment pursuant to Rule 56 upon the grounds that there was a lack of a genuine issue of material fact with respect to the applicability of the statute of limitations, *inter alia*. " 'Once a defendant has properly pleaded the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action.' " *Waddle v. Sparks*, 331 N.C. 73, 85-86, 414 S.E.2d 22, 28-29 (1992) (quoting *Pembee*, 313 N.C. 488, 491, 329 S.E.2d 350, 353).

In an action for intentional infliction of emotional distress, a plaintiff must prove "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335

(1981). Similarly, in an action for negligent infliction of emotional distress, a plaintiff must prove "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). Assuming *arguendo*, for the sake of this appeal, that plaintiff has established each essential element of both torts, plaintiff has the burden of showing that his action was brought within the applicable statute of limitations.

Because emotional distress claims are not specifically denominated under any limitation statute, our courts have consistently held that, "[c]auses of action for emotional distress, both intentional and negligent, are governed by the three-year statute of limitation provisions of N.C. Gen. Stat. § 1-52(5) . . . ." *Russell v. Adams*, 125 N.C. App. 637, 640, 482 S.E.2d 30, 33 (1997); *see also King v. Cape Fear Mem. Hosp.*, 96 N.C. App. 338, 341, 385 S.E.2d 812, 814 (1989). Specifically, N.C. Gen. Stat. § 1-52(5) (1999) sets a three-year statute of limitations "for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated."

An essential element of both intentional and negligent infliction of emotional distress is "severe emotional distress," which our courts have defined to "mean[] any emotional or mental disorder, such as, for example, 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.*" *Johnson*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (emphasis added). Significant for the purposes of this appeal, "the three-year period of time for [emotional distress] claims does not begin to run (accrue) until the 'conduct of the defendant causes extreme [or severe] emotional distress.' " *Russell*, 125 N.C. App. at 641, 482 S.E.2d at 33 (quoting *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 12, 437 S.E.2d 519, 525 (1993)); *see also Ruff v. Reeves Brothers, Inc.*, 122 N.C. App. 221, 227, 468 S.E.2d 592, 597 (1996). Sometimes, causes of action for emotional distress "take years to manifest the severe emotional results required to complete the tort." *Bryant*, 113 N.C. App. at 13, 437 S.E.2d at 526. However, that is not the case *sub judice*.

In the instant action, plaintiff's last contact with defendants was in the summer of 1986, when plaintiff, then age 18, returned to NCSA, "desperate and determined to earn the respect and affirmation of

[defendants] and obtain some closure on the abrupt and upsetting termination of [his] relationship with Gain." During that summer, Gain refused to talk to plaintiff, and Kuch verbally abused him. Since plaintiff makes no allegations of emotional distress between the time he left NCSA in 1984 and returned in 1986—except for his "self-destructive behavior which involved over-eating, drinking, and smoking," we view plaintiff's claims from the date of plaintiff's last contact with defendants in 1986. We note that by the summer of 1986, plaintiff had already attained the age of 18 and therefore was no longer a minor.

Uncontroverted evidence developed during discovery shows that plaintiff's emotional distress was triggered upon his leaving NCSA in 1986. In an affidavit, plaintiff states that following his 1986 departure from NCSA, and

> [f]or the next seven years of [his] life, [he] suffered from extreme feelings of shame and confusion about [his] own sexuality. [He] tried to alleviate the pain [he] was feeling by abusing alcohol. [He was] unable to form healthy relationships with others or lead a normal life. [He] also had several mental breakdowns during this period. The defendants' rejection of [him] and negative judgments of [him] upset [him] so much that [he] contemplated suicide.

Here, even viewing the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact as to when plaintiff manifested signs of "severe emotional distress." By his own admission, he manifested signs of "severe emotional distress"—"shame," "confusion," alcohol abuse, inability "to form healthy relationships," inability to "lead a normal life," "several mental breakdowns," and "contemplat[ion of] suicide"—following his 1986 departure from NCSA and for the next seven years of his life. Based on this evidence, it is clear that plaintiff's "severe emotional distress" and PTSD diagnosis could have been "*generally recognized and diagnosed by professionals trained to do so*," at that time. *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97 (emphasis added). Therefore, we find that plaintiff's admissions forecast sufficient evidence of his "severe emotional distress" and PTSD. Consequently, plaintiff's "severe emotional distress" and PTSD matured to the level of being actionable after his leaving NCSA in the summer of 1986.

While it may be true that until diagnosis, plaintiff was not aware that he suffered from PTSD by that name, plaintiff's admissions show

that he did know for some years after leaving NCSA in 1986 that he was suffering from some sort of emotional distress. We find that because plaintiff's emotional distress could have been generally recognized and diagnosed as PTSD by a medical professional in 1986, it was not latent.

Furthermore, plaintiff's psychologist testified that during her sessions with plaintiff, plaintiff admitted that while defendants' conduct was on-going, "he felt that it was not a good thing," and he knew "that something not okay had occurred . . . ." Moreover, we note that plaintiff's mother—a layperson and not a trained professional—was able to recognize and inform plaintiff that "the defendants[']conduct was legally wrongful and had caused damage to [him]," after a conversation with her son in 1992. By further delaying treatment until 1993—approximately seven years after defendants' last contact with plaintiff and approximately one year after plaintiff's conversation with his mother—plaintiff does not now get the benefit of postponing the accrual of his cause of action until 1992 (the date of plaintiff's conversation with his mother) or 1993 (the date of his diagnosis as having PTSD).

Hence, plaintiff's intentional and negligent infliction of emotional distress claims accrued after the summer session of 1986. Once plaintiff's causes of actions accrued, the three-year statute of limitations of N.C. Gen. Stat. § 1-52(5) began to run, and thus expired at the end of the summer of 1989. Plaintiff filed his complaint on 19 July 1995, well after the three-year statute of limitations had expired. Consequently, plaintiff's claims are time-barred.

[2] Plaintiff's primary argument on appeal is that the statute of limitations of N.C. Gen. Stat. § 1-52(16) (1999) should apply to his causes of action for intentional and negligent infliction of emotional distress. Again, we disagree.

Statutes of limitation in our state "are subject to expansion . . . by North Carolina's 'discovery' . . . statutes." *Leonard v. England*, 115 N.C. App. 103, 106-07, 445 S.E.2d 50, 52 (1994); *see also Pembee*, 313 N.C. 488, 492-93, 329 S.E.2d 350, 353-54. A "discovery statute" allows a statute of limitations to "not begin to run until plaintiff discovers, or in the exercise of reasonable care, should have discovered, that he was injured as a result of defendant's wrongdoing." *Black v. Littlejohn*, 312 N.C. 626, 642, 325 S.E.2d 469, 480 (1985) (*Black* was analyzed under § 1-15(c), the statute of limitations applicable to med-

ical malpractice claims; therefore, *Black* is distinguishable from the case at bar).

Our legislature has expressly provided a "discovery statute" in N.C. Gen. Stat. § 1-52. Specifically, § 1-52(16) provides a three-year statute of limitations,

> [u]nless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

"The primary purpose of N.C. Gen. Stat. § 1-52(16) is that it is intended to apply to plaintiffs with latent injuries." *Robertson v. City of High Point*, 129 N.C. App. 88, 91, 497 S.E.2d 300, 302, *disc. rev. denied*, 348 N.C. 500, 510 S.E.2d 654 (1998). Specifically, § 1-52(16) "protect[s] a potential plaintiff in the case of a latent injury by providing that a cause of action does not accrue until the injured party becomes aware or should reasonably have become aware of the existence of the injury." *Pembee*, 313 N.C. at 493, 329 S.E.2d at 354. "[A]s soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run." *Id.* At bar, plaintiff's injuries were apparent to plaintiff and his PTSD could have been generally recognized and diagnosed by a medical professional in 1986. Therefore as we have already held, plaintiff's injuries and PTSD were not latent; thus, § 1-52(16) is inapplicable to the facts of this case.

Plaintiff relies heavily upon a Fourth Circuit Federal Court of Appeals opinion interpreting §§ 1-52(5) and 1-52(16), *Doe v. Doe*, 973 F.2d 237 (4th Cir. 1992). We recognize that "with the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State." *State v. Woods*, 136 N.C. App. 386, 390, 524 S.E.2d 363, 365 (2000). Therefore, we find that the decision in *Doe* is not binding upon this Court.

In further arguing for delayed discovery and the application of § 1-52(16) to the facts of his case, plaintiff raises several cases that

utilize N.C. Gen. Stat. § 1-52(16) to delay accrual until discovery of an injury. *See Wilson v. McLeod Oil Co.*, 327 N.C. 491, 398 S.E.2d 586 (1990) *and Crawford v. Boyette*, 121 N.C. App. 67, 464 S.E.2d 301 (1995) (in water contamination cases, accrual does not begin until official notification of water contamination); *see also Dunn v. Pacific Employers Ins. Co.*, 332 N.C. 129, 418 S.E.2d 645 (1992) (in occupational disease cases, negligence action accrues when disease is diagnosed). Again, these cases are clearly distinguishable from the case at bar as they deal with latent injuries—the injuries were not readily apparent.

As to plaintiff's contention that his emotional distress claims did not accrue and the statute of limitations did not begin to run until after his being diagnosed by his psychologist in 1993, we reiterate that "severe emotional distress" is any emotional or mental disorder "*which may be generally recognized and diagnosed by professionals trained to do so.*" *Johnson*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (emphasis added). The crux of establishing "severe emotional distress" is that the emotional or mental disorder *may generally be diagnosed by professionals trained to do so*; however, an "actual diagnosis" by medical professionals is not always required or necessary. Moreover, the accrual of emotional distress claims does not necessarily begin at the time of diagnosis, nor is an "actual diagnosis" always necessary to trigger accrual. *See Price v. Fasco Controls Corp.*, 1999 WL 33117437 (W.D.N.C. 1999); *see also Johnson v. ADT Security Systems, Inc.*, 1999 WL 1940046 (W.D.N.C. 1999). Thus, the three-year period of time for emotional distress claims accrues when the "conduct of the defendant causes extreme emotional distress." *Bryant*, 113 N.C. App. 1, 12, 437 S.E.2d 519, 525.

In some cases, PTSD is latent and sufferers complain of impaired/repressed memories. However, plaintiff here does not suffer from either latent PTSD or impaired/repressed memories. Plaintiff's own affidavit and psychologist's deposition testimony confirms that plaintiff realized from 1986 forward that defendants' conduct inflicted upon him was wrong. Plaintiff's realization of the wrongfulness of the conduct—although self-denied—through his conversation with his mother and treatment by his psychologist—only confirmed what he knew, but denied, all along, that defendants' conduct was wrongful. Furthermore, plaintiff offered no evidence, neither did his psychologist testify, that plaintiff did not remember, or had repressed memories of his experiences with defendants. Hence, plaintiff's injury and his PTSD were apparent in 1986, and thereby not latent.

Therefore, we find that plaintiff had enough information to bring suit in 1986, and by his own admissions, he was aware of his injury, the causation, and the wrongdoing by defendants. Thus, the application of § 1-52(16) is not warranted under the facts of this case.

Finally, we take this opportunity to distinguish this Court's decision in *Russell*, 125 N.C. App. 637, 482 S.E.2d 30, in light of our decision in this case. In *Russell*, this Court stated that claims for emotional distress "do not accrue until the plaintiff 'becomes aware or should reasonably have become aware of the existence of the injury.' " *Id.* at 641, 482 S.E.2d at 33 (quoting *Pembee*, 313 N.C. at 493, 329 S.E.2d at 354). The facts in *Russell* show that the plaintiff sued her daughter's psychologist (defendant) claiming negligent and intentional infliction of emotional distress, *inter alia*. *Russell*, 125 N.C. App. 637, 482 S.E.2d 30. The plaintiff's claims were based upon the psychologist's (defendant) statements to the daughter (patient) in 1989 and the daughter's father in 1992 that the plaintiff was mentally ill with a borderline personality. *Id.* In reversing the trial court's grant of defendant's motion to dismiss, we found that the complaint was silent as to when plaintiff's alleged severe emotional distress manifested itself, and thus, we were unable to determine when the action accrued. *Id.* Therefore, at the time defendant made his motion to dismiss, it was unclear whether plaintiff's injuries were latent. Contrarily, the present plaintiff's admissions show that his injuries were not latent at the summary judgment stage. Since plaintiff's injuries were not latent here, *Russell* is distinguished.

[3] In his next assignment of error, plaintiff contends that the trial court erred in not tolling the applicable statute of limitations due to plaintiff's alleged incompetence as defined in N.C. Gen. Stat. § 35A-1101(7). However, we hold that plaintiff has not established that he was incompetent. Thus, we reject this assignment of error.

In North Carolina, statutes of limitation are also "subject to expansion . . . by North Carolina's . . . 'disabilities' statutes." *Leonard*, 115 N.C. App. 103, 106-07, 445 S.E.2d 50, 52. The disability statute which might operate to toll the statute of limitations in the case at bar is N.C. Gen. Stat. § 1-17(a) (1999), which states in pertinent part:

> (a) A person entitled to commence an action who is at the time the cause of action accrued . . .
>
> . . .

> (3) Incompetent as defined in G.S. 35A-1101(7) . . . may bring his action within the time herein limited, after the disability is removed, . . . when he must commence his action . . . within three years next after the removal of the disability, and at no time thereafter.

Section 35A-1101(7) defines an incompetent adult as being,

> an adult or emancipated minor who lacks sufficient capacity to *manage the adult's own affairs* or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C. Gen. Stat. § 35A-1101(7) (emphasis added). The appropriate test for establishing an adult incompetent "is one of mental competence to *manage one's own affairs.*" *Cox v. Jefferson-Pilot Fire and Casualty Co.*, 80 N.C. App. 122, 125, 341 S.E.2d 608, 610 (1986) (emphasis added); *see also Hagins v. Redevelopment Comm.*, 275 N.C. 90, 104, 165 S.E.2d 490, 499 (1969). The term "affairs" encompasses more than "just one transaction or one piece of property to which he may have a unique attachment." *Hagins*, 275 N.C. at 104, 165 S.E.2d at 499.

Plaintiff's only allegation regarding his incompetency is that his mental condition "cause[d] him to be incapable of understanding his legal rights, making or communicating important decisions about those rights or bringing a lawsuit . . . ." As stated above, the term "affairs" in § 35A-1101(7) encompasses more than just one transaction. *See id.* Moreover, evidence presented during discovery showed that since leaving NCSA in 1986, plaintiff arranged for places to live, signed leases, cooked, went shopping, held several jobs, attended college at two institutions, obtained and renewed driver's licenses from three states, drove vehicles, owned farmland, traveled and lived in foreign countries, produced a ballet, and created music. The evidence is sufficient to show that plaintiff could and did manage his own affairs and make important decisions concerning his person and property after his 1986 departure from NCSA. Thus, we hold plaintiff was not incompetent as per § 35A-1101(7), and plaintiff's mental condition did not warrant tolling the three-year statute of limitations of § 1-52(5).

In arguing that the statute of limitations should have been tolled until his alleged incompetency was removed, plaintiff raises this

Court's decision in *Leonard*, 115 N.C. App. 103, 445 S.E.2d 50. In *Leonard*, this Court held that a thirty-nine year old plaintiff produced sufficient evidence that her repression of memories and PTSD suffered as a result of her grandmother's alleged sexual, physical, and emotional abuse—that occurred approximately twenty-eight years earlier when the plaintiff was age 11—rendered plaintiff "incompetent" within the meaning of § 35A-1101(7) until she was diagnosed by a medical professional. *Id.* Therefore, we held that the applicable statutes of limitation were tolled until plaintiff's diagnosis, and summary judgment based on the statutes of limitation was improper. *Id.* Again, a key distinction between *Leonard* and the case at bar is that the plaintiff in *Leonard* suffered from PTSD *and* repressed memories of abuse, a latent injury. Thus, we find *Leonard* not to be controlling in the case *sub judice*.

[4] Finally, in his third assignment of error, plaintiff contends that the trial court's grant of summary judgment was error as he forecasted sufficient evidence to establish each essential element of his claims of intentional and negligent infliction of emotional distress. Having found that the three-year statute of limitations of § 1-52(5) bars plaintiff's claims, the merits of this argument are rendered moot. Therefore, we need not address this assignment.

In summary, we hold that plaintiff's intentional and negligent infliction of emotional distress claims—which accrued after plaintiff left NCSA in the summer of 1986—were time-barred in 1989 by the three-year statute of limitations of N.C. Gen. Stat. § 1-52(5). Further, we hold that N.C. Gen. Stat. § 1-52(16) is inapplicable to the facts of plaintiff's case; and plaintiff was not incompetent as defined in N.C. Gen. Stat. § 35A-1101(7), thus the statute of limitations of § 1-52(5) was not tolled.

Affirmed.

Judges WALKER and CAMPBELL concur.

IN RE STUMBO

[143 N.C. App. 375 (2001)]

IN THE MATTER OF: JOANIE STUMBO, STEVEN STUMBO, SCOTT STUMBO, UNKNOWN STUMBO

No. COA00-408

(Filed 15 May 2001)

1. Child Abuse and Neglect— investigation—private interview with children—Fourth Amendment rights

There was no search or seizure implicating respondents' Fourth Amendment rights where a child protective services investigator drove to respondents' house to investigate a report that a naked two-year-old child was unsupervised in respondents' driveway, the investigator indicated to a woman who emerged from the house that she needed to speak with the children in the household privately, the woman's husband was called and came home from work, the investigator remained outside and observed the children but did not ask them any questions, she testified that she asked to speak privately with the children at least three times during the incident but was refused and that she never asked to enter the house, DSS later filed a petition to prohibit interference with or obstruction of the investigation, and the court granted the petition. The evidence in this case clearly indicates that the child protective services investigator was seeking merely to interview the children in private and did not seek to enter the home, entry into the home is not required under the statutory scheme, and the trial court's order does not authorize entry into the home. Furthermore, a private interview with a child pursuant to a child abuse or neglect investigation does not necessarily constitute a "seizure" warranting Fourth Amendment protection. The "lawful excuse" provision of N.C.G.S. § 7B-303(c) does not permit parents to interfere with or obstruct a child neglect or abuse investigation on Fourth Amendment grounds where neither a search nor a seizure is involved. N.C.G.S. § 7B-302.

2. Child Abuse and Neglect— interference with investigation—evidence of underlying incident

The trial court correctly excluded evidence of whether the underlying incident constituted child neglect or abuse from a hearing to determine whether respondents obstructed or interfered with the investigation under N.C.G.S. § 7B-303.

Judge GREENE dissenting.

Appeal by respondents from order entered 25 January 2000 by Judge Anna F. Foster in Cleveland County District Court. Heard in the Court of Appeals 13 March 2001.

Church, Paksoy & Wray, by John D. Church, for petitioner-appellee.

Home School Legal Defense Association, by Michael P. Farris and Scott W. Somerville, and Stam, Fordham & Danchi, P.A., by Paul B. Stam, for respondents-appellants.

HUDSON, Judge.

James and Mary Ann Stumbo (respondents) appeal from an order entered 25 January 2000 instructing them to cease their obstruction of and interference with an investigation by the Cleveland County Department of Social Services (DSS) pursuant to a report of child neglect concerning respondents' daughter, Jonie Stumbo. We affirm the order of the trial court.

Article 3 ("Screening of Abuse and Neglect Complaints") of the "Juvenile Code" (set forth in Chapter 7B of our General Statutes) provides a comprehensive system for reporting and investigating allegations of child abuse and child neglect in North Carolina. The first statute in Article 3, entitled "Protective services," provides in pertinent part:

> The director of the department of social services in each county of the State shall establish protective services for juveniles alleged to be abused, neglected, or dependent. Protective services shall include the investigation and screening of complaints, casework, or other counseling services to parents, guardians, or other caretakers as provided by the director to help the parents, guardians, or other caretakers and the court to prevent abuse or neglect, to improve the quality of child care, to be more adequate parents, guardians, or caretakers, and to preserve and stabilize family life.

N.C.G.S. § 7B-300 (1999). The next statute in Article 3, entitled "Duty to report abuse, neglect, dependency, or death due to maltreatment," provides in pertinent part:

> Any person . . . who has cause to suspect that any juvenile is abused, neglected, or dependent . . . shall report the case of that juvenile to the director of the department of social services in the county where the juvenile resides or is found.

N.C.G.S. § 7B-301 (1999). The third statute in Article 3, entitled "Investigation by director; access to confidential information; notification of person making the report," provides in pertinent part:

> (a) When a report of abuse, neglect, or dependency is received, the director of the department of social services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition. . . . When the report alleges neglect or dependency, the director shall initiate the investigation within 72 hours following receipt of the report. The investigation and evaluation shall include a visit to the place where the juvenile resides.

N.C.G.S. § 7B-302 (1999). The fourth statute in Article 3, entitled "Interference with investigation," provides in pertinent part:

> (a) If any person obstructs or interferes with an investigation required by G.S. 7B-302, the director may file a petition naming said person as respondent and requesting an order directing the respondent to cease such obstruction or interference. The petition shall contain the name and date of birth and address of the juvenile who is the subject of the investigation, shall specifically describe the conduct alleged to constitute obstruction of or interference with the investigation, and shall be verified.
>
> (b) For purposes of this section, obstruction of or interference with an investigation means refusing to disclose the whereabouts of the juvenile, refusing to allow the director to have personal access to the juvenile, refusing to allow the director to observe or interview the juvenile in private, refusing to allow the director access to confidential information and records upon request pursuant to G.S. 7B-302, refusing to allow the director to arrange for an evaluation of the juvenile by a physician or other expert, or other conduct that makes it impossible for the director to carry out the duty to investigate.
>
> (c) Upon filing of the petition, the court shall schedule a hearing to be held not less than five days after service of the petition and summons on the respondent. . . . If at the hearing on the petition the court finds by clear, cogent, and convincing evidence that the respondent, without lawful excuse, has obstructed or interfered with an investigation required by G.S. 7B-302, the court may

> order the respondent to cease such obstruction or interference. The burden of proof shall be on the petitioner.

N.C.G.S. § 7B-303 (1999). These statutes provide the legal framework within which the events in the present case transpired.

The evidence presented at the 28 September 1999 hearing tended to show the following facts. On 9 September 1999, Tasha Lowery, a child protective services investigator for DSS, received a report that a naked, two-year old child had been seen unsupervised in the driveway of a house in Kings Mountain. Lowery drove to the house to investigate. A woman came out of the house and introduced herself as Mrs. Stumbo. Lowery introduced herself to Mrs. Stumbo and explained why she was there. Lowery further explained to Mrs. Stumbo that, as part of her investigation, she needed to speak with the children privately. In response, Mrs. Stumbo indicated that she would need to contact her husband. This conversation took place outside of the home in the driveway. During the conversation, two children were playing outside. Mrs. Stumbo then contacted Mr. Stumbo at work, using a cordless phone to call him while she and Lowery remained outside in the driveway. Lowery then spoke on the phone to Mr. Stumbo. Lowery introduced herself to Mr. Stumbo over the phone and explained why she was at his home. Mr. Stumbo briefly tried to explain how it was that the two-year old had been out in the yard naked and unattended. He also agreed to come home from work to talk further with Lowery.

While Mr. Stumbo was on his way home, Mrs. Stumbo called an attorney. Lowery spoke with the attorney on the phone and explained who she was and why she was there. At one point, apparently while waiting for Mr. Stumbo to arrive, Lowery went around to the back of the home with Mrs. Stumbo and sat on the back deck. At that time she was close enough to all four of the Stumbo children to observe them in detail. She did not see any bruises, marks, or other behavior to lead her to suspect abuse or neglect. She refrained from asking the children any questions because she had been asked by Mrs. Stumbo not to speak with the children, and she was honoring that request. Lowery testified that Mrs. Stumbo was in an "uproar," that Mrs. Stumbo indicated she had a headache or that something was wrong, that she needed to see a neurologist, and that she didn't have time for the investigation. Mr. Stumbo arrived home after approximately twenty or thirty minutes, and spoke with Lowery. Mr. Stumbo told Lowery that he felt he had a privacy right to refuse to allow her to interview his children, and to refuse to allow her to enter his home,

because he felt there was no good reason for the investigation. Lowery told Mr. Stumbo that it was the policy of DSS to interview children who are the subjects of an investigation. After this conversation, the family went into the house and closed the door, and Lowery left. Lowery testified that she requested to speak to the children privately at least three times during the incident but was unable to complete her investigation because Mr. and Mrs. Stumbo did not allow her to conduct any interviews with the children. She also testified that she never asked to enter the house.

On 16 September 1999, DSS filed a "petition to prohibit interference with or obstruction of child protective services investigation" pursuant to G.S. § 7B-303. Respondents filed a brief opposing the petition. The cause came before the Cleveland County Juvenile Court for hearing on 28 September 1999. At the hearing, having heard the arguments by both parties, the trial court explained its view that because the investigation did not involve a "search" or a "seizure," the Fourth Amendment did not apply and no probable cause showing was necessary.

The trial court entered an order on 25 January 2000, making seven findings of fact, including:

> 4. . . . Ms. Lowery was not allowed to speak with the children nor was she allowed to go into the house. . . . Tasha Lowery made at least three requests to speak with the children and was denied. Ms. Lowery is required to conduct a private [interview] with all the children in the household. . . .
>
> 7. N.C. General Statute 7B-303 specifically provides that obstructing or interfering with an investigation includes the denial of private interviews with the juveniles.

The trial court concluded that respondents obstructed or interfered with the investigation "by refusing to allow Tasha Lowery as a representative of the Director of Social Services for Cleveland County, to observe or interview the Juveniles in private without lawful excuse." The trial court ordered respondents to permit DSS "to conduct an investigation as required by 7B-302," and ordered respondents not to interfere with or obstruct "the investigation as set forth in 7B-303(a) and 7B-303(b)." Respondents appeal from this order.

On appeal, respondents raise four assignments of error. We first address respondents' assignments of error numbered 2, 3 and 4, all of which involve one distinct set of interrelated arguments. These argu-

ments are: (1) that social workers conducting a DSS investigation are "state actors" for Fourth Amendment purposes; (2) that the investigation mandated by G.S. § 7B-302 requires that the investigating social worker enter the home in question, and conduct private interviews with the children; (3) that entry into the household by a social worker is a "search," and a private interview of a juvenile by a social worker is a "seizure," both requiring probable cause under the Fourth Amendment; and (4) that the trial court's order, instructing respondents to cease interfering with and obstructing the investigation, constitutes reversible error because (a) it is a warrant issued without probable cause, and (b) the "lawful excuse" provision in G.S. § 7B-303(c) allows parents to interfere with and obstruct a child neglect investigation on Fourth Amendment grounds. Respondents have expressly stated that they do not contend that G.S. § 7B-303 is, in and of itself, unconstitutional.

[1] Whether a search or a seizure has, in fact, occurred is always a threshold question that must be resolved before determining whether the protections guaranteed by the Fourth Amendment apply. *See State v. Raynor*, 27 N.C. App. 538, 540, 219 S.E.2d 657, 659 (1975). "A search ordinarily involves prying into hidden places, and a seizure contemplates forcible dispossession." *State v. Fry*, 13 N.C. App. 39, 44, 185 S.E.2d 256, 259-60 (1971), *cert. denied*, 280 N.C. 495, 186 S.E.2d 514 (1972). Here, we need not reach respondents' contention that social workers conducting a DSS investigation of child neglect are state actors for Fourth Amendment purposes because this case involves neither a search nor a seizure and, therefore, does not implicate respondents' Fourth Amendment rights.

Respondents' contentions that an investigation pursuant to G.S. § 7B-302 requires entry into the home, that Lowery did, in fact, seek entry into the home in this case, and that the trial court's order "was a judicial warrant for a search of the Stumbo home" are without merit. Respondents have attempted to portray this case as involving a direct conflict between respondents' right to refuse entry into their home, and the statutory investigation mandated by G.S. § 7B-302. For example, in their brief to this Court, respondents contend that Lowery testified at the hearing that when she arrived at respondents' home she asked "to be allowed to enter the home and to interview each of the children privately." Further, counsel for respondents argued to the trial court at the hearing that DSS, through Lowery, sought to "enter the home without probable cause." To the contrary, Lowery testified that she never asked to enter the home, and there is

no testimony in the transcript or other evidence in the record to contradict this assertion. Furthermore, Lowery testified that when she spoke with Mr. Stumbo on the phone, "[she] told him that [she] needed to talk with everybody in the household" and that she has been trained to "make a home visit, talk with the parents privately and talk with the children privately in order to conduct the investigation." Thus, the evidence clearly indicates that Lowery was seeking merely to interview the children in private, and did not at any time seek to enter the home.

Furthermore, entry into the home does not appear to be required under the statutory scheme. G.S. § 7B-302(a) states that an investigation pursuant to a report of abuse or neglect "shall include a visit to the place where the juvenile resides." As noted by the dissent, similar language is found in the North Carolina Administrative Code. *See* N.C. Admin. Code tit. 10, r. 41I.0305 (January 2001). Although this provision in G.S. § 7B-302(a) is somewhat ambiguous, we believe "a visit to the place where the juvenile resides" means merely a personal visit to the home as distinguished from, for example, an investigation conducted by telephone interviews, or an investigation consisting of interviews conducted at the offices of DSS. We do not read this language as requiring physical entry into the home itself. Thus, a visit such as the one that occurred in this case, where a social worker personally drives to the home and seeks to speak with the children in person but does not seek to enter the home, would constitute "a visit to the place where the juvenile resides."

Moreover, the trial court's order does not authorize entry into the home. The order simply finds that respondents "obstructed or interfered with this investigation by refusing to allow Tasha Lowery . . . to observe or interview the Juveniles in private," and orders respondents "to not obstruct, interfere with the investigation as set forth in 7B-303(a) and 7B-303(b)." The dissent appears to interpret the trial court's finding that "Ms. Lowery is required to conduct a private [interview] with all the children *in the household*" as a finding that Ms. Lowery is required to conduct an interview of the children *while physically inside of the house*. However, we believe the phrase "in the household" was intended to modify the phrase "all the children," such that "all the children in the household" was intended to mean "all the children in the family," or "all the children who live in the household."

As to whether this case involves a "seizure," respondents cite three cases in support of the proposition that a private interview with

a child for purposes of a DSS investigation of neglect or abuse is a "seizure." These cases do not stand for this proposition. In *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000), police officers seized two children from their home without a court order, placed the children in a county institution for several days, and subjected them to highly invasive anal and vaginal physical examinations without judicial authorization and without notifying their parents. In *Tenenbaum v. Williams*, 193 F.3d 581 (2d. Cir. 1999), *cert. denied*, 529 U.S. 1098, 146 L. Ed. 2d 776 (2000), a DSS caseworker removed a juvenile from school without parental permission or a court order and the juvenile was then subjected to a vaginal and anal medical examination at a hospital emergency room. In *Robinson v. Via*, 821 F.2d 913 (2d Cir. 1987), a state assistant attorney and a state trooper investigating a child abuse allegation seized two juveniles without a court order and against the mother's will (the seizure required forcibly restricting the mother). The juveniles were taken to the police barracks where they remained for over two hours until a temporary custody order was entered by a judge. Obviously, these cases are very different from the circumstances here, where the social worker merely sought to carry out the mandate of the statute by interviewing the children in private. The cases cited by respondents do not compel the conclusion that a private interview with a child, pursuant to a child abuse or neglect investigation, necessarily constitutes a "seizure" warranting Fourth Amendment protection.

Because it is not squarely before us, we need not reach the issue of whether the "lawful excuse" provision in G.S. § 7B-303(c) permits parents to interfere with or obstruct a child neglect or abuse investigation on Fourth Amendment grounds where a search or a seizure has occurred without probable cause. The facts here do not involve a search or a seizure, and the relevant statutory scheme does not require any conduct by DSS that necessarily constitutes a search or a seizure. Therefore, this case does not implicate the Fourth Amendment rights of respondents. Accordingly, we hold that the trial court's order, instructing respondents to cease interfering with and obstructing the investigation, does not constitute error. Moreover, we hold that the "lawful excuse" provision in G.S. § 7B-303(c) does not permit parents to interfere with or obstruct a child neglect or abuse investigation on Fourth Amendment grounds where neither a search nor a seizure is involved. Thus, respondents must comply with the trial court's order, including permitting DSS to conduct private interviews with their children.

[2] In their fourth and final assignment of error, respondents contend that the trial court erred by excluding certain testimony offered at the hearing. At the hearing, respondents sought to admit testimony regarding how their daughter Jonie came to be found outside of the home naked and unattended. As the trial court explained at the hearing, the purpose of a G.S. § 7B-303(c) hearing is to determine whether the respondents have obstructed or interfered with the investigation without lawful excuse, not to determine whether the underlying incident which led to the allegation of neglect or abuse actually involved neglect or abuse. The trial court was correct in its interpretation of the purpose of such a hearing, and did not err in excluding the evidence in question. This assignment of error is overruled.

Affirmed.

Judge McCULLOUGH concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

Because I believe the investigation ordered in this case and mandated by section 7B-302 constitutes a search within the meaning of the Fourth Amendment, I dissent.

Section 7B-302 mandates the Director of the Department of Social Services (the Director) to make a "prompt and thorough investigation" of all reports of abuse, neglect, and dependency. N.C.G.S. § 7B-302(a) (1999). Although the statute does not define what is required to accomplish a "thorough investigation," it does provide the "investigation . . . shall include a visit to the place where the juvenile resides." *Id.* The statute also provides the Director is to "have personal access to the juvenile" and interview the child in private. N.C.G.S. § 7B-303(b) (1999). The North Carolina Administrative Code (Code) sets out, in some detail, the requirements for a "thorough" investigation. 10 NCAC 41I .0305 (June 2000). The Code mandates the Director, among other things, assess "whether the specific environment in which the child or children is found meets the child's or children's need for care and protection[,]" make a "visit to the place where the child or children reside," and interview the "victim child." 10 NCAC 41I .0305 (a),(d) & (e) (June 2000). Thus, the Director is required to make an inspection of the residence in which the child (the subject of the child abuse/neglect report) resides, necessitating

an entry into the home, and to speak personally with the reported victim child.[1]

Entry into the home of a person suspected of child abuse/neglect by the Director for the purpose of ascertaining if the child has been abused/neglected is a search by a government actor and thus implicates the Fourth Amendment. *Cf. Ferguson v. Charleston*, — U.S. —, —, — L. Ed. 2d —, —, 69 U.S.L.W. 4184, 4187 (2001) (testing of urine for drugs by private hospital is search by state actor). An interview of a reported victim child by the Director, without the consent of the child's parents, constitutes a seizure of the child within the meaning of the Fourth Amendment. *See Graham v. O'Connor*, 490 U.S. 386, 395 n.10, 104 L. E. 2d 443, 455 n.10 (1989) ("seizure" under the Fourth Amendment occurs when government actors "by means of [a] physical force or show of authority . . . in some way restrain[] the liberty of a citizen"); *see also Tenebaum v. Williams*, 193 F.3d 581, 602 (2d Cir. 1999), *cert. denied*, 529 U.S. 1098, 146 L. Ed. 2d 776 (2000). This Fourth Amendment right can be asserted by the child's parents on behalf of the child. *Tenebaum*, 193 F.3d at 601.

Whether the search or seizure violates the teaching of the Fourth Amendment is dependent on the reasonableness of the search or seizure, as only unreasonable searches and seizures are proscribed. Whether the search or seizure is reasonable requires balancing the intrusion of the individual's interest in privacy against the "importance of the governmental interests alleged to justify" the search. *O'Connor v. Ortega*, 480 U.S. 709, 719, 94 L. Ed. 2d 714, 724 (1987) (internal quotation marks and citation omitted). Stated another way, a party's interest in privacy must be balanced against some "special need" advanced by the State. *Ferguson*, — U.S. at —, — L. Ed. 2d at —, 69 U.S.L.W. at 4188. Depending on the strength of the competing interest, our courts have on occasion: completely suspended probable cause, *Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602, 633, 103 L. Ed. 2d 639, 670 (1989) (drug testing of railroad employees); required a showing of probable cause, *Ferguson*, — U.S. at —, — L. Ed. 2d at —, 69 U.S.L.W. at 4189-90 (testing for drugs in pregnant women); and required a showing of reasonable suspicion, *O'Connor*, 480 U.S at 726, 94 L. Ed. 2d at 729 (search of public employee's desk by employer); *New Jersey v. T.L.O.*, 469 U.S. 325,

1. The majority construes section 7B-302(a) as only requiring "a personal visit to the home" and not "physical entry into the home itself." I disagree. Without physically entering the home, the Director would be unable to assess whether the environment in which the child is found meets the child's need for care and protection.

341, 83 L. Ed. 2d 720, 734 (1985) (Powell, J., concurring) ("[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause," our courts "have not hesitated to adopt such a standard").

The privacy interest of property owners/lessees (home owner) in their property is, without dispute, substantial. The right of any person, including minor children, to be free from governmental seizure is substantial. Likewise, governmental interest in protecting the safety and well-being of children is substantial and is well served by mandating a timely section 7B-302 investigation of reports of child abuse/neglect. This substantial governmental interest must, however, be weighed in the context of the Director's obligation to "make an immediate oral and subsequent written report" of its findings to the district attorney and the "appropriate local law enforcement agency." N.C.G.S. § 7B-307(a) (1999). The district attorney, after receipt of this report, is required to initiate a criminal investigation and determine whether criminal prosecution is appropriate.[2] *Id.* Indeed, this statutorily mandated disclosure to law enforcement "provides an affirmative reason for enforcing the strictures of the Fourth Amendment." *Ferguson*, —— U.S. at ——, —— L. Ed. 2d at ——, 69 U.S.L.W. at 4190. Furthermore, if the person suspected of child abuse/neglect fails to comply with a section 7B-303 order directing non-interference with the investigation, that person can be imprisoned pursuant to a finding of civil or criminal contempt,[3] thus, further subjecting the person to criminal penalties. N.C.G.S. § 7B-303(f) (1999).

A proper balance of these competing interests suggests an intermediate standard of reasonableness as a prerequisite to obtaining a section 7B-303(c) order. In other words, the Director must be required to show by clear and convincing evidence there are reason-

2. A parent or other person providing care to or supervision of a child less than 16 years of age is subject to prosecution for criminal child abuse. N.C.G.S. §§ 14-318.2 & 14-318.4 (1999). More generally, parents have "an affirmative legal duty to protect and provide for their minor children," *State v. Walden*, 306 N.C. 466, 473, 293 S.E.2d 780, 785 (1982), and a violation of this duty is a misdemeanor, N.C.G.S. § 14-316.1 (1999).

3. Because a person refusing to open his house for inspection by a social worker investigating a report of child abuse/neglect does subject himself to imprisonment, this situation is different from the facts presented in *Wyman v. James*, 400 U.S. 309, 27 L. Ed. 2d 408 (1971) (Fourth Amendment not implicated by inspection of home of recipient of monies under the Aid to Families with Dependent Children because the refusal to permit the inspection resulted only in loss of benefits, with no criminal penalties).

able grounds for suspecting a person(s) has abused/neglected the child being investigated and has, without lawful excuse, obstructed or interfered with the investigation mandated by section 7B-302.[4] Because of the substantial governmental interest in protecting children and the need to act quickly, as well as the additional time likely required to gather evidence in support of probable cause, it would be ill advised to utilize the probable cause standard.[5] Also, due to the sanctity of private dwellings and the potential for criminal investigation/prosecution arising from the section 7B-302 investigation, a total suspension of the probable cause standard is not appropriate. A total suspension would permit entry into a home and interviews with the reported victim child, based simply on a totally unsubstantiated report of abuse/neglect, as long as there is a showing that the home owner/person "without lawful excuse, has obstructed or interfered with [the] investigation." N.C.G.S. § 7B-303(c) (1999).

In this case, the trial court entered an order directing respondents not to obstruct or interfere with any investigation by DSS "as required by 7B-302."[6] As this investigation mandated DSS inspect the residence in which the child lived to interview Joanie Stumbo, the trial court was required, prior to issuing a section 7B-303(c) order, to make a finding there existed reasonable grounds for suspecting the respondents had abused/neglected Joanie Stumbo.[7] The failure to

4. An anonymous report of abuse/neglect, which is permitted under section 7B-301, would rarely, in itself, constitute reasonable grounds for suspecting a person to have abused/ neglected a child. *Cf. Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000) ("an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity") (internal quotation marks and citations omitted).

5. I do note the Legislature has mandated use of the probable cause standard for issuance of an *ex parte* order entered pursuant to section 7B-303(d). N.C.G.S. § 7B-303(d) (1999) (there must be "probable cause to believe . . . the juvenile is at risk of immediate harm"). This is an obvious recognition by our Legislature of the need to protect the privacy interest of the person to be investigated in the face of a report of abuse/neglect of a child.

6. The evidence in the record reveals the DSS worker (agent of the Director) testified the respondents did not allow her to conduct interviews with the children and did not allow her to enter the house. The petition filed seeking the section 7B-303(c) order alleges respondents' attorney "advised [respondents] not to allow a private interview with the children nor access [to] their home." The trial court found as fact that the DSS worker "was not allowed to speak with the children nor was she allowed to go into the house." The trial court further found the DSS worker "is required to conduct a private [interview] with all the children in the household."

7. It is not every investigative act of the Director that implicates the Fourth Amendment. For examples: the Director is to interview any person identified in the report "having information concerning the condition of the child[;]" the Director is to review any school, medical, etc. records that may provide information about the child;

make this finding requires reversal of the order. This case must be remanded for a new hearing, at which time DSS must be given the opportunity to present new evidence.

DORIS FRIEND-NOVORSKA, PLAINTIFF v. JAMES C. NOVORSKA, DEFENDANT

No. COA00-254

(Filed 15 May 2001)

1. **Appeal and Error— alimony order vacated and remanded— new findings**

The trial court did not err by making new findings of fact on remand of an alimony order where the original decision that plaintiff was a dependent spouse and defendant a supporting spouse was affirmed on appeal, but the remainder of the decision was vacated. The vacated portions of the order were void and of no effect, and the trial court was free to reconsider the evidence and to enter new or additional findings based on the evidence, with the exception of the portions of the order affirmed in the first appeal.

2. **Divorce— alimony—findings**

The trial court's findings supported the amount and duration of an alimony award where the court made findings on all of the N.C.G.S. § 50-16.3A(b) factors for which evidence was presented, there is no indication that the court misapplied the law when making findings on those factors, and the record does not show that the court abused its discretion when assigning weight to those factors.

3. **Divorce— alimony—attorney fees—findings**

An alimony order was remanded for findings on whether plaintiff was entitled to an award of attorney fees where the court did not make any findings regarding whether plaintiff was without sufficient means to subsist during the prosecution of the suit and to defray the necessary expenses and the court's conclusion

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and the Director "shall check the county agency's records and the North Carolina Central Registry of child abuse, neglect, and dependency reports to ascertain if any previous reports . . . have been made." 10 NCAC 41I .0305(b),(g) & (h)(4).

that plaintiff was not entitled to an award of attorney fees was therefore not supported by the findings.

Judge HUDSON dissenting.

Appeal by plaintiff from order filed 7 September 1999 by Judge Joseph M. Buckner in Orange County District Court. Heard in the Court of Appeals 13 March 2001.

Hayes Hofler & Associates, P.A., by R. Hayes Hofler, for plaintiff-appellant.

Darsie, Sharpe, Mackritis & Dukelow P.L.L.C., by Jimmy D. Sharpe and Lisa M. Dukelow, for defendant-appellee.

GREENE, Judge.

Doris Friend-Novorska (Plaintiff) appeals an order filed 7 September 1999 awarding Plaintiff temporary alimony from James C. Novorska (Defendant).

This case was originally heard by this Court based on Plaintiff's appeal from an alimony order entered on 17 October 1997. *See Friend-Novorska v. Novorska*, 131 N.C. App. 867, 509 S.E.2d 460 (1998) (*Friend-Novorska I*). The following facts are based on the facts recited in *Friend-Novorska I*: Plaintiff and Defendant were married on 13 February 1982 and separated on 30 June 1995. No children were born to the marriage. Plaintiff filed a complaint against Defendant on 3 January 1996, seeking postseparation support, alimony, equitable distribution, and attorney's fees. Subsequent to a hearing on Plaintiff's claim for alimony, the trial court made the following pertinent findings of fact: Plaintiff has monthly expenses of $3,089.00 " 'to maintain the standard of living to which she has become accustomed during the last several years of the marriage' "; Plaintiff has an available net income of $1,745.22 per month from her employment and " 'is in need of a contribution on a monthly basis of $1,343.78 to meet her monthly living needs' "; Defendant has a net monthly income from his employment of $4,077.00 and a net investment income of approximately $810.00 per month; and Defendant has " 'actual present monthly expenses [of] $3,758.00.' " Based on its findings of fact, the trial court awarded Plaintiff alimony in the amount of $600.00 per month for 30 months.

On appeal, this Court held that "[i]n making its decision to award a monthly amount of alimony substantially less than [Plaintiff's]

needs, the trial court erroneously relied on [Defendant's] desire to purchase a new house and car." *Id.* at 869, 509 S.E.2d at 461. Because Defendant argued before this Court in *Friend-Novorska I* that the trial court erred by considering his investment income, this Court also held "the trial court was correct in considering [Defendant's] investment income." *Id.* at 370, 509 S.E.2d at 462. Additionally, this Court held that because the parties offered evidence regarding Defendant's alleged marital misconduct, the trial court erred by failing to make findings of fact regarding whether "the existence of the factor was or was not supported by the greater weight of the evidence." *Id.* Finally, this Court noted the trial court "set[] forth no reasons for the 30-month duration of the award." *Id.* This Court, therefore, held: "On remand, the trial court must make a new award of alimony and make specific findings justifying that award, both as to amount and duration. Those portions of the order declaring [Plaintiff] to be a dependent spouse and [Defendant] to be a supporting spouse are affirmed." *Id.* at 870-71, 509 S.E.2d at 462. Accordingly, this Court affirmed in part and vacated and remanded in part the decision of the trial court. *Id.* at 871, 509 S.E.2d at 462.

On remand, the trial court did not hear additional evidence regarding Plaintiff's claim for alimony. In an order filed 7 September 1999, the trial court made the following pertinent findings of fact:

> H. An equitable distribution order was entered in this cause . . . on July 24, 1997, from a hearing held May 28, 1997. Pursuant to the judgment of equitable distribution, . . . [P]laintiff received an unequal distribution of the marital property in her favor. . . . [P]laintiff received assets with a date of separation net value of $92,205.83, which was 55% of the marital estate, and . . . [D]efendant received assets with a date of separation net value of $75,441.13, or 45% of the marital estate. . . .
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> L. . . . [P]laintiff was earning an annual salary of $17,280.00 working part-time at the date of separation. At the time of trial, . . . [P]laintiff worked full-time with University of North Carolina Hospital at an annual salary of $29,000.00 per year[.] . . . [P]laintiff has $1,745.22 per month net income available to her to meet . . . monthly expenses. . . . This is a permanent, full-time position which provides . . . [P]laintiff with health insurance at no cost, dental insurance, disability insurance and a retirement plan which requires a six percent (6%) deduction

from her salary and the State of North Carolina matches her contribution at the same rate.

M. . . . [D]efendant has a Bachelor of Administration Degree . . . which he obtained prior to the marriage[.] . . . [D]efendant . . . earns an annual gross salary of $80,000.00. Based on [D]efendant's amended financial affidavit submitted at trial, and his own testimony, his actual present monthly expenses are $3,758. This is based on [D]efendant presently having rent of $745 per month for an apartment, and no payments to make on his present vehicle. According to [D]efendant's affidavit, his net monthly income from his employment . . . is $4,077. . . . According to [D]efendant's 1996 Federal Income Tax return, [D]efendant has additional income of $196 per month from interest, dividends and refunds. . . . [D]efendant also recognized capital gains in 1996 of $12,404 due to the sale of securities.[1]

. . . .

Q. . . . [P]laintiff presented into evidence a financial affidavit with regard to her necessities of utilities, food, clothing, cosmetics and shelter [as] evidence [of] a need of $2,394.00 per month excluding maintenance on the property which . . . [P]laintiff testified is $350.00 per month. . . . [P]laintiff also submitted an amended affidavit and testified that her expenses had decreased in some respects and increased in others. . . .

R. Based upon the testimony, the Court finds the reasonable fixed expenses of . . . [P]laintiff to be $1,802.00 per month. Therefore, . . . [P]laintiff's total reasonable needs are $2,685.00 per month and . . . [P]laintiff's shortfall for her projected needs, after applying her income, is approximately $939.78 per month.

S. . . . [P]laintiff was awarded an unequal distribution in her favor and is able to re-allocate her resources to meet her reasonable needs, including, but not limited to, refinancing the marital residence without depleting her separate estate.

. . . .

1. In its 17 October 1997 order, the trial court found as fact that Defendant had income from "interest, dividends, refunds, and capital gains" of $14,968.00 per year.

V. The Court has considered the evidence presented by both parties as it relates to the factors set forth in North Carolina General Statute[] § 50-16.3A(b), and finds facts related to those factors as follows:

(1) **The marital misconduct of either of the spouses.** The Court considered the evidence presented by . . . [P]laintiff relating to . . . [D]efendant's friendship with several women prior to separation. Both parties had friends of the opposite sex during the course of the marriage. Neither party committed illicit sexual marital misconduct during the course of the marriage and prior to the date of separation.

(2) **The relative earnings and earning capacities of the spouses.** This is a mid-life second marriage for both of the parties. Both of the parties had selected careers and been educated for their career plans prior to this marriage. At the time of trial, both parties were earning to their full capacity and both parties' relative earnings were based upon their educational background and employment history that each obtained prior to this marriage.

. . . .

(8) **The standard of living of the spouses established during the marriage.** The parties lived beyond their means during the last four years of their marriage as a result of expenditures by the parties during the marriage of funds and assets received by . . . [D]efendant from his mother's estate. The inflated standard of living established by the parties during the last four (4) years of their marriage resulted from . . . [D]efendant inheriting approximately $200,000.00 from his mother's estate.

(9) **The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs.** Upon separation of the parties, . . . [D]efendant voluntarily provided support for . . . [P]laintiff from July, 1995, to the entry of the post separation support to June 14, 1996, to enable her to work herself into a full-time position at the University of North Carolina at Chapel Hill,

commensurate with her education and training. Additionally, . . . [D]efendant voluntarily agreed to continue post separation support to . . . [P]laintiff by a consent order dated June 14, 1996, thus allowing . . . [P]laintiff to complete her training such that she could accept a full-time position at the University of North Carolina at Chapel Hill in order to meet her reasonable economic needs. Both parties are currently employed to their full capacity and neither needs to be re-trained in order to seek employment or to meet their reasonable economic needs.

. . . .

(11) **The property brought to the marriage by either spouse.** The parties expended approximately $100,000.00 of . . . [D]efendant's separate property which he received from his mother's estate during the last several years of their marriage, thus creating an inflated standard of living for the parties during that period of time.

. . . .

(13) **The relative needs of the spouses.** . . . Both parties have the ability to meet their relative needs in order to subsist in the future. The Court recognizes that certain expenses will have to be cut and re-allocated by both parties in order to live within their means which was not the case during the last few years of the parties' marriage.

. . . .

(15) **Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.** During the course of the marriage . . . [P]laintiff shared all residences with . . . [D]efendant and at times . . . [D]efendant's son. At the time of trial, . . . [P]laintiff is not sharing her residence with another person and continues to live in the same home with the same square footage and acreage as when two people occupied the residence. . . . [P]laintiff's current residence is greater than she needs to maintain her standard of living established during the marriage; however, . . .

> [P]laintiff voluntarily chose to retain the house and 5.47 acres which is subject to the mortgage of approximately $139,000.00 at the date of this trial. . . . [P]laintiff has not sought a roommate and refuses to refinance the debt on her residence.

The trial court then concluded as a matter of law, in pertinent part:

> Based upon the factors set forth in North Carolina General Statute § 50-16.3A(b), the [c]ourt concludes that a term of alimony for thirty consecutive months from October, 1997 to April, 2000, in the amount of $600.00 per month is reasonable and equitable based on the findings of fact made by this Court . . . .

Additionally, the trial court concluded that "[P]laintiff is not entitled to an award of attorney['s] fees."

The issues are whether: (I) the trial court on remand erred by making new and/or additional findings of fact when this Court vacated the order of the trial court in *Friend-Novorska I*; (II) the trial court's findings of fact are sufficient to support the amount and duration of its award of alimony under N.C. Gen. Stat. § 50-16.3A(b); and (III) the trial court's findings of fact support its conclusion "[P]laintiff is not entitled to an award of attorney['s] fees."

I

[1] Plaintiff argues the trial court was "bound by its own findings of fact" made in its 17 October 1997 order because it took no new evidence on remand. Plaintiff, therefore, contends the trial court erred by making new and/or additional findings of fact on remand, including its finding of fact regarding the contribution needed by Plaintiff to meet her monthly expenses.

In *Friend-Novorska I*, this Court affirmed the decision of the trial court that Plaintiff was a dependent spouse and Defendant was a supporting spouse. Additionally, this Court held "the trial court was correct in considering [Defendant's] investment income." The remainder of the trial court's decision was vacated and remanded to the trial court for "a new award of alimony" and "specific findings justifying that award." The term "vacate" means: "To annul; to set aside; to cancel or rescind. To render an act void; as, to vacate . . . a judgment." *Black's Law Dictionary* 1548 (6th ed. 1990). Thus, the vacated portions of the 17 October 1997 order were void and of no effect. On remand, therefore, the trial court was free to reconsider the evidence

before it and to enter new and/or additional findings of fact based on the evidence, with the exception that the trial court was bound on remand by any portions of the 17 October 1997 order affirmed by this Court in *Friend-Novorska I*. Accordingly, the trial court on remand was bound by its previous finding of fact regarding Defendant's investment income and by its previous conclusion that Defendant was a supporting spouse and Plaintiff was a dependent spouse. On remand, the trial court did not make new and/or additional findings regarding Defendant's investment income[2] or regarding its conclusion Defendant was a supporting spouse and Plaintiff was a dependent spouse. In regard to the remaining portions of its 7 September 1999 order, the trial court did not err by making new and/or additional findings of fact, including its finding of fact regarding the contribution needed by Plaintiff to meet her monthly expenses.

II

[2] Plaintiff argues the trial court's findings of fact do not support the amount and duration of its alimony award. We disagree.

N.C. Gen. Stat. § 50-16.3A, which governs actions for alimony, states, in pertinent part: "The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony." N.C.G.S. § 50-16.3A(b) (1999). In determining the amount, duration, and manner of payment of alimony, the trial court must consider the sixteen factors set forth in section 50-16.3A(b) and "make a specific finding of fact on each of the factors in subsection (b) . . . if evidence is offered on that factor." N.C.G.S. §§ 50-16.3A(b), 50-16.3A(c) (1999). Additionally, section 50-16.3A(c) provides: "The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment." N.C.G.S. § 50-16.3A(c). The issue of what constitutes sufficient "reasons for" the amount, duration, and manner of payment of an alimony award has previously not been addressed by this Court. However, because the statutory scheme provided in section 50-16.3A is similar to N.C. Gen. Stat. § 50-20 (equitable distribution of marital and divisible property), the findings of fact required to support an equitable distribution award under section 50-20 provide

2. In its 17 October 1997 order, the trial court attributed to Defendant $14,968.00 gross income per year from dividends, interest, capital gains, and tax refunds. In its 7 September 1999 order, the trial court attributed to Defendant $14,756.00 gross income per year from these same sources. As the amounts of additional income are not materially different, we affirm the trial court's findings in its 7 September 1999 order regarding Defendant's income from dividends, interest, capital gains, and tax refunds.

guidance as to the findings of fact required to support an alimony award under section 50-16.3A.

N.C. Gen. Stat. § 50-20(c) provides twelve factors the trial court must consider when determining the equitable distribution of marital and divisible property. N.C.G.S. § 50-20(c) (1999). As with section 50-16.3A, the trial court must make findings of fact under section 50-20 regarding any of the factors for which evidence is introduced at trial. *Armstrong v. Armstrong*, 322 N.C. 396, 406, 368 S.E.2d 595, 600 (1988). Section 50-20 further provides: "In any order for the distribution of property made pursuant to [N.C. Gen. Stat. § 50-20], the court shall make written findings of fact that support the determination that the marital property and divisible property has been equitably divided." N.C.G.S. § 50-20(j) (1999). Findings of fact are sufficient to "support the determination" an equitable division has been made when findings of fact have been made on the ultimate facts at issue in the case, and the findings of fact show the trial court properly applied the law in the case. *Armstrong*, 322 N.C. at 405-06, 368 S.E.2d at 600; *Atkinson v. Chandler*, 130 N.C. App. 561, 566, 504 S.E.2d 94, 97 (1998). The weight given each factor, however, is within the discretion of the trial court, and the trial court is not required to specifically state the weight given each factor to "support the determination" an equitable distribution has been made. *White v. White*, 312 N.C. 770, 777-78, 324 S.E.2d 829, 833 (1985). Additionally, the weight given each factor by the trial court must be upheld on appeal absent a showing of abuse of discretion. *Id.* at 777, 324 S.E.2d at 833 ("trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason"). Thus, because the discretionary powers granted to the trial court in equitable distribution actions is similar to the discretion granted to the trial court in alimony actions, *see id.* (comparing "wide discretionary powers" granted to the trial court in equitable distribution actions, alimony actions, and child support and custody actions), we hold the findings of fact required to support the amount, duration, and manner of payment of an alimony award are sufficient if findings of fact have been made on the ultimate facts at issue in the case[3] and the findings of fact show the trial court properly applied the law in the case. The findings of fact need not set forth the weight given to the factors in section 50-16.3A(b) by the trial court when determining the appropriate amount, duration, and manner of payment,

3. The ultimate facts at issue in the case are facts relating to the factors set forth in section 50-16.3A(b) for which evidence is presented at trial.

as the weight given the factors is within the sound discretion of the trial court.

In this case, the trial court made extensive findings of fact regarding the parties' incomes and expenses. The trial court found as fact that Plaintiff's "shortfall for her projected needs . . . is approximately $939.78 per month." In awarding Plaintiff an alimony award of $600.00 per month for 30 months, the trial court considered: Plaintiff received an unequal distribution of the marital property in her favor; Plaintiff is able to "re-allocate her resources to meet her reasonable needs . . . without depleting her separate estate"; both of the parties "had selected careers and been educated for their career plans prior to this marriage"; the parties lived beyond their means during the last four years of their marriage; subsequent to the parties' separation, Defendant provided support to Plaintiff which enabled Plaintiff to obtain a full-time position at the University of North Carolina at Chapel Hill and to "complete her training . . . in order to meet her reasonable economic needs"; and "certain expenses will have to be cut and re-allocated by both parties in order to live within their means which was not the case during the last few years of the parties' marriage." The record shows the trial court made findings of fact on all of the section 50-16.3A(b) factors for which evidence was presented, and there is no indication in the record that the trial court misapplied the law when making findings on these factors. Additionally, the record does not show the trial court abused its discretion when assigning weight to the section 50-16.3A(b) factors in this case. Accordingly, we must affirm the amount, duration, and manner of payment of the trial court's 7 September 1999 award of alimony.

III

[3] Plaintiff argues the trial court erred by failing to award her attorney's fees under N.C. Gen. Stat. § 50-16.4.

Section 50-16.4 provides, in pertinent part: "At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, . . . the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony." N.C.G.S. § 50-16.4 (1999). "Before granting an award of attorney[']s[] fees, the trial court must determine, as a mater of law, that the spouse seeking the award is dependent, and that the spouse is without sufficient means to subsist during the prosecution

of the suit and to defray the necessary expenses." *Owensby v. Ownesby*, 312 N.C. 473, 475, 322 S.E.2d 772, 773-74 (1984). When an award of attorney's fees is properly awarded, the amount of the award is within the discretion of the trial court. *Id.* at 475, 322 S.E.2d at 774.

In this case, the trial court concluded Plaintiff is a dependent spouse. The trial court did not, however, make any findings regarding whether Plaintiff "is without sufficient means to subsist during the prosecution of the suit and to defray the necessary expenses." The trial court's conclusion of law that "[P]laintiff is not entitled to an award of attorney['s] fees" is, therefore, not supported by its findings. Accordingly, the portion of the trial court's 7 September 1999 order denying Plaintiff attorney's fees is reversed, and this case is remanded to the trial court for findings on whether Plaintiff is entitled to an award of attorney's fees. The remaining portions of the trial court's 7 September 1999 order are affirmed. We reject the additional arguments asserted by Plaintiff in her brief to this Court.

Affirmed in part and reversed in part.

Judge McCULLOUGH concurs.

Judge HUDSON dissents.

HUDSON, Judge, dissenting.

I do not believe the majority opinion fully addresses a number of crucial issues in this case. These issues are: (I) precisely which portions of the trial court's original order were vacated, and which portions were left standing, by this Court in *Friend-Novorska v. Novorska*, 131 N.C. App. 867, 509 S.E.2d 460 (1998) (*Friend-Novorska I*); (II) the trial court's failure to make a new award of alimony on remand; and (III) the trial court's renewed failure to explain both the amount of alimony and the duration of the award on remand. For these reasons, I must dissent.

The trial court's original order, from which plaintiff appealed in *Friend-Novorska I*, contained only two conclusions of law:

> 1. Plaintiff is, and was during the marriage and at date of separation, the dependent spouse . . . . Defendant is and was the supporting spouse at these times . . . .

2. . . . Defendant should pay alimony to Plaintiff of $600 per month for a term of thirty consecutive months.

On appeal from this order in *Friend-Novorska I*, plaintiff set forth only one assignment of error: "The Order and Judgment for Alimony ordering Defendant to pay Plaintiff $600 per month for thirty consecutive months as being contrary to law and unsupported by evidence, findings of fact and conclusions of law." In her brief, plaintiff argued as a subsidiary issue that the trial court erred by failing to make adequate findings with regard to marital misconduct. Likewise, defendant, in his brief to this Court, argued only one cross-assignment of error: the trial court's award of any alimony to plaintiff. Defendant argued as a subsidiary issue that the trial court erred in considering his investment income in determining his monthly income. Neither party, on appeal in *Friend-Novorska I*, assigned error to any other finding or conclusion in the trial court's first order.

In response to these two assignments of error, we affirmed (1) the trial court's first conclusion of law (that plaintiff was a dependent spouse and that defendant was a supporting spouse), and (2) the trial court's consideration of defendant's investment income in calculating defendant's net monthly income. However, we further held that the trial court had erred in three specific ways. First, we held that the trial court had erred in considering defendant's desire to purchase a new house and car "[i]n making its decision to award [to plaintiff] a monthly amount of alimony substantially less than her needs." *Id.* at 869, 509 S.E.2d at 461. We explained that the trial court had abused its discretion in allowing "a supporting spouse to reduce his net monthly income, and thus his obligation to his dependent spouse, based not on necessity, but instead on his expressed 'desires' for a new house and automobile." *Id.* Second, we held that the trial court had erred in not making findings regarding the marital misconduct of the parties since the parties had offered evidence on that issue. Third, we held that the trial court had erred in not making findings justifying either the amount or the duration of the award of alimony. In regard to this third error, we specifically cited *Payne v. Payne*, 49 N.C. App. 132, 137, 270 S.E.2d 546, 549 (1980), for the proposition that "[o]vershadowing the entire matter is the inescapable fact that [when the alimony payments cease,] plaintiff's right to 'permanent alimony' will terminate, along with any semblance of her accustomed standard of living." *Friend-Novorska*, 131 N.C. App. at 870, 509 S.E.2d at 462.

After our discussion of these three specific errors on the part of the trial court, we stated:

> On remand, the trial court must make a new award of alimony and make specific findings justifying that award, both as to amount and duration. Those portions of the order declaring [plaintiff] to be a dependent spouse and [defendant] to be a supporting spouse are affirmed. For the foregoing reasons, the decision of the trial court is Affirmed in part, and vacated and remanded in part.

Id. at 870-71, 509 S.E.2d at 462. Reading this language in context, I believe we vacated only the trial court's second conclusion of law awarding plaintiff $600.00 per month for thirty months. I further believe we remanded only for (1) a new award of alimony calculated without considering defendant's desire for a new house and car, (2) *additional* specific findings to justify the amount and duration of that award, and (3) *additional* findings as to marital misconduct. The majority states that aside from the two issues which we expressly affirmed (the conclusion that plaintiff was a dependent spouse and the consideration of defendant's investment income in calculating his monthly income),"the remainder of the trial court's decision was vacated." I disagree.

Plaintiff's single assignment of error from the trial court's original order in *Friend-Novorska I* contended only that the trial court's second conclusion of law, awarding plaintiff $600.00 per month for thirty months, was "contrary to law and unsupported by evidence, findings of fact and conclusions of law." Plaintiff did not assign error to any of the findings of fact in the trial court's original order. Likewise, although defendant on appeal in *Friend-Novorska I* initially assigned error to a few factual findings in the trial court's original order, these assignments of error were abandoned by defendant on appeal to this Court because in his brief in *Friend-Novorska I* he argued only one assignment of error, namely that the trial court erred in its legal conclusion that defendant should pay alimony to plaintiff. *See* N.C.R. App. P. 28(a). Where no error is assigned to findings of fact, such findings of fact "are presumed to be supported by competent evidence and are binding on appeal." *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982). Because none of the findings of fact from the trial court's original order were challenged on appeal to this Court in *Friend-Novorska I*, and because we did not hold in that case that any of the findings were unsupported by the evi-

dence, I believe all of the findings of fact, rather than being vacated by our opinion in *Friend-Novorska I*, as the majority contends, remained intact.

In *Lea Co. v. N.C. Board of Transportation*, 323 N.C. 697, 374 S.E.2d 866 (1989), our Supreme Court stated:

> A decision of this Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974). "[O]ur mandate is binding upon [the trial court] and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered." *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966). "We have held judgments of Superior [C]ourt which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court . . . to be unauthorized and *void*." *Collins v. Simms*, 257 N.C. 1, 8, 125 S.E.2d 298, 303 (1962).

Id. at 699, 374 S.E.2d at 868. Here, despite the absence of any instructions from this Court to the trial court in *Friend-Novorska I* to delete, modify or supplant the findings of fact from its original order, the trial court on remand reconsidered the very same evidence and entered findings of fact which are contrary to those in its original order (which new findings of fact resulted in a greatly reduced calculation of plaintiff's reasonable monthly expenses). I believe the trial court was without authority to take this action, and I would reverse and remand with instructions that the trial court may only supplement the findings of fact from its original order in strict accordance with the directive of this Court in *Friend-Novorska I*.

I further believe the trial court erred in awarding plaintiff precisely the same alimony as in its original order, rather than making a new award of alimony as it was instructed to do on remand. In *Friend-Novorska I*, we held that the trial court had abused its discretion in awarding plaintiff alimony in the sum of $600.00 per month for 30 months. We reached this determination based on the following facts set forth in the trial court's first order: (1) plaintiff had an available net income of $1,745.22 per month from employment, while her reasonable monthly expenses were $3,089.00, resulting in plaintiff needing $1,343.78 per month to meet her monthly living expenses; (2) defendant had approximately $4,887.00 per month (including net

income from salary and investments) with expenses of only $3,758.00 per month, giving him over $1,000 more than necessary to meet his monthly living expenses; and (3) an alimony award of $600 per month would provide defendant with about $210.00 per month in tax benefits, and would provide plaintiff a net of only $520.00 per month after taxes. In other words, the award of $600 per month would have left plaintiff with $823.78 less than her reasonable monthly expenses of $3,089, while providing defendant with approximately $761 more than his reasonable monthly expenses of $3,758. Thus, we held that the trial court had abused its discretion in awarding plaintiff "substantially less than her needs," *Friend-Novorska*, 131 N.C. App. at 869, 509 S.E.2d at 461, and ordered the trial court on remand to "make a new award of alimony," *id.* at 871, 509 S.E.2d at 462.

The trial court, however, did not make a new award of alimony. Instead, the trial court made the same award of $600 per month for the same duration of 30 months. Furthermore, the only calculation that has changed in the trial court's second order as compared to its original order is the calculation of plaintiff's reasonable monthly expenses (based on the very same evidence, the trial court inexplicably reduced plaintiff's reasonable monthly car expenses from $307 to $150, and reduced plaintiff's reasonable monthly expenses for home maintenance from $350 to $100). According to these new calculations, an award of $600 per month would still leave defendant with $761 more than his reasonable monthly expenses of $3,758, while still leaving plaintiff with $419.78 less than her recalculated reasonable monthly expenses of $2,685. As in *Payne*, where the trial court's alimony award would have provided plaintiff with $138 less per month than her reasonable monthly living expenses but would have provided defendant with $739 more per month than his reasonable monthly living expenses,"the order challenged by this appeal effectively destroys plaintiff's 'accustomed standard of living' while substantially improving defendant's." *Payne*, 49 N.C. App. at 137, 270 S.E.2d at 549. I believe the trial court's alimony award of $600 per month in its second order directly contradicts our instructions on remand and constitutes reversible error.

Finally, in *Friend-Novorska I*, we not only ordered the trial court on remand to make a new award of alimony, but also to "make specific findings justifying that award, both as to amount and duration." *Id.* The trial court's second order states:

> The Court concludes that a term of alimony for thirty consecutive months from October, 1997 to April, 2000, in the amount of

$600.00 per month is reasonable and equitable based on the findings of fact made by this Court in paragraph 4, and its subsections, of the findings of fact.

"Paragraph 4" comprises 14 pages of the order (the entire order is 15 pages), and "its subsections" include paragraphs A through V, and, under paragraph V, sub-paragraphs 1 through 15. I believe this broad reference to virtually every finding in the order as a basis for concluding that the amount and duration of the alimony award is reasonable is insufficiently specific to satisfy our explicit instructions in *Friend-Novorska I.*

In sum, I believe the trial court's second order follows neither the explicit instructions, nor the spirit, of this Court's opinion in *Friend-Novorska I.* I believe the findings of fact in the original order were not vacated by our opinion in *Friend-Novorska I* and that the trial court was without authority to modify or supplant those findings. I also believe the trial court's failure to make a new award of alimony, and the trial court's failure to make additional findings justifying the amount and duration of the award, constitute reversible error. Therefore, I must dissent.

IN THE MATTER OF: CHAREESE McMILLON, (A) MINOR CHILD

No. COA00-569

(Filed 15 May 2001)

1. Termination of Parental Rights— willfully leaving child in foster care over twelve months—no contributions to child's financial support—failure to visit child

The trial court did not abuse its discretion by terminating respondent mother's parental rights based on the best interests of the child, because clear, cogent, and convincing evidence supports the trial court's findings and conclusions that: (1) the mother willfully left the child in foster care for over twelve months without making reasonable progress toward correcting the conditions that led to his removal; (2) she contributed nothing toward the child's financial support during the twenty-eight months the child was in foster care despite having the ability to pay some amount greater than zero; and (3) she failed to visit her child for the eighteen months preceding the termination hearing.

2. Evidence— hearsay—no prejudice

Although respondent mother contends the trial court erred in a parental termination proceeding by admitting the hearsay testimony of two social workers who were treating the minor child, there was no prejudice because: (1) the trial court's findings regarding the mother do not depend upon the challenged testimony; (2) there is no indication the trial court relied on the controverted testimony; and (3) there is sufficient evidence to support the trial court's findings exclusive of the social workers' testimony.

3. Termination of Parental Rights— abuse—willfully left child in foster care over twelve months—no contributions to child's financial support

The trial court did not abuse its discretion by terminating respondent father's parental rights based on the best interests of the child, because clear, cogent, and convincing evidence supports the trial court's findings and conclusions that: (1) the father's own testimony of past physical abuse coupled with his refusal to address his emotional problems in counseling indicates a likelihood the child's abuse would reoccur; (2) the father willfully left his child in foster care for over twelve months without making reasonable progress under the circumstances toward correcting the conditions that had led to the child's removal; and (3) the father has failed to pay a reasonable portion of the cost of the child's care during the six months prior to the filing of the petition although he was physically and financially able to do so.

Appeal by respondents from an order terminating their parental rights entered 20 August 1999 by Judge William G. Hamby, Jr. in Cabarrus County District Court. Heard in the Court of Appeals 21 February 2001.

Matthew F. Ginn, for respondent-appellant Charles McMillon.

Scott C. Robertson, for respondent-appellant Janet Earle.

Kathleen Arundell Widelski, for petitioner-appellee Cabarrus County Department of Social Services.

BIGGS, Judge.

On 20 August 1999 the trial court entered an order terminating the parental rights of Charles McMillon (McMillon) and Janet Earle

(Earle), respondents. Respondent McMillon gave notice of appeal on 30 August 1999; respondent Earle gave notice of appeal 9 September 1999. In separate briefs, both respondents contest the trial court's conclusions that grounds for termination exist, and that termination would be in the best interests of Chareese McMillon (Chareese). For the reasons that follow, we affirm the trial court's order terminating parental rights as to both respondents.

Chareese Jamar Earl McMillon, born 28 May 1987, is the son of Charles McMillon and Janet Earle. In 1996, when Chareese was nine years old, the Cabarrus County Department of Social Services (DSS) investigated reports that Chareese was being mistreated. On 12 March 1996, DSS filed a petition alleging that respondents McMillon and Earle had abused and neglected Chareese. On the same date, DSS obtained a non-secure custody order and placed Chareese in foster care. On 9 July 1996, Adam C. Grant Jr. presided over an adjudication and disposition hearing on the allegations in the petition. The trial judge received evidence that included a Predisposition Summary prepared by DSS, and a report from the court-appointed guardian ad litem (GAL). These reports indicated that Chareese had exhibited "deep emotional problems and violent episodes," was terrified of his father, and had been aggressive toward other children. McMillon did not permit his wife or son to socialize with others, and had issued violent threats to neighborhood children who played near his yard. Earle could not restrain McMillon's violent behavior either toward her or Chareese. At the hearing, the court also heard testimony on specific instances of violent behavior by McMillon toward Chareese.

The court found by clear, cogent, and convincing evidence the following: that McMillon had "struck Chareese McMillon in the face with a belt buckle leaving a swollen, red abrasion to his cheek area that was 4 centimeters by 4 centimeters, the dimensions of Mr. McMillon's belt buckle;" that on another occasion "Charles McMillon and Janet Earle were engaged in domestic violence in the presence of Chareese McMillon [and] Chareese McMillon placed himself in harm's way to protect his mother; that the child hid in the closet and watched his father batter his mother; that the child sustained a bump to his head during the altercation; and that he has expressed fear of his father." On the basis of these and other findings, the court adjudicated Chareese to be neglected and abused.

A dispositional hearing was held the same day. The court's Dispositional Order continued Chareese in the custody of the Cabarrus County DSS. The court also ordered Earle and McMillon to

comply with the parental tasks enumerated in the DSS Predispositional Summary. Included in the DSS plan were provisions that required both parents to "have psychological evaluations and attend counseling indicated;" to "obtain education regarding child development, [parenting skills,] and [the] emotional needs of Chareese;" and to "be able to demonstrate what they have learned." Additionally, McMillon was required to obtain counseling "regarding anger management and appropriate discipline," while Earle was directed to address her problems "regarding domestic violence and dependency issues."

At the dispositional hearing, the trial court ordered that a review be conducted in 60 days to assess Chareese's needs, as well as McMillon's and Earle's progress toward reunification with Chareese. Accordingly, a review hearing was held in December, 1996, before Judge Adam C. Grant, Jr. The trial judge considered several reports, including updates from social workers and therapists, and a report from the guardian ad litem. This evidence indicated that Chareese had problems with "peer relationships and low self esteem," had been placed on suicide watch several times, and had a "tremendous fear of his father." He had engaged in "inappropriate sexual behavior with another male child," and his counselors were concerned about the possibility of prior sexual abuse. Chareese also had been diagnosed with Oppositional Defiant Disorder and "severe ADHD," and "was functioning well below his age and grade level educationally, socially, developmentally, and emotionally." In therapy, he had expressed concern about incidents in which his father had inflicted "severe physical discipline," while his mother "did not attempt to protect [him.]"

The DSS and GAL reports that were received into evidence revealed that neither parent had made any financial contribution to Chareese's upkeep after he was placed in foster care. McMillon had visited Chareese only once during the five months he was in foster care. Chareese was so distraught after their meeting, that his therapist suspended further visits with McMillon. Earle also had not visited Chareese until August, 1996, five months after Chareese's initial placement. Both parents had obtained the required psychiatric evaluation. This evaluation "was not favorable for Ms. Earle." Earle denied that there were any problems in her home, or that Chareese had been neglected or abused. She had told the social worker "on several occasions" that she would not complete the items in the Service Plan and that, if she had to choose between Chareese and McMillon, she would

choose McMillon. McMillon likewise had expressed an intention not to complete the items in the plan because he believed "he does not need any help with the issues identified in the Service Agreement." He denied that Chareese had been neglected or abused, and "further [denied] that he [had] any problems that need to be addressed and/or changed." The GAL expressed "serious concern for the safety of Chareese were he to be reunited with his parents due to Janet Earle's past inability to protect her son from harm, their past denial that abuse occurred in their home, and the most recent disclosure of graphic pornography viewed by their son in their home."

After considering the evidence, the court found that the respondents were not making reasonable progress toward reunification with Chareese. A new Service Agreement was implemented, which included the same components as the earlier agreement, and additionally directed both parents to "fully participate" in counseling, and to "enroll, attend, and fully participate in the next available parenting class offered by Cabarrus Behavioral Healthcare." Earle was to have supervised bi-weekly visits with Chareese. The court ordered Chareese to remain in DSS custody, pending another review in 60 days. This review was held in February, 1997, before Judge Clarence E. Horton, Jr. The court found that respondents had made "some progress" toward reunification, in that they had attended several counseling sessions. The court ordered that the respondents continue to work toward reunification, and that the matter be reviewed in 90 days.

The next review hearing was held in August, 1997, before Judge Adam C. Grant, Jr. The court heard testimony from several of those who had been working with respondents, including Dr. Barton, a psychiatrist, as well as a DSS social worker. The trial court also received written reports into evidence, including a psychological progress summary and a letter from the Alexander Children's Center where Chareese had been placed. This evidence indicated that both respondents "continue[d] to deny their culpability in the abuse issues" that they had been directed to address in therapy with Dr. Barton. Although respondents had attended some counseling sessions, Dr. Barton reported that "little or no progress [had] been made in the last six months that he [had] worked with Ms. Earle," and that McMillon had not "expressed concerns about anger management or sexual issues, nor [did he have] a perspective or self-awareness of his risk to others." He noted that Earle had "an unclear or vacillating posture with respect to who's needs should come first, herself or

Chareese," and that McMillon's "closed posture does not suggest a constructive motivation [for change]" and "further suggests risk to Chareese should he return home." Moreover, the evidence demonstrated that neither respondent had contributed anything to Chareese's financial support.

The court also received progress reports concerning Chareese. The GAL report stated that Chareese "continues to deal with behavior and psychological problems from his troubled home life." Chareese received weekly counseling sessions, and medication for anxiety, depression, and attention deficit disorder. Dr. Barton reported that "it seems clear that Chareese is a disturbed young man, and that his family is not able . . . to help him". . . . "[T]he family's limitations and Chareese's apparent needs suggest that he should be placed somewhere where the community can be reassured that he will receive more active and constructive support."

Upon consideration of the evidence, the court found that Cabarrus County DSS had made reasonable efforts toward reunification, and concluded that the respondents had not made reasonable progress toward addressing their problems. The court further concluded that additional efforts by DSS toward reunification would be futile or inconsistent with Chareese's needs, and that the permanent plan for Chareese should be changed from reunification to termination of parental rights.

In April, 1998, the Cabarrus County DSS filed a petition to terminate the respondents' parental rights. A hearing was held on 1 July 1999, more than three years after Chareese's initial placement in foster care. The trial court found the following statutory grounds for termination of parental rights: (1) that respondents willfully left Chareese in foster care for over twelve months without making reasonable progress toward correcting the conditions that had led to Chareese's placement in foster care, and that poverty was not the sole or primary reason for this failure; (2) that respondents willfully failed to contribute any funds toward Chareese's care, although physically and financially able to do so; and (3) that McMillon had abused or neglected Chareese. In its findings of fact, the trial judge incorporated by reference all of the Court Reports and other documents in the file, and all prior Orders in the case, and also found that Chareese needed structured supervision, which he had not received from his parents. The court concluded that termination of the respondents' parental rights was in the child's best interests, and ordered that the

parental rights of both respondents be terminated. Respondents appeal from this order.

Initially, we note that the North Carolina Juvenile Code, including the provisions governing proceedings to terminate parental rights, was revised effective 1 July 1999. This revision replaced former Articles 41 through 59 of Chapter 7A with new Chapter 7B. However, because the petition in the instant case was filed prior to the effective date of Chapter 7B, this case is governed by the appropriate provisions of Chapter 7A.

The hearing on a petition for termination of parental rights is conducted in two phases: adjudication and disposition. At the adjudication stage, the petitioner has the burden of proof to demonstrate by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination exist. *In re Young*, 346 N.C. 244, 485 S.E.2d 612 (1997); *In re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992). The criteria for termination are set out in N.C.G.S. § 7A-289.32 (1999). The standard for appellate review of the trial court's conclusion that grounds exist for termination of parental rights is whether the trial judge's findings of fact are supported by clear, cogent, and convincing evidence, and whether these findings support its conclusions of law. *In re Huff*, 140 N.C. App. 288, 536 S.E.2d 838 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001); *In re Allred*, 122 N.C. App. 561, 471 S.E.2d 84 (1996).

If the petitioner meets its burden of proving that there are grounds to terminate parental rights, the trial court then will consider whether termination is in the best interests of the child. The trial court does not automatically terminate parental rights in every case that presents statutory grounds to do so. *In re Leftwich*, 135 N.C. App. 67, 518 S.E.2d 799 (1999); *In re Allred*, 122 N.C. App. 561, 471 S.E.2d 84 (1996). However, the trial court has discretion, if it finds that at least one of the statutory grounds exists, to terminate parental rights upon a finding that it would be in the child's best interests. *In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001); *In re McLemore*, 139 N.C. App. 426, 533 S.E.2d 508 (2000). A court's finding of one (1) of the statutory grounds for termination, if supported by competent evidence, will support an order terminating parental rights. *In re Nolen*, 117 N.C. App. 693, 453 S.E.2d 220 (1995); *In re Taylor*, 97 N.C. App. 57, 387 S.E.2d 230 (1990). The trial court's decision to terminate parental rights, if based upon a finding of one or more of the statutory grounds supported by evidence in the record, is reviewed on an abuse of discretion standard. *In re Brim*, 139 N.C.

App. 733, 535 S.E.2d 367 (2000); *In re Allred*, 122 N.C. App. 561, 471 S.E.2d 84 (1996).

The issues presented to this Court are: (1) whether the trial court's findings of fact were supported by the evidence, (2) whether its conclusion that grounds existed to terminate the respondents' parental rights was supported by its findings of fact, and (3) if so, whether it was an abuse of discretion for the trial judge to terminate the respondents' parental rights.

[1] We first evaluate the trial court's termination of respondent Earle's parental rights. The trial court found two grounds for termination of Earle's parental rights: that she had willfully left Chareese in foster care for over twelve months without making reasonable progress toward correcting the conditions that led to his removal, and that she had contributed nothing toward Chareese's financial support, despite having the ability to "pay some amount greater than zero." A finding of either one of these statutory grounds for termination, if supported by the record, will support the court's order of termination. *In re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992); *In re Williamson*, 91 N.C. App. 668, 373 S.E.2d 317 (1988). This Court finds that the evidence supports both findings.

It is undisputed that Chareese was in foster care for over twelve months; as of the time of the hearing, he had been in DSS custody for twenty-eight (28) months. This Court must determine whether the record supports the trial court's finding that Earle had wilfully failed to make progress during the time that Chareese was in foster care. Following the court's initial adjudication of abuse and neglect of Chareese, the child was placed in foster care in the custody of DSS. Pursuant to court order, Earle was ordered to comply with the Service Plan for reunification with Chareese. The Plan required Earle to focus on psychological and emotional growth, in order to learn how to care properly for Chareese. She was required to obtain a psychological examination, and to participate in any counseling recommended as a result of the examination. She was also to complete a parent education class, participate in biweekly visits with Chareese, and address the problems she had in responding to McMillon's displays of anger. In over two years, Earle completed only one item on this list—the psychological examination. She did not take a parenting skills class, and visited only a few times with Chareese; indeed, at the time of the hearing she had not visited him for eighteen (18) months. Moreover, she consistently denied either that Chareese had been abused or neglected, or that she had any need for counseling. As a

result, the therapist assigned to work with the family observed that Earle's behavior indicated "an unfavorable prognosis," noting that she "has not . . . demonstrated an empathetic concern for Chareese's circumstances, nor demonstrated to day care workers, DSS professionals, nor me that she has sophisticated parenting skills to deal with Chareese's behavioral and emotional difficulties." We find that the evidence demonstrated that Earle had left Chareese in foster care for over twelve months without making reasonable progress toward reconciliation.

In order to uphold the trial court's order, we also must find that respondent's failure was willful. *In re Bishop*, 92 N.C. App. 662, 375 S.E.2d 676 (1989). Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort. *See, e.g., In re Nolen*, 117 N.C. App. 693, 453 S.E.2d 220 (1995) (parent's refusal to obtain treatment for alcoholism constituted willful failure to correct conditions that had led to removal of child from home); *In re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992) (general lack of involvement with child over two year period supports finding that respondent willfully left child in foster care). It is significant that the tasks assigned to Earle were within her ability to achieve, and did not require financial or social resources beyond her means. *See In re Oghenekevebe*, 123 N.C. App. 434, 473 S.E.2d 393 (1996) (respondent willfully left child in foster care where she did not take advantage of DSS assistance with services such as counseling and parenting classes to improve her situation); *In re Wilkerson*, 57 N.C. App. 63, 291 S.E.2d 182 (1982) (respondents willfully abandoned child where they had the ability to overcome problems, but did not do so). In the instant case, the record demonstrates that respondent was unwilling to comply with the Service Plan in order to be reunified with Chareese. She would not acknowledge that she needed to learn more about her son's needs; that she could not provide a safe and appropriate home for Chareese as long as both she and he were subject to McMillon's physical abuse; or that the counseling required by the DSS plan would help her to effect changes in her emotional relationships. Moreover, she failed to visit Chareese for the eighteen months preceding the termination hearing. We find that this record amply supports the trial judge's finding that she had willfully left Chareese in foster care for over twelve months without making adequate progress toward reunification.

The record also supports the trial court's conclusion that Earle had willfully failed to contribute financially to Chareese's upkeep.

Earle was regularly employed, yet she did not contribute *any* funds in child support during the twenty-eight months that Chareese was in foster care. This Court has held that under such circumstances, the trial court need not make detailed findings as to the amount that would be "reasonable" to expect from respondent. *See In re Huff*, 140 N.C. App. 288, 536 S.E.2d 838 (court has "no difficulty" in concluding that zero is not a reasonable sum to pay). We likewise find that the record clearly supports the conclusion that respondent willfully failed to make any financial contribution to Chareese, despite having the resources to do so.

[2] Respondent Earle has argued that the trial court erred in admitting the hearsay testimony of two social workers who were treating Chareese. However, the court's findings concerning respondent Earle do not depend upon the challenged testimony. In a bench trial, the court is presumed to disregard incompetent evidence. *In re Oghenekevebe*, 123 N.C. App. 434, 473 S.E.2d 393 (1996). Where there is competent evidence to support the court's findings, the admission of incompetent evidence is not prejudicial. *In re Huff*, 140 N.C. App. 288, 536 S.E.2d 838. In the instant case, there is no indication that the trial court relied on the controverted testimony, and there is sufficient evidence to support the trial court's findings, exclusive of the social workers' testimony. Thus, assuming *arguendo* that the testimony was inadmissible, we find no prejudice.

We find that the trial court's conclusion that grounds existed for termination of Earle's parental rights was supported by the record. Additionally, we hold that the trial court did not abuse its discretion in concluding that it was in Chareese's best interest that respondent Earle's parental rights be terminated. Voluminous evidence in the record documents Chareese's special needs, and Earle's unwillingness to meet them. Accordingly, we affirm the trial court's order terminating Earle's parental rights.

[3] We next consider respondent McMillon's appeal. We will first address the trial court's finding that McMillon had abused Chareese. The court took note of the prior adjudication of abuse, and of the evidence that had supported the ruling, including the fact that McMillon "admitted to smacking the child and whipping him, [and has] stated that he may knock the child down and might leave marks on him." He found further that "McMillon [had] fathered 16 additional children by various mothers, according to his own testimony, and he has spanked all of them and has left bruises." The record further indicates a likelihood that the abuse would reoccur if Chareese were returned to his

father. The court noted that "McMillon has stated that he can not complete these items [in the DSS plan] as he does not need any help with the issues identified in the Service Agreement." This finding is consistent with Dr. Barton's observation that McMillon "denies any physical or sexual abuse of anyone," which denial had prevented him from making "any meaningful clinical progress" during counseling. Dr. Barton noted also that Chareese's "clinical signs and symptoms are . . . consistent with the patterns [of] a child who has been abused." We find that the evidence of past physical abuse, coupled with McMillon's refusal to address his emotional problems in counseling, fully supports the court's finding that McMillon had abused Chareese.

The trial court found also that McMillon had willfully left Chareese in foster care for over twelve months without making reasonable progress under the circumstances toward correcting the conditions that had led to his removal. The DSS Service Plan required McMillon to learn more about the physical and emotional needs of children and specifically Chareese, and to address the psychological problems underlying his prior abuse of Chareese. Accordingly, he was ordered to obtain a psychological examination, complete a parenting class, attend counseling on anger management and appropriate discipline, and to be able to demonstrate what he had learned. In over two years, he completed only one of these—the psychological examination. Like Earle, McMillon contended that his "innocence" of any neglect or abuse meant that he had no need to change, and that therapy had nothing to offer him. McMillon blamed DSS for "all of [Chareese's] problems." Thus, although he was physically present for a series of counseling sessions, he did not demonstrate "any meaningful clinical progress toward acknowledging or dealing with the abuse and neglect of his son," according to Dr. Barton. Moreover, the GAL did not observe "any significant progress . . . that would indicate a safe environment for Chareese were he to be reunited with his parents." This Court finds that the record supports the trial judge's finding that McMillon had left Chareese in foster care for more than twelve months without making reasonable progress toward reunification.

We also find support in the record for the court's finding that this was a willful failure, not caused primarily by poverty. The components of the DSS plan did not require material resources, but rather called upon McMillon to make the personal effort to change abusive and assaultive behaviors.

The court also found that McMillon had failed to pay a reasonable portion of the cost of Chareese's care during the six months prior to the filing of the petition, although physically and financially able to do so. In fact, McMillon had paid nothing at all during the twenty-eight months that Chareese was in foster care prior to the hearing. The evidence was that McMillon was buying a house, owned a car, and received a disability check, and was able to support at least one other child during the six months prior to the hearing. He also indicated to the court that he had other sources of income, but refused to specify for the court what these were, saying instead that he would "take the Fifth on that." Under these circumstances, we find that the record supports the trial judge's finding that McMillon had "the ability to pay some amount greater than zero towards the care of the child." *See In re Huff*, 140 N.C. App. 288, 536 S.E.2d 838 (trial judge not required to make detailed analysis of respondent's means where respondent had failed to pay any money at all toward child's support).

For the reasons stated above, we find that the record supports the trial court's conclusion that grounds existed to terminate McMillon's parental rights. We hold also that the trial court did not abuse its discretion in terminating McMillon's parental rights based upon a conclusion that termination was in Chareese's best interests. The record shows that Chareese was one of seventeen (17) children fathered by McMillon. None of his children had lived with him throughout childhood. McMillon admitted "disciplining" Chareese by "smacking" and "whipping" him. This evidence is relevant to the issue of whether there was a likelihood of future neglect or abuse were Chareese to be returned to his father. *In re Huff*, 140 N.C. App. 288, 536 S.E.2d 838 (chronic pattern of neglect of other children relevant to issue of future neglect of child who is subject of petition). The record, including McMillon's willful failure either to contribute to Chareese's support, or to cooperate with the DSS plan for reunification, amply supports the trial judge's decision to terminate McMillon's parental rights.

For the reasons stated above, we affirm the trial court's order of termination of parental rights as to both respondents.

Affirmed.

Judges WALKER and SMITH concur.

DONNA L. WALKER, PLAINTIFF v. MAURICE L. WALKER, DEFENDANT

No. COA00-101

(Filed 15 May 2001)

1. Pleadings— amendment—second—denied

The trial court did not abuse its discretion in an action for alimony, child custody and support, and a domestic violence prevention order by denying defendant's motion for a second amendment to his answer. A party may amend his pleadings once as a matter of course under N.C.G.S. § 1A-1, Rule 15(a) before a responsive pleading is filed, but otherwise only by leave of the court. Refusal to grant leave to amend without any reason is abuse of discretion; here, the record showed that more than four years had passed since the original answer and first amendment and extensive discovery and numerous court proceedings had occurred in the interim.

2. Appeal and Error— assignment of error—no supporting authority—abandoned

An assignment of error concerning a sustained objection in a domestic action was abandoned where there was no supporting authority.

3. Appeal and Error— preservation of issues—instructions—no objection

An issue concerning a constructive abandonment instruction in a domestic action was not preserved for appeal where defendant objected to the omission of language on the burden of proof, the court promptly remedied any error, and defendant made no further objection concerning constructive abandonment.

4. Divorce— alimony—constructive abandonment—sufficiency of evidence

The trial court did not err by denying defendant's motions for a directed verdict and judgment notwithstanding the verdict on a permanent alimony claim where defendant contended that there was insufficient evidence of constructive abandonment but there was evidence presented that defendant drank excessively, would not come home after work, spent many weekends at the coast without his family, and was removed from the home due to violent behavior, while plaintiff cared for the home, did the yard work, and cared for the children.

5. Appeal and Error— preservation of issues—inconsistent jury verdict—motion for new trial

The question of whether a jury verdict was inconsistent was not properly preserved for appeal where there was no motion for a new trial.

6. Divorce— alimony—amount—benefits received through company

The trial court did not abuse its discretion in the amount of alimony awarded where the court properly considered benefits defendant received through his company.

7. Divorce— attorney fees—sufficiency of evidence

The trial court did not abuse its discretion in a domestic action by awarding plaintiff partial attorney's fees where the main asset plaintiff received in the equitable distribution was the marital home, which included a $1,200 per month mortgage payment; the marital home was subject to foreclosure at the time of the trial; plaintiff received a cash distributive award of $69,265.63 to equalize the division of marital property, paid in monthly installments; defendant was in child support arrears by more than $7,600; defendant had provided no alimony support to plaintiff prior to the award of counsel fees; plaintiff did not have substantial stock and bond holdings at the time of trial; plaintiff had an imputed gross income of $1,400 per month and defendant a gross income of $5,417 per month; and defendant received ownership of a business valued at $234,000.

Defendant appeals from judgment entered by the Honorable William L. Daisy in Guilford County District Court on 30 August 1999, *nunc pro tunc* 20 May 1999. Heard in the Court of Appeals 15 February 2001.

Morgenstern & Bonuomo, P.L.L.C., by Barbara R. Morgenstern, for plaintiff-appellee.

Hatfield & Hatfield, by Kathryn K. Hatfield, for defendant-appellant.

TYSON, Judge.

Plaintiff and defendant were married on 26 January 1979. On 16 April 1994, the parties separated when an emergency domestic violence protective order removed defendant from the marital home.

On 18 April 1994, plaintiff brought this action, and sought *inter alia*, custody of the parties' two minor children, child support, alimony, domestic violence protective relief and attorney's fees. On 20 June 1994, defendant filed an answer and counterclaim, and sought *inter alia*, custody, restraining orders and an interim distribution. On 18 July 1994, defendant amended his answer and counterclaim, and added a prayer for divorce from bed and board. On 17 July 1995, a judgment of absolute divorce was entered. On 22 February 1996, an equitable distribution judgment was entered. The issues of permanent alimony and attorney's fees remained pending for adjudication.

On 14 December 1998, defendant filed a second motion to amend his answer, and sought to add the defense of plaintiff's alleged pre-divorce adultery. This motion was heard and denied at the pretrial conference on 17 May 1999.

From 17 through 20 May 1999, a jury trial was held on the issue of permanent alimony. The jury heard testimony regarding alleged verbal abuse, physical abuse, drug use, heavy drinking and accusations of adultery by both parties.

Defendant was self-employed, as the one hundred percent shareholder of GRS, Inc. ("GRS"). Evidence was introduced that defendant earned $107,755.00 in 1998, $65,500.00 in 1997, and $55,500.00 in 1996 as an employee of GRS. GRS purchased a $32,000.00 vehicle for defendant's use after the separation. GRS paid for defendant's health insurance, all expenses related to his vehicle, and some of his personal entertainment expenses. Defendant also purchased a $50,000.00 boat, and contributed $8,400.00 per year to his retirement account. Defendant's second wife was paid $1,646.00 per month by GRS, and drove a vehicle paid for by GRS.

Plaintiff was responsible primarily for homemaking and child rearing duties during the marriage. Plaintiff also assisted with the clerical and administrative duties at GRS during the marriage. From the parties' separation during April 1994 until May 1997, both minor children resided with plaintiff. In May 1997, the parties' older child began residing with defendant. Plaintiff testified that she was employed part-time, but was seeking full-time employment. Plaintiff also testified that she incurred approximately $15,000.00 in debt to pay for expenses after the separation, and that the debt on the marital home was in foreclosure.

Defendant orally moved for directed verdict at the conclusion of plaintiff's evidence. This motion was denied. The jury found that defendant had not committed indignities toward plaintiff, but had constructively abandoned her. The jury further found that plaintiff had not committed either indignities toward, or abandonment of defendant. Defendant orally moved for judgment notwithstanding the verdict. The motion was also denied.

The trial court entered an order and judgment on 30 August 1999, *nunc pro tunc* 20 May 1999, requiring defendant to pay child support arrearages, prospective child support, alimony and counsel fees. Defendant appeals.

Defendant appeals six issues to this Court: (1) whether the trial court abused its discretion in denying defendant's second motion to amend his answer; (2) whether the trial court erred by sustaining plaintiff's objection to a question posed to a defense witness; (3) whether the trial court improperly instructed the jury on the issue of constructive abandonment; (4) whether the trial court erred in denying defendant's motion for a directed verdict or judgment notwithstanding the verdict; (5) whether the trial court erred in awarding plaintiff $1,800.00 per month alimony; and (6) whether the trial court erred in ordering defendant to pay plaintiff's attorney's fees in the amount of $7,500.00.

1. Amendment to the Answer

[1] Defendant argues that the trial court erred by denying his motion to amend his answer and counterclaim to allege plaintiff's alleged pre-divorce adultery. Under the law applicable to this case, former N.C.G.S. § 50-16.6, plaintiff's pre-divorce adultery would be a bar to her alimony claim.

N.C.G.S. § 1A-1, Rule 15(a) (1999) provides, in pertinent part:

> **Amendments**. A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

In the present case, defendant's second amendment was allowable only by leave of court. A motion to amend the pleadings is addressed to the trial judge's sound discretion. *Coffey v. Coffey*, 94 N.C. App. 717, 722, 381 S.E.2d 467, 471, *disc. review allowed*, 325 N.C. 705, 388

S.E.2d 450 (1989), *disc. review improvidently allowed*, 326 N.C. 586, 391 S.E.2d 40 (1990). The trial judge's decision will not be disturbed on appeal absent showing an abuse of discretion. *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984).

"[O]utright refusal to grant the leave (to amend) without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion . . . ." *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 226 (1962). Factors to be considered by the trial judge in deciding whether to grant or deny a motion to amend include delay, bad faith, undue prejudice, and the futility of amendment. *See Patrick v. Williams*, 102 N.C. App. 355, 360, 402 S.E.2d 452, 455 (1991) (trial court did not err in denying defendants' motion to amend their answer where defendants filed the motion almost a full year after filing the answer and after both parties had conducted extensive discovery); *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119 (1978) (trial judge did not abuse his discretion in denying defendant's motion to amend after defendant waited 16 months to file the motion to amend); *House Healers Restorations, Inc. v. Ball*, 112 N.C. App. 783, 437 S.E.2d 383 (1993) (trial judge did not abuse discretion in denying plaintiff's motion to amend where plaintiffs waited one year and three months after filing their complaint).

In the present case, over four years had passed since the filing of the first amendment to defendant's answer. In denying the motion to amend, the trial judge found:

> Absent there being any direct evidence of adultery, I'm going to deny the motion. It's been too many years to do an information and opportunity evidentiary hearing from 1994.

The record in this case shows that: (1) defendant amended his answer once, (2) that over four years had passed since the original answer and first amendment was filed, and (3) that extensive discovery and numerous court proceedings had occurred in the interim. We hold that the trial judge did not abuse his discretion in denying defendant's second motion to amend his answer that was heard on the eve of trial.

2. Questioning of Mr. Gerringer

[2] Defendant next assigns as error the decision of the trial court to sustain plaintiff's objection to a question posed to a witness, Roger Gerringer. Defendant cites no authority to support his position that

sustaining this objection was error. Thus this assignment of error is deemed abandoned. *See* N.C.R. App. P. 28(b)(5) (assignments of error "in support of which no . . . authority [is] cited, will be taken as abandoned."). *See Also Metric Constructors, Inc. v. Industrial Risk Insurers*, 102 N.C. App. 59, 64, 401 S.E.2d 126, 129, *aff'd*, 330 N.C. 439, 410 S.E.2d 392 (1991) ("[b]ecause the appellee cites no authority for this argument, it is deemed abandoned.").

3. Jury Instruction on "Constructive Abandonment"

[3] Defendant argues that the trial court committed error when it charged the jury on the issue of constructive abandonment. After the jury was charged, defendant objected to the omission of language from the pattern jury instruction on the issue of burden of proof. The trial court promptly remedied any error. However, the record reveals defendant made no further objection to the trial court concerning the constructive abandonment instruction to the jury. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides:

> **Jury instructions; Findings and Conclusions of Judge.** A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

Defendant did not preserve this issue for appeal. *See State v. Howie*, 116 N.C. App. 609, 612, 448 S.E.2d 867, 869 (1994) (pursuant to N.C.R. App. P. 10(b)(2), failure to object to a jury charge normally precludes review of the issue). This assignment of error is overruled.

4. Denial of Defendant's Motions for Directed Verdict and Judgment Notwithstanding the Verdict

[4] Defendant's fourth assignment of error is the trial court's denial of defendant's Rule 50(a) and (b) motions for directed verdict and judgment notwithstanding the verdict. Defendant made an oral motion at the conclusion of plaintiff's evidence that the case be dismissed due to insufficient evidence to support a claim for permanent alimony. The trial court denied the motion.

Upon return of a jury verdict in favor of plaintiff, defendant made the following oral motion:

> Judge, I'd like to make a motion pursuant to Rule 50 and ask that—Rule 50 and ask for a judgment notwithstanding the verdict; that the verdict that the jury came back with finding that Mr. Walker abandoned Ms. Walker be set aside in that the jury also found that Mr. Walker did not commit indignities and that abandonment would be an indignity, and therefore it's—since he did not physically leave the place, he was put out by the sheriff, so it has to be constructive abandonment that the court found because he didn't leave. He was put out by her, so it has to be constructive abandonment. If the jury found that he did not commit indignities, that is, they found no to issue one, it would be inconsistent to find yes to issue two.

The purpose of a motion for a directed verdict pursuant to Rule 50 is to test the legal sufficiency of the evidence. *Allison v. Food Lion, Inc.*, 84 N.C. App. 251, 352 S.E.2d 256 (1987). "The motion for judgment notwithstanding the verdict is technically only a renewal of the motion for a directed verdict made at the close of all the evidence, and thus movant cannot assert grounds not included in the motion for directed verdict." *Love v. Pressley*, 34 N.C. App. 503, 511, 239 S.E.2d 574, 580 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978) (*citing House of Koscot Development Corp. v. American Line Cosmetics, Inc.*, 468 F. 2d 64 (5th Cir., 1972)).

Defendant contends that there was insufficient evidence to find that he abandoned plaintiff. Defendant first contends that he could not have actually abandoned plaintiff because he was forcibly removed from the marital home pursuant to a Chapter 50B emergency protective order. We agree. However, the fact that defendant did not voluntarily leave the residence does not preclude a verdict in favor of plaintiff on the issue of constructive abandonment.

In *Somerset v. Somerset*, 3 N.C. App. 473, 165 S.E.2d 33 (1969), the plaintiff-wife sought alimony and divorce from bed and board from defendant on the grounds of indignities and abandonment. The defendant-husband had previously been ordered to move out of the marital home by the court due to his behavior towards the plaintiff. The defendant in *Somerset* argued that because he left the home involuntarily, he did not abandon her. *Id.* at 475, 165 S.E.2d at 34. Rejecting this argument this Court held:

> We perceive no reason why plaintiff's seeking the aid of the Domestic Relations Court should detract from her cause of action. It was for the jury to determine whether defendant's con-

> duct prior to the order of the Domestic Relations Court would justify plaintiff in seeking the aid of the Courts and thereby constitute a constructive abandonment by him. Defendant cannot hide behind the order which his own improper conduct brought about.

Id. at 476, 165 S.E.2d at 35.

In the present case, defendant also argues that there was insufficient evidence to go to the jury on the issue of constructive abandonment.

> It is the well-established rule that in determining the sufficiency of evidence to withstand a defendant's motions for directed verdict and for judgment notwithstanding the verdict, all the evidence which supports the plaintiffs' claim must be taken as true and considered in the light most favorable to them, giving them the benefit of every reasonable inference which may legitimately be drawn therefrom, and resolving contradictions, conflicts and inconsistencies in their favor.

Love, 34 N.C. App. at 511, 239 S.E.2d at 580 (citation omitted). In this case, evidence was presented that defendant drank excessively, would not come home in the evenings after work, spent many weekends at the coast without his family, and was removed from the home due to his violent behavior towards plaintiff. Evidence was also presented that plaintiff cared for the home, did the yard work, and tended to the children. Applying the above test to these facts, the trial court did not err in denying defendant's motions for directed verdict and judgment notwithstanding the verdict based on the sufficiency of the evidence.

[5] Furthermore, in defendant's motion purportedly for judgment notwithstanding the verdict under Rule 50(b), defendant sought to have the verdict set aside as the findings of the jury were inconsistent. Where the jury's answers to the issues are allegedly contradictory, a motion for a new trial under Rule 59 is the appropriate motion. *See Palmer v. Jennette*, 227 N.C. 377, 379, 42 S.E.2d 345, 347 (1947) (if the jury verdict is inconsistent, then it is not the practice of the Court to enter a judgment notwithstanding the verdict "[w]here the answers to the issues are so contradictory as to invalidate the judgment, the practice of the Court is to grant a new trial . . . because of the evident confusion.").

In *Love*, defendant made a Rule 50 motion for judgment notwithstanding the verdict seeking "to have the verdict set aside as against the greater weight of the evidence, and to have the verdicts as to damages for conversion of personal property and for mental suffering set aside on the grounds that they were excessive." *Love*, 34 N.C. App. at 510, 239 S.E.2d at 579. This Court held that:

> The asserted grounds are proper grounds for a motion for a new trial under Rules 59(a)(7) and 59(a)(6) respectively; however, no such motion appears in the record. For this reason . . . these questions are not properly presented for review on appeal of the denial of defendant's motion for judgment notwithstanding the verdict.

Id.

In *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 174 S.E.2d 820 (1970), the trial court granted defendant's Rule 50 motion for judgment notwithstanding the verdict. This Court reversed the trial court and reinstated the jury verdict. *Id.* In so doing, this Court stated that a new trial may not be granted on appeal where defendant did not alternatively move for a new trial. *Id.* at 391-92, 174 S.E.2d at 824.

No motion by defendant for a new trial appears in the record. Therefore, the question of whether the verdict was inconsistent was not properly preserved for review on appeal. This assignment of error is overruled.

5. Alimony Award

[6] Defendant contends that the trial court erred by ordering defendant to pay alimony to the plaintiff in the amount of $1,800.00 per month. The amount of alimony awarded is determined by the trial judge's exercise of sound discretion. The award is not reviewable on appeal in the absence of an abuse of discretion. *Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 218 (1966). In determining the amount of alimony, the trial judge must follow the requirements of the applicable statutes. *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982). The statute which controls the determination of alimony in this case is former N.C.G.S. § 50-16.5.

> That statute provides that '[a]limony shall be in such amount as the circumstances render necessary, having due regard to the (1) estates, (2) earnings, (3) earning capacity, (4) condition, (5)

> accustomed standard of living of the parties, and (6) other facts of the particular case' . . . In other words, the statute requires a conclusion of law that 'circumstances render necessary' a designated amount of alimony. Our case law requires conclusions of law that the supporting spouse is able to pay the designated amount and that the amount is fair and just to all parties.

Quick, 305 N.C. at 453, 290 S.E.2d at 658-59. In awarding plaintiff $1,800.00 alimony per month, defendant concedes that the trial judge made sufficient conclusions of law to satisfy all of the required elements of N.C.G.S. § 50-16.5. However, defendant asserts that the conclusions of law are not supported by the actual findings of fact.

The trial judge made the following findings of fact: (1) defendant's net income is $3,598.00 per month, (2) defendant's reasonable expenses are $1,650.00 per month, (3) defendant owes $639.00 per month in child support, per the child support guidelines, (4) plaintiff's income is $1,040.00 per month, and (5) plaintiff's reasonable expenses are $2,320.00 per month. Defendant's total support obligation is $2,439.00 per month ($1,800.00 in alimony and $639.00 in child support). After paying his support obligation, defendant has funds of $1,159.00 available to "meet his own needs." The trial judge found that defendant's reasonable needs are $1,650.00 per month, resulting in a monthly shortfall of $491.00. Defendant contends that this finding was error. We disagree.

In *Ahern v. Ahern*, 63 N.C. App. 728, 306 S.E.2d 140 (1983), this Court upheld an award of $25,000.00 per year in alimony despite the plaintiff-husband's testimony that his salary was only $31,500.00 per year. In *Ahern*, plaintiff owned his own business and established his own salary. The evidence revealed that the parties owned a $175,000.00 marital home and marketable securities of $110,000.00. Plaintiff's company had retained earnings of $125,000.00 and his equity in his company was appraised at $412,000.00. Plaintiff's company provided him with an expensive automobile, and paid for all associated expenses. Plaintiff's company also paid for several expensive vacations. Based on this evidence, this Court held that plaintiff's real income was greater than the salary he received, and he therefore had means to pay the alimony awarded. *See also Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985) (it is proper for trial court to take regard not only of husband's salary, but also of the various financial benefits he enjoyed as a result of his ownership interest in his own company).

As in *Ahern* and *Patton*, the trial court properly considered defendant's financial benefits, such as health insurance, vehicle and reimbursed expenses received through his company when calculating the amount of alimony owed to plaintiff. The trial court did not abuse its discretion in awarding alimony in the amount of $1,800.00 per month to plaintiff. This assignment of error is overruled.

6. Attorney's Fees

[7] Defendant also contends that the trial court erred in awarding attorney's fees to plaintiff. Plaintiff presented an affidavit requesting an award of attorney's fees and expenses in an amount exceeding $11,000.00. The trial court awarded plaintiff partial attorney's fees in the amount of $7,500.00.

To justify an award of attorney's fees, it must be determined "that (1) the spouse is entitled to the relief demanded; (2) the spouse is a dependent spouse; and (3) the dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof." *Hudson v. Hudson*, 299 N.C. 465, 473, 263 S.E.2d 58, 67 (1980) (citation omitted). "Whether these requirements have been met is a question of law that is reviewable on appeal, and if counsel fees are properly awarded, the amount of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for an abuse of discretion." *Clark v. Clark*, 301 N.C. 123, 136, 271 S.E.2d 58, 67 (1980). In awarding partial attorney's fees to plaintiff, the trial judge made findings of fact and conclusions of law consistent with these requirements. Defendant argues that the trial court erred in determining that plaintiff did not possess sufficient means to defray the expense of the suit.

Defendant cites *Rickert v. Rickert*, 282 N.C. 373, 193 S.E.2d 79 (1972), in support of his contention that plaintiff was improperly awarded attorney fees. In *Rickert*, our Supreme Court reversed an award of $8,500.00 in attorney fees to the dependent spouse. *Rickert's* facts are quite different from the present case.

In *Rickert*, a consent judgment had been in effect by which plaintiff-wife was awarded alimony in the amount of $600 per month and the sum of $200 per month for child support at the time of the entry of the order allowing counsel fees.

> This same judgment awarded plaintiff the use of the homeplace together with all personal property located therein free of ad val-

orem property taxes. She was awarded a 1970 Pontiac convertible automobile and the privilege of enjoying the family membership in the Biltmore Country Club. *Most significantly, the record reveals that plaintiff owned stocks and bonds valued at $141,362.50 and had an annual income therefrom in the amount of $2,253.*

Id. at 382, 193 S.E.2d at 84 (emphasis supplied).

In the present case, the main asset plaintiff received at equitable distribution was the marital home, including a $1,200.00 per month mortgage payment. The debt on the marital home was the subject of a foreclosure proceeding at the time of the trial. *See Cobb v. Cobb*, 79 N.C. App. 592, 339 S.E.2d 825 (1986) (attorney fees awarded where the wife would be forced to sell her only remaining asset, the marital home). Plaintiff received a cash distributive award of $69,265.63 to equalize the division of marital property, which defendant paid in monthly payments. Unlike the defendant in *Rickert*, defendant was adjudged to be in child support arrears by more than $7,600.00. Unlike the defendant in *Rickert*, defendant had provided no alimony support to plaintiff prior to the award of counsel fees. Most significantly, unlike the plaintiff in *Rickert*, plaintiff did not have substantial stock and bond holdings at the time of trial. Plaintiff was found to have an imputed gross income of $1,040.00 per month. Defendant was found to have a gross income of $5,417.00 per month. He received ownership of the business, valued at $234,000.00.

There was sufficient evidence to support the trial court's findings that plaintiff was a dependant spouse, who was entitled to the relief sought, and who had insufficient means to defray the costs of the lawsuit. The trial court did not abuse its discretion in awarding plaintiff partial attorney's fees.

No error.

Judges MARTIN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. EDDIE GOLDEN, JR.

No. COA00-231

(Filed 15 May 2001)

1. **Homicide— felony murder—voluntary intoxication—defense to robbery**

The trial court committed prejudicial error in a first-degree murder case based on the felony murder rule by failing to instruct the jury on defendant's voluntary intoxication as a possible defense to the underlying felony of robbery, because: (1) substantial evidence was presented that defendant was intoxicated from consuming a number of beers, a half of a fifth of gin, and two rocks of crack cocaine in roughly four hours without eating anything; (2) a doctor testified that this amount of alcohol, combined with defendant's past alcohol abuse, drug use, and low I.Q. would impair defendant's ability to form the specific intent to rob; and (3) the jury found defendant not guilty of premeditated and deliberated murder, indicating defendant was incapable of forming specific intent, while determining that defendant was capable of the specific intent to rob.

2. **Homicide— first-degree murder—failure to instruct on second-degree murder**

The trial court committed harmless error in a first-degree murder case by failing to instruct the jury on second-degree murder when defendant presented evidence of voluntary intoxication but was acquitted of premeditated and deliberated murder and convicted of felony murder, because second-degree murder cannot be a lesser included offense of first-degree murder based on the felony murder rule alone.

Appeal by defendant from judgment entered 9 March 1999 by Judge Judson D. DeRamus, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 19 February 2001.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defenders Beth S. Posner and Constance E. Widenhouse, for the defendant-appellant.

EAGLES, Chief Judge.

Defendant Eddie Golden, Jr. was indicted, tried capitally and convicted of common law robbery and first-degree murder under the felony murder rule. Because the defendant was convicted of first-degree murder based on the felony murder rule, the trial court arrested judgment as to the common law robbery conviction. Defendant was sentenced to life in prison.

The evidence tended to show the following. The victim, James Golden, was defendant's uncle. Defendant's extended family, including the victim, lived near to each other in Pleasant Garden, N.C. Defendant's father was a heavy drinker and at a early age, defendant went to live with his grandmother. All of defendant's siblings have a history of abuse of either alcohol or drugs. Many of defendant's relatives have a history of alcohol problems. Defendant testified that he abuses alcohol and drugs, although he testified he has never gone to work drunk. Defendant dropped out of school after the eighth grade and has an IQ of 71 which is in the low range of borderline intelligence.

Prior to 29 April 1997, defendant had temporarily separated from his wife. He resided for a period of time with Joyce McSwain. On the morning of 29 April 1997, defendant awoke between 7:30 a.m. and 8:00 a.m. at Ms. McSwain's house. Defendant got dressed and got a beer. Ms. McSwain told defendant that she had company coming over and he would have to leave. While driving away from Ms. McSwain's home, defendant saw a man he had purchased crack cocaine from in the past. Defendant asked the man if he would "[l]et me get two twenties 'till Friday." Defendant testified that this meant that the man would give defendant two twenty dollar rocks of crack cocaine on credit until Friday. The man agreed and defendant drove on to the house of his cousin, James T. Golden, also known as "Nunnie." Defendant unlocked the door, entered the house and turned on the TV. Defendant called into work and was told that it was too wet for him to work that day. Defendant then searched Nunnie's refrigerator for beer. Hidden beside the refrigerator, defendant found ½ a fifth of gin and two 16 ounce cans of Budweiser beer. Defendant put one beer in the refrigerator and then returned to the TV room. He began to drink the gin and "chase" it with the other beer. Defendant had had three "drinks" when Nunnie and Herman Benton, another relative, entered the house. The three began talking about some needed repairs on Nunnie's truck and then walked outside to look at the truck. While outside, Mary Whitsett asked Herman Benton to go to

the store. Defendant asked Herman to bring back some Natural Light beer. Defendant went back into Nunnie's house twice for more "drinks" of gin. Defendant then spoke to and startled a man bringing Nunnie some materials. Next defendant went over to Mary Whitsett's house and asked another relative, Bonita if he could borrow $5. She refused and defendant said "[w]ell, that's all right. Well, I know where I can get it," turned around and walked out.

Defendant went back over to Nunnie's house and continued drinking. Defendant was not sure if Nunnie noticed that defendant was drinking his liquor. Defendant finished the beer he had earlier placed in the refrigerator. By that time, Herman Benton had returned from the store and defendant began drinking a beer that Mr. Benton had brought. A few minutes later, Nunnie left to do some business errands. After defendant heard Nunnie leave, he retrieved the crack cocaine and smoked one of the rocks he had acquired that morning. Defendant then called his sister about some problems she was having with her car. He told her to bring the car to him and he would take a look at it. He put down the phone and finished the fifth of gin.

About that time, defendant's sister arrived with her daughter and her daughter's boyfriend. Defendant and the boyfriend took the car out about a quarter of a mile to try and determine what its problems were. Defendant testified that he told his sister she needed a new modulator valve. He further testified that even if he was "passed out" he could tell if a car was "skipping." His sister then took him to the store and he purchased a 40 ounce Natural Light beer. Defendant called Ms. McSwain to find out if he could return to her house. She stated that she had not planned on him returning to her house, so defendant went back to his truck and smoked the other rock of crack cocaine.

Defendant then decided he needed some more money to buy more crack. Defendant walked over to victim's house because he saw the door open. Defendant asked if "he could borrow $20.00." Victim said he did not have any money. Defendant asked again and victim stated he did not have any money. Defendant asked again and at this point victim told defendant that if defendant did not leave, victim was going to shoot defendant. According to testimony of many of defendant's and victim's relatives, victim was reputed to keep guns in his house. Defendant then testified that the victim began to head toward victim's bed and defendant reached out and grabbed him. Defendant testified that he does not "really remember what happened" but that defendant held the victim on the bed until the victim quit moving.

Defendant then let go, took victim's wallet out of his pocket and about $30.00 in change from the desk drawer. The officers who secured the scene found no guns in the house, but found the victim's wallet in the wood stove. A second wallet was found in the crawl space of the victim's house. The defendant does not remember placing a wallet in either location.

Defendant then got into his truck and after refusing his cousin Mary Whitsett's request to check on his uncle, defendant drove towards Randleman. He went to Ms. McSwain's house and the two arranged to purchase a $20 rock of crack cocaine. They smoked the rock and then drank a beer. Later that evening, he turned his pager on and noticed that his nephew "Heavy" had called him. He drove to Heavy's house and was told that someone had killed his uncle. Defendant cried and then Heavy and his wife drove defendant home. The next day, defendant was contacted by Detectives Byrd and McBride of the Guilford County Sheriff's Department. Defendant did not confess at that time. On 2 May 1997 defendant spoke again with Detective McBride. Defendant admitted nothing. Defendant was questioned again in August of 1997 and admitted nothing. Defendant was arrested in October of 1997 for failing to appear for driving without a license in Randolph County. Defendant was questioned by Detectives McBride and Byrd about his uncle's death and at that time admitted his involvement. The officers wrote down what the defendant said, read it back to him and the defendant signed the written statement. Each time the defendant agreed to speak with the police, he voluntarily did so without his lawyer present.

During the charge conference defendant requested instructions on voluntary intoxication for the premeditated and deliberated portion of the first-degree murder charge. Defendant also requested a voluntary intoxication instruction for the felony murder portion of the charge. The trial court instructed on voluntary intoxication in the premeditation and deliberation portion but refused to give the instruction with the felony murder portion. The trial court held that as a matter of law the defendant had the specific intent to rob the victim when the defendant took the money. The defendant also requested a second-degree murder instruction based on the diminished capacity of defendant. The trial court refused. Because we believe that the defendant produced enough evidence of his intoxication for a reasonable juror to find that defendant did not have the capacity to form the specific intent to rob the victim, we hold that the trial court should have instructed the jury on voluntary intoxication.

Because we believe that on this record the defendant produced sufficient evidence for a reasonable juror to find that the defendant did not have the capacity to commit first-degree murder, we hold that the trial court should have instructed on the lesser included offense of second-degree murder. Accordingly we hold that defendant is entitled to a new trial.

I. Voluntary Intoxication

[1] Defendant argues that the voluntary intoxication instruction should have been given as a possible defense to the robbery charges. The common law robbery conviction was used as the underlying felony for the felony murder charge. The voluntary intoxication instruction was given as a possible defense to the premeditation and deliberation charge but not as a possible defense to the robbery charge.

Robbery with a dangerous weapon is a specific intent crime. Voluntary intoxication in and of itself is not a legal defense. *State v. Gerald*, 304 N.C. 511, 521, 284 S.E.2d 312, 318 (1981). It is only a viable defense if the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense. *Id.* Our Supreme Court, in the context of first-degree murder, explained the proper usage of a voluntary intoxication instruction.

> It is "well established that an instruction on voluntary intoxication is not required in every case in which a defendant claims that he killed a person after consuming intoxicating beverages or controlled substances." State v. Baldwin, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992). Evidence of mere intoxication is not enough to meet defendant's burden of production. State v. Mash, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). Before the trial court will be required to instruct on voluntary intoxication, defendant must produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried "defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon." State v. Strickland, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987) (quoting State v. Medley, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978)).

State v. Cheek, 351 N.C. 48, 74-75, 520 S.E.2d 545, 560 (1999). In *Cheek* the defendant testified that on the morning of the murder, defendant took a "hit of acid." *Id.* at 75, 520 S.E.2d at 561. Defendant next testified that when his friend "freaked out" it "killed [his] buzz." *Id.* The testimony further showed that defendant was able to drive a stolen cab for 51 miles, and was able to discuss, in detail, the events both before and after the murder. *Id.* Here, defendant consumed ½ a fifth of gin, several beers and 2 rocks of crack cocaine in four hours. Further, defendant cannot remember the details of the actual killing or what he did afterwards.

In addition defendant's expert, qualified in the fields of addiction medicine and addiction psychiatry, testified as to the psychological effects of the overuse of alcohol, both in the short and long terms. According to Dr. Roy Jacob Mathew's testimony, the long term effect of alcohol abuse can manifest itself in several ways, ranging from memory loss to dementia. Dr. Mathew testified further that the "disinhibiting effects" of cocaine and alcohol together are "something similar to releasing the breaks in the car and stepping on the gas pedal. Alcohol takes the inhibition off and the cocaine stimulates directly the primitive impulses." Dr. Mathew further testified that defendant has an I.Q. of 71 which is one point above retarded. This is relevant because "[l]ow I.Q. basically means malfunction of the neurons. It is the same neurons that inhibit the animal deeper down. So, people who have low I.Q. are usually more prone to the disinhibiting effects of alcohol and Valium, that group of drugs, and, in that sense, I thought the I.Q. of 71 was relevant." When asked if the defendant, under the conditions present that day, would have been able to form a specific intent to kill or a specific intent to rob, Dr. Mathew testified as follows:

> DR. MATHEW: At the time of the commission of the crime, he was intoxicated, and he had basically lost control, all inhibitory control, and in that frame of mind, he would be unable to weigh the consequences of his actions.
>
> QUESTION: And, finally, would these conditions you described taken together have impaired the defendant's ability to form a specific intent to kill or a specific intent to rob?
>
> DR. MATHEW: Again, at the time of commission of the crime, it would have interfered with his ability. It would be like a horse with blinders on. It would be unfocused pure fury. It would have interfered.

In *State v. Lancaster*, 137 N.C. App. 37, 44, 527 S.E.2d. 61, 67 (2000), the defendant argued that the "evidence of defendant's history of drug addiction, as testified to by his drug counselors and employer, along with evidence of defendant's mental condition on the night of the robbery, constituted sufficient evidence such that a jury instruction on diminished capacity was warranted." *Id.* On the *Lancaster* facts, the Court held that the testimony was not sufficient to warrant the instruction. In *Lancaster*, the expert was not able to testify as to the capacity of the defendant.

> Mr. Bancroft was certified as an expert in the fields of substance abuse addictions and cognizant behaviors. He testified that defendant could have been impaired at the time of the robbery, but that "the euphoric high would have probably been over." Additionally, Bancroft testified that such an impairment "could have had a negative impact" upon the defendant's ability to form a plan or course of conduct. In a *voir dire* examination of Bancroft, he stated that he could not testify about the defendant's ability to think, make judgments, and distinguish right from wrong at the time these acts occurred. Bancroft's testimony only referred to the effect cocaine *could* have had on the defendant, based on his experience of how cocaine affects people in general.

Id. at 44-45, 527 S.E.2d at 67. Here, Dr. Mathew testified directly that defendant's intoxication would impair defendant's ability to form the specific intent to kill or rob.

The State argues that when the defendant was cross-examined by the district attorney, defendant testified that he intended to keep the money when he took it, to wit:

> Question: You remember stealing all of that money from him, don't you?
>
> Answer: Yes, I do.
>
> Question: And you knew when you got that money that you weren't entitled to that money?
>
> Answer: Yes; I reckon I did.
>
> Question: And you knew it was wrong to take that money?
>
> Answer: I reckon I did.

Question: And you knew that when you left out of that house with that money that you weren't going to give it back to him, that you were taking it for yourself?

Answer: I reckon so.

The State argues that from this testimony, no reasonable juror could find that the defendant did not have the intent to permanently deprive the victim of his property. We disagree. The defense presented substantial evidence that defendant was intoxicated from consuming a number of beers, a ½ of a fifth of gin and two rocks of crack cocaine in roughly four hours, having eaten nothing. Dr. Mathew testified that this amount of alcohol, combined with his past alcohol abuse, drug use and low I.Q. would impair defendant's ability to form the specific intent to rob. In *State v. Robertson*, 138 N.C. App. 506, 531 S.E.2d 490 (2000), this Court held that "whether defendant was so intoxicated as to prevent his forming the specific intent to rob and assault [the victim] was a question of fact, to be determined by the jury." *Id.* at 508, 531 S.E.2d at 492; *State v. Caldwell*, 616 So.2d 713, 721 (La.Ct.App. 1993); *Bryant v. State*, 574 A.2d 29, 35 (Md.Ct.App. 1990); *State v. Givens*, 631 S.W.2d 720, 721 (Tenn.Crim.App. 1982).

In *State v. Kyle*, 333 N.C. 687, 699, 430 S.E.2d 412, 418 (1993), the defendant requested that the trial court instruct on the defense of voluntary intoxication. *Id.* Our Supreme Court concluded that it was error for the trial court to limit the voluntary intoxication instruction only to the murder charge. *Id.* Defendant was entitled, upon his request, to have the trial court instruct the jury on the law regarding voluntary intoxication as it applied to the offenses of burglary and kidnaping as well as premeditated and deliberated murder. *Id.* However, in *Kyle*, the error was harmless because the jury returned a verdict of first-degree murder on the basis of premeditation and deliberation and the felony murder rule. *Id.* "By finding defendant guilty of first-degree, premeditated and deliberated murder, the jury failed to find that defendant was intoxicated to a degree sufficient to negate his ability to form the specific intent to kill, thus rejecting defendant's voluntary intoxication defense." *Id.* at 699, 430 S.E.2d at 418-19. "The jury's first-degree murder conviction based on premeditation and deliberation indicates that it considered defendant capable of forming specific intent." *Id.* Here, unlike *Kyle*, the jury found the defendant not guilty of premeditated and deliberated murder. The same jury, without a voluntary intoxication instruction as to robbery, determined that the defendant was capable of the specific intent to

rob. There is no indication that the jury rejected the voluntary intoxication defense. Therefore, this error is prejudicial. This Court has held that if a "request be made for a special instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance." *State v. Lamb*, 321 N.C. 633, 644, 365 S.E.2d 600, 605-06 (1988); State v. Hooker, 243 N.C. 429, 431, 90 S.E.2d 690, 691 (1956).

II. Second-Degree Murder

[2] Defendant next assigns error to the trial court's refusal to instruct the jury on second-degree murder. Defendant asserts that there was conflicting evidence as to the defendant's ability to form the specific intent to premeditate and deliberate the murder. On this record, we agree.

Jury instructions of a lesser included offense are 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. Gary*, 348 N.C. 510, 524, 501 S.E.2d 57, 67 (1998). The test is whether there "is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). In *State v. Brooks*, 136 N.C. App. 124, 523 S.E.2d 704 (1999), this Court held that in a trial for first-degree murder where there was evidence warranting an instruction on voluntary intoxication, an instruction of second-degree murder is proper. *Brooks*, 136 N.C. App. at 131, 523 S.E.2d at 709. On this record, the trial court gave the voluntary intoxication instruction in conjunction with the premeditated and deliberated portion of the first-degree murder instruction. If the defendant presented sufficient evidence showing that "defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill," an instruction on second-degree murder is proper. *Cheek*, 351 N.C. at 74-75, 520 S.E.2d at 561.

On this record, however, the error is harmless. Defendant was acquitted of premeditated and deliberated murder. Murder in the first-degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17; *State v. Lamm*, 232 N.C. 402, 61 S.E.2d 188 (1950). Murder in the second-degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889 (1963). Malice is not an element of felony murder. Therefore, second-

degree murder cannot be a lesser included offense of first-degree murder based on felony murder alone. *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982), *overruled on other grounds, State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). There is no offense of felony murder in the second-degree in this jurisdiction. *State v. Davis*, 305 N.C. 400, 422, 290 S.E.2d 574, 590 (1982). Thus, when the defendant was acquitted of premeditated and deliberated murder, but convicted of felony murder, the jurors, following their instructions, found that all the elements of felony murder were present. The jurors determined that no malice or degree of malice was necessary to find the defendant guilty of felony murder. Thus, on this record, that the jury was not instructed as to second-degree murder is harmless error.

Because this case is remanded to the trial court for a new trial, we need not address the remaining issues. Accordingly, the judgment of the trial court is vacated and the case is remanded for a

New trial.

Judges HUNTER and CAMPBELL concur.

RICHARD KEVIN GLASPY v. SANDRA (CHAPMAN) GLASPY

No. COA00-335

(Filed 15 May 2001)

1. Divorce— equitable distribution—classification of property

The trial court erred by classifying as marital real property that was purchased by plaintiff before the marriage where plaintiff made the down payment and paid the closing costs, and the deed listed as grantees plaintiff and defendant, "unmarried." Property acquired by a party prior to marriage remains that party's separate property; the Court of Appeals has specifically refused to adopt a theory of transmutation. Correspondingly, any increases in equity and any debt incurred during the marriage were appropriately classified as marital property.

2. Divorce— equitable distribution—valuation of property

The trial court erred in an equitable distribution action by not specifically finding the net value of real property and a truck as of the date of separation.

3. Divorce— equitable distribution—property acquired before marriage—constructive trust

The trial court erred in an equitable distribution action, remanded on other grounds, by imposing a constructive trust on real property acquired before marriage; the facts supporting a constructive trust must be supported by clear and convincing evidence and so stated in the equitable distribution action. If the constructive trust cannot be properly supported on remand, the property can be transferred by court order pursuant to N.C.G.S. § 50-20(g) so long as defendant is given credit for the value of that part which is separate in character.

4. Divorce— equitable distribution—tax lien—marital debt

The trial court in an equitable distribution action properly found a tax lien to be a marital debt where plaintiff and defendant were the owners of a masonry business, they shared the proceeds from the business during the marriage, debt was incurred by the business in the form of a tax lien, and there was nothing presented in the brief that would make the debt separate.

5. Divorce— equitable distribution—distributional factors

The trial court did not err in an equitable distribution action by considering as distributional factors the source of funds for a down payment on real property, defendant's removal or disposal of plaintiff's separate property, and defendant's "looting" of the marital estate.

6. Divorce— equitable distribution—trial court errors—remand rather than new trial

A defendant in an equitable distribution action was not entitled to a new trial rather than a remand to correct errors. The Court of Appeals is hesitant to remand equitable distribution cases and even more hesitant to grant a new trial. New trials have been granted where the trial court errors are pervasive and egregious; there are no such errors in the case at bar.

Appeal by defendant from judgment entered 19 July 1999 by Judge Robert S. Cilley in Henderson County District Court. Heard in the Court of Appeals 25 January 2001.

Donald H. Barton for the Plaintiff-Appellee.

Jackson & Jackson by Phillip T. Jackson for the Defendant-Appellant.

THOMAS, Judge.

Defendant, Sandra (Chapman) Glaspy, appeals from an equitable distribution order, setting forth five assignments of error. For the reasons discussed herein, we affirm in part and reverse and remand in part.

Plaintiff, Richard Kevin Glaspy, and defendant lived together prior to marriage. During that time, in March of 1988, a 25.2 acre tract of land in Henderson County, which included two double-wide trailers, was purchased. The deed named as grantees, Richard Kevin Glaspy, "unmarried," and Sandra Dianne Chapman "unmarried." Plaintiff made the initial down payment of $15,000 toward the purchase price of $75,000 from his separate funds, with the remaining amount financed.

The parties married on 28 December 1989 and accumulated additional property prior to their separation on 3 April 1995. Plaintiff operated a masonry business during the marriage with defendant's name, at times, listed as part owner. The income from that enterprise, combined with proceeds from selling firewood, went toward household needs and $29,600 in mortgage payments on the Henderson County tract. The masonry business, however, eventually generated a federal tax lien of $29,000. Plaintiff made a $700 payment on it after the date of separation and by the date of trial $28,300 was still owed on the tax lien.

In a judgment entered 29 July 1999, the trial court found that defendant's income from working sporadically outside the home was primarily used for vehicle payments. The trial court further found that the Henderson County property was marital despite being purchased prior to marriage. The court imposed a constructive trust and ordered defendant to transfer her interest by limited warranty deed to plaintiff. The trial court also determined that the tax lien was marital debt.

The trial court included in its order a finding that defendant had "to the extent she was able to do so, looted the marital estate." Among other misdeeds affecting the economic status of the parties, she entered the home being used by plaintiff after the date of separation and, without permission, took items such as furniture, lawn maintenance supplies, a horse and its reins, a stove, sets of scaffolding, a cast iron Dutch oven, food and even a 650-pound live pig. The trial court did not find as a distributional factor but did find as a fact going to credibility that defendant received over $13,000 in child support from plaintiff after the date of separation only for a DNA test to later show the child was not plaintiff's. Considering all of the evidence, the court ordered an unequal division of marital property in favor of plaintiff. Defendant appeals.

[1] By defendant's first assignment of error, she argues the trial court erred in failing to find a net value as of the date of separation for some of the property classified as marital. We agree and remand to the trial court for further findings of fact related to this assignment of error. First, however, we note that in defendant's brief there is a question of whether the real property was correctly classified by the trial court as marital. We next address this concern.

At the time this equitable distribution action was filed, the court's three-step analysis was to: (1) identify the marital property and separate property; (2) calculate the net value of the marital property; and (3) distribute the marital property in an equitable manner. *O'Brien v. O'Brien*, 131 N.C. App. 411, 508 S.E.2d 300 (1998), *review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999). A separate category of divisible property was added effective 31 October 1998. This Court has held the trial court must make specific findings related to the net value of each item, determining the net market value as of the date the parties separated for each item distributed. *See* N.C. Gen. Stat. § 50-20(c) (1999); *McIver v. McIver*, 92 N.C. App. 116, 374 S.E.2d 144 (1988).

Plaintiff paid the $15,000 down payment and $1000 closing costs for the property *before* the marriage. The deed for the property named plaintiff and defendant, "unmarried," as grantees. Generally, property acquired by a party prior to marriage remains that party's separate property. *Ciobanu* v. *Ciobanu*, 104 N.C. App. 461, 409 S.E.2d 749 (1991). Further, in North Carolina, if unmarried persons acquire property in land, it is presumed they acquire it as tenants in common and not tenants by the entirety because the unity of person is lacking. *Grant v. Toatley*, 244 N.C. 463, 94 S.E.2d 305 (1956). In *McIver v.*

McIver, this Court held that property acquired during cohabitation is not marital property, even though the parties purchased the home with the intent that it become their marital residence. 92 N.C. App. 116, 374 S.E.2d 144 (1988). The *McIver* Court specifically stated that the "statute is unambiguous: property must be acquired *during marriage* to be classified as marital property, and only marital property is subject to distribution." *Id.* at 125, 374 S.E.2d at 150. (Emphasis original).

In the equitable distribution order at issue, however, the trial judge found that the Henderson County tract was entirely marital property and that defendant held legal title in a one-half interest in the land, or equity in the amount of $7500. Section 50-20 provides that " 'Marital property' means all real and personal property acquired by either spouse during the course of the marriage and before the date of separation. . . . 'Separate property' means all real and personal property acquired by a spouse before marriage. . . ." N.C. Gen. Stat. § 50-20(b)(1,2) (1999). In his order, the trial judge notes in the findings of fact that

> the said property is and should be deemed to have been acquired during the marriage by virtue of the purchase money mortgage payments, taxes, insurance and other improvements made on the property . . . during the marriage.
>
> 18. That equity demands that the property . . . be considered marital property. That said property . . . was occupied by the parties for only a short duration prior to the marriage. The Plaintiff made all the [various payments] and marital funds were expended upon this property during the marriage.
>
> 19. That the Defendant would be unjustly enriched if the Plaintiff and the marital estate were not compensated for the contributions in payments[.]
>
> 20. . . . [I]t was the parties' intention that this property be part of the marital estate[.]
>
> 21. That the parties held title to this property under circumstances which in equity obligated them to hold the title and ownership of said property for the benefit of the marital estate.
>
> 22. That this property . . . was the marital residence and was occupied during the entire time the parties lived together as the marital residence. . . .

24. That these facts establish the acquisition of an equitable interest in this property, which is marital, regardless of when it was acquired and how it was acquired, and this property is subject to disposition by this court as if acquired during the marriage.

25. That on these facts, a constructive trust should be imposed upon the property. . . .

[27]. That to Allow the Defendant to retain any benefits of the Marital Estate's contribution to the acquisition of this property, without declaring the property to be part of the marital estate, would be inequitable.

The trial judge, despite recognizing that the property was acquired before marriage, nevertheless classified it as marital. As precedent, however, *McIver* governs the instant case, regardless of the extensive and detailed findings of the trial court. Moreover, this Court has specifically refused to adopt a theory of transmutation, which would allow commingling separate property with marital property and classifying the improved real property as entirely marital because it evidences an intent to "transmute" or transform separate property into marital property. *Wade v. Wade*, 72 N.C. App. 372, 381, 325 S.E.2d 260, 269 (1985). We hold, therefore, that the interests acquired by plaintiff and defendant before they were married are the parties' respective separate property. Correspondingly, any increases in equity and any debt incurred during the marriage were appropriately classified as marital property.

[2] Further, the trial court failed to find the net value of the marital portion of the real property and the 1994 F-150 truck. Without a full determination of the net value as of the date of separation of distributed items, the trial court cannot be said to have divided the property equitably. *See* N.C. Gen. Stat. § 50-20(c); *Willis v. Willis*, 86 N.C. App. 546, 358 S.E.2d 571 (1987). A failure to divide the property equitably would clearly prejudice defendant. In the instant case, the trial court failed to specifically find the net value of the real property and the Ford F-150 truck as of the date of separation. Therefore, as to defendant's third assignment of error, we find the trial court committed error in classifying the real property as marital and in failing to make appropriate findings of fact as to the valuation of the real property and the F-150 truck. Upon remand, we leave it to the discretion of the trial court to determine whether additional evidence or arguments of counsel would be necessary.

[3] Although we remand for reclassification and valuation, we nonetheless respond to defendant's second assignment of error, where she argues the trial court erred by imposing a constructive trust for the benefit of the marital estate on the real property acquired prior to the marriage. We agree.

> A constructive trust is a
>
> relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.

Black's Law Dictionary 315 (6th ed. 1990). Thus, it operates against any party who wrongfully holds title to property. *Roper v. Edwards*, 323 N.C. 461, 373 S.E.2d 423 (1988). In *Upchurch v. Upchurch*, this Court held that in an equitable distribution action, a trial judge may impose a constructive trust on property if an equitable interest was acquired in it during the marriage and before the date of separation. (*Upchurch II*) 128 N.C. App. 461, 495 S.E.2d 738, *review denied*, 348 N.C. 291, 501 S.E.2d 925 (1998). The facts supporting a constructive trust must be supported by clear and convincing evidence and so stated in the equitable distribution order. *Id.* In the case at bar, there is nothing in the order that indicates whether the constructive trust was established by clear and convincing evidence. Consequently, here, as in *Upchurch I*, we remand for the trial judge to reconsider the evidence based on that standard of proof. *See Upchurch v. Upchurch*, 122 N.C. App. 172, 468 S.E.2d 61, *disc. rev. denied*, 343 N.C. 517, 472 S.E.2d 26(1996) (*Upchurch I*).

We note that even if the constructive trust cannot be properly supported, there is still an adequate remedy for plaintiff. The property can be transferred by court order pursuant to section 50-20(g) even if it is separate so long as defendant is given credit for the value of that part which is separate in character. *Wade v. Wade*, 72 N.C. App. 372, 382-83, 325 S.E.2d 260, 270, *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

[4] By defendant's third assignment of error, she argues the trial court erred by determining a federal tax lien to be a marital debt. We disagree.

A marital debt is one incurred during the marriage and before the date of separation, by either spouse or both spouses, for the joint

benefit of the parties. *Huguelet v. Huguelet*, 113 N.C. App. 533, 439 S.E.2d 208, *review denied*, 336 N.C. 605, 447 S.E.2d 392 (1994). The evidence presented at trial showed plaintiff and defendant were owners of a masonry business. During the marriage, the proceeds from the business were shared by plaintiff and defendant. Later, the debt was incurred by the business in the form of a tax lien. There was nothing presented in defendant's brief that would make the debt separate, since the business profits were for the joint benefit of plaintiff and defendant as husband and wife during the marriage. *See Riggs v. Riggs*, 124 N.C. App. 647, 652, 478 S.E.2d 211, 214 (1996), *review denied*, 345 N.C. 755, 485 S.E.2d 297 (1997). Based on our review of the record, the trial court properly found the tax lien to be marital debt. We, accordingly, reject this assignment of error.

[5] By defendant's fourth assignment of error, she argues the trial court used improper factors in distributing the property. We disagree. Because the trial court must reclassify and make findings as to the valuation of certain property, some findings as to the distributional factors may change. Nevertheless, many of these same issues may well resurface. Consequently, we consider this assignment of error.

Under N.C. Gen. Stat. § 50-20, the trial court is to distribute the property equally unless the court determines that an equal division is not equitable. *Daetwyler v. Daetwyler*, 130 N.C. App. 246, 502 S.E.2d 662 (1998), *affirmed*, 350 N.C. 375, 514 S.E.2d 89 (1999). The distributional factors are as follows:

(1) The income, property, and liabilities of each party at the time the division of property is to become effective;

(2) Any obligation for support arising out of a prior marriage;

(3) The duration of the marriage and the age and physical and mental health of both parties;

(4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;

(5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property;

(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and

contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;

(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;

(9) The liquid or nonliquid character of all marital property and divisible property;

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;

(11) The tax consequences to each party;

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution; and

(12) Any other factor which the court finds to be just and proper.

N.C. Gen. Stat. § 50-20(c). Defendant argues the trial court should not have considered as distributional factors: 1) the source of funds for the down payment on the real property; 2) the defendant's removal or disposal of plaintiff's separate property; and 3) the defendant's "looting" of the marital estate. The trial court's findings of fact included these three categories. We note that on appeal, findings of fact supported by competent evidence are binding. *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982).

First, defendant challenges the trial court's use of the source of funds rule. Under the source of funds rule, property is acquired through both marital and separate estates and each estate is entitled to an interest in the property in proportion to its contribution. *Davis v. Sineath*, 129 N.C. App. 353, 498 S.E.2d 629 (1998). Thus, premarital contributions are relevant in an equitable distribution proceeding. N.C. Gen. Stat. § 50-20(b)(1, 2). *See also McIver v. McIver*, 92 N.C. App. 116, 374 S.E.2d 144 (1988). Such contributions are considered a proper distributional factor. *Davis*, 129 N.C. App. at 359, 498 S.E.2d at 633. Accordingly, the trial court did not err in considering

plaintiff's separate funds in making a down payment on their real property.

Second, the trial court considered evidence of defendant removing or disposing of plaintiff's separate property as a non-statutory distributional factor. Non-statutory distributional factors fall under the catch-all factor of "[a]ny other factor which the court finds to be just and proper." N.C. Gen. Stat. § 50-20(c)(12). The record shows defendant entered the dwelling of the plaintiff after separation and removed approximately $4,000.00 worth of property, including all the furniture in the house with the exception of a bed, chair and kitchen table. Defendant then entered the home again at a later date and removed such items as food, guns, a leather coat, frozen meats and personal items of plaintiff. Defendant even "hauled off" their 1971 Chevy pickup truck and sold it for $400. Therefore, we find there was sufficient evidence for the trial court's findings of fact and the trial court properly considered the conduct of defendant as it related to the economic standing of the parties as a distributional factor under section 50-20(c)(12). Consequently, the trial court did not err in considering evidence of defendant removing or disposing of plaintiff's separate property.

Third, defendant argues the trial court erred in considering and finding that defendant "looted the marital estate." This was, as well, a non-statutory distributional factor pursuant to section 50-20(c)(12). She seized more than $7500 worth of goods out of the marital estate, including rental funds, $4000 worth of property and plaintiff's personal items. This, among other matters, led the trial court to the conclusion that "an equal distribution of the marital property would be grossly inequitable." The trial court's finding of this non-statutory distributional factor is, therefore, sufficiently supported by the evidence. The trial court did not err in considering this evidence and, accordingly, we reject defendant's fourth assignment of error.

[6] By her fifth assignment of error, defendant argues she is entitled to a new trial rather than a remand to correct any errors. We disagree.

This Court is hesitant to remand equitable distribution cases and even more hesitant to reverse an equitable distribution judgment and grant the appellant a new trial. *See Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986). In situations where errors committed by the trial court are so pervasive and egregious, this Court has occasionally granted a new trial to correct such errors. *See Hunt v. Hunt*,

112 N.C. App. 722, 436 S.E.2d 856 (1993); *Wilkins v. Wilkins*, 111 N.C. App. 541, 432 S.E.2d 891 (1993). In *Hunt*, the trial court made insufficient findings of fact, leading to unsupported conclusions of law and no record for the trial court to rely upon to determine equitable distribution. In *Wilkins*, the trial court erred as a matter of law in considering hypothetical tax consequences as a distributive factor and in considering an ancillary order for alimony *pendente lite* in formulating the equitable distribution award. In the case at bar, however, we find no such consequential errors and reject this assignment of error.

Accordingly, we remand the matter with the following instructions: the trial court may take additional evidence, if necessary, but in any event must make sufficient findings of fact as to the net value of the F-150 truck on the date of separation and the net value of the real estate on both the date of marriage and separation. The trial court must also reclassify the real property as property that is both partially marital and partially separate and vacate the order for a constructive trust. The trial court may modify its division of property as appropriate. Otherwise, the judgment of the trial court is affirmed.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges MARTIN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. JOEL MATIAS

No. COA00-245

(Filed 15 May 2001)

Drugs— felony possession of cocaine—sufficiency of evidence

The trial court did not err in denying defendant's motion to dismiss the charge of felony possession of cocaine, because: (1) sufficient incriminating circumstances exist to give rise to a reasonable inference that defendant knew of the presence of the plastic bag in the car containing marijuana and cocaine and had the power and intent to control its disposition or use even though defendant did not own or control the vehicle; (2) the plastic bag containing both marijuana and the tin foil in which the cocaine was hidden was found in the area of the car occupied

solely by defendant; and (3) defendant was in the vehicle for at least twenty minutes prior to the vehicle being observed by the officers.

Judge HUNTER dissenting.

Appeal by defendant from judgment entered 14 September 1999 by Judge James C. Spencer, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 19 February 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Clinton C. Hicks, for the State.

Craig T. Thompson, for defendant-appellant.

CAMPBELL, Judge.

On 14 September 1999, defendant was convicted of felony possession of cocaine. Defendant appeals.

The State's evidence at trial tended to show that on 28 March 1999, at approximately 9:03 p.m., Officer Jesse Qualls and Officer Sam Epps were on off-duty patrol in the parking lot of the Creekside Apartments in Burlington when they observed a blue Buick vehicle, traveling approximately 5 miles per hour, drive past their patrol car. After the vehicle passed the officer's location, Officer Qualls, seated on the passenger side of the patrol car with his window down, detected a moderate odor of what he believed to be marijuana. Officer Qualls testified that this odor had not been present prior to the passage of the vehicle. The vehicle had a Tennessee registration plate, and this out-of-state plate furthered the suspicions of Officer Qualls. After the vehicle was parked, Officer Epps positioned the patrol car to block the vehicle.

Officer Epps approached the vehicle to question the driver. The driver did not respond to the officer's questions. Defendant, seated in the right rear passenger seat, spoke up to assist the officer in communicating with the driver. There were also passengers seated in the front passenger seat and the left rear passenger seat. Officer Epps testified that, upon approaching the vehicle, he too smelled what he categorized as a slight odor of marijuana. He was unable to determine whether the smell was burnt marijuana or unburnt marijuana.

Upon questioning, the driver did not present a driver's license, and Officer Epps placed him in custody for driving without a license.

Officer Epps then ordered all of the occupants of the vehicle out of the car, and they were all patted down for weapons. Defendant exited from the right rear passenger seat of the vehicle. At no time did either officer notice any unusual or surreptitious movements by any of the occupants of the vehicle.

Officer Epps conducted a search of the vehicle incident to arrest, and discovered an unopened beer can in the front seat. Upon inquiry, Officer Epps determined that all of the occupants of the vehicle were under age. Officer Epps found a cigar located in the right front floorboard, a pack of rolling papers, and also noticed what appeared to be marijuana seeds in the carpet of the vehicle in various locations. Officer Epps also discovered a small plastic bag tucked in the crack between the back of the right rear passenger seat and the seat itself. In response to questioning by defense counsel, Officer Epps testified that the plastic bag "was found in the back right where the actual person would be sitting." This was the position in the vehicle occupied by defendant, and Officer Epps testified that in his opinion defendant was the only occupant of the vehicle who could have placed the plastic bag in the location where it was found. The plastic bag contained a green leafy vegetable material, identified as marijuana by Officer Epps, and a balled up piece of tin foil with a smaller plastic bag containing a small amount of a white powdery substance. As a result of this discovery, defendant was charged with possession of cocaine, while the other three passengers were charged with possession of marijuana. The white powdery substance was later identified as less than a tenth of a gram of cocaine. At the close of the State's evidence, defendant moved to dismiss the cocaine possession charge against him based on insufficiency of the evidence. This motion was denied.

Defendant testified that he was picked up from his house on the night of 28 March 1999 at around 8:40 p.m. by one of his friends and two other individuals. Defendant sat in the right rear passenger seat of a two-door Buick Regal driven by Jose Ramirez, whom defendant claimed not to know. The only individual that defendant knew, Miquel Salas, was seated in the front passenger seat. Defendant smelled cigar odor when he got in the vehicle, and smoked a cigar while he was in the car. Defendant testified that he had no drugs on him when he left his house, he did not know there were drugs in the car, and the drugs found by Officer Epps were not his.

At the close of all the evidence, defendant renewed his motion to dismiss, which was again denied by the trial court. Defendant was

convicted and received a suspended sentence. Defendant appeals from this judgment.

Defendant argues that the trial court erred in denying his motion to dismiss the charge against him as the evidence presented at trial was insufficient to support a conviction. We disagree.

"In ruling on a motion to dismiss, the issue before the trial court is whether substantial evidence of each element of the offense charged has been presented, and that defendant was the perpetrator of the offense." *State v. Carr*, 122 N.C. App. 369, 371-72, 470 S.E.2d 70, 72 (1996). Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994). "All the evidence, whether direct or circumstantial, must be considered by the trial court in the light most favorable to the State, with all reasonable inferences to be drawn from the evidence, being drawn in favor of the State." *Carr*, 122 N.C. App. at 372, 470 S.E.2d at 72.

Defendant contends that the State's evidence was insufficient to prove defendant's possession of cocaine. An accused has possession of a controlled substance within the meaning of the law when he has both the power and intent to control its disposition or use. *State v. Weems*, 31 N.C. App. 569, 230 S.E.2d 193 (1976). Necessarily, power and intent to control the controlled substance can exist only when one is aware of its presence. *Id.* at 571, 230 S.E.2d at 194. "Possession of controlled substances may be either actual or constructive." *Carr*, 122 N.C. App. at 372, 470 S.E.2d at 73. Because defendant did not physically possess the cocaine on his person when it was found in the car, the State relied on evidence of constructive possession. Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the controlled substance. *State v. Peek*, 89 N.C. App. 123, 365 S.E.2d 320 (1988). "Proving constructive possession where defendant had nonexclusive possession of the place in which the drugs were found requires a showing by the State of other incriminating circumstances which would permit an inference of constructive possession." *Carr*, 122 N.C. App. at 372, 470 S.E.2d at 73.

This Court has held that the mere presence of the defendant in an automobile containing drugs does not, without additional incriminating circumstances, constitute sufficient proof of drug possession. *State v. Weems*, 31 N.C. App. 569, 230 S.E.2d 193 (1976). Defendant

relies on *Weems* to support his argument that the evidence was insufficient to show defendant had possession of the cocaine. In *Weems*, the defendant was a passenger in the front seat of an automobile in which heroin was found. Some of the heroin was found hidden in the front passenger seat in close proximity to the defendant. There was no evidence the defendant had been in the car at any time other than during the short period which elapsed between the time the officers saw the defendant get in the car and the time they stopped and searched the car. As in the instant case, the defendant in *Weems* did not own or control the vehicle. However, the instant case is distinguishable from *Weems* in that sufficient incriminating circumstances exist to give rise to a reasonable inference that defendant knew of the presence of the cocaine in the car and had the power and intent to control its disposition or use.

In the instant case, the State provided substantial evidence that both Officer Qualls and Officer Epps detected an odor of marijuana emanating from the vehicle in which defendant was a passenger. Officer Qualls smelled marijuana when the vehicle passed the officer's patrol car, and Officer Epps smelled marijuana when he approached the vehicle and performed the search of the vehicle's interior. Also, Officer Epps noticed marijuana seeds scattered throughout the vehicle. This evidence is sufficient to give rise to a reasonable inference that someone in the vehicle was, or had quite recently been, smoking marijuana when the vehicle arrived at the apartment complex, and that the occupants of the vehicle had been passing marijuana around in the vehicle. This, in turn, gives rise to a reasonable inference that defendant was, in fact, aware of the presence of marijuana in the vehicle. The State also presented substantial evidence that the plastic bag, containing both marijuana and the tin foil in which the cocaine was hidden, was found in the area of the car occupied solely by defendant. Officer Epps testified that he found the plastic bag "in the back right where the actual person would be sitting." Defendant was the only occupant who exited the vehicle from the right rear passenger seat, and Officer Epps testified that in his opinion defendant was the only one in the vehicle who could have placed the plastic bag and tin foil containing the drugs in the location where it was discovered. Further, the evidence shows that defendant was in the vehicle for at least twenty minutes prior to the vehicle being observed by the officers. This evidence is sufficient to support an inference that defendant placed the plastic bag in the crack of the right rear passenger seat where it was found, and, therefore, had the power and intent to control its disposition or use. Viewing the evi-

dence in the light most favorable to the State, where sufficient evidence exists to support an inference that defendant knew of the presence of marijuana in the vehicle, and had the intent and capability to control the plastic bag in which it was found, we hold that there are sufficient incriminating circumstances to give rise to a reasonable inference that defendant had constructive possession of the cocaine found in the same plastic bag.

For the foregoing reasons, we find that defendant received a trial free from error.

No error.

Chief Judge EAGLES concurs.

Judge HUNTER dissents.

HUNTER, Judge, dissenting.

In its opinion, I believe the majority has lost sight of the fact that the defendant in this case was convicted of possession of *cocaine*. The majority agrees that *State v. Weems*, 31 N.C. App. 569, 230 S.E.2d 193 (1976) controls, requiring "additional incriminating circumstances" to be shown aside from "the mere presence of the defendant in an automobile containing drugs . . . ." However, the majority purports to have found the necessary "additional incriminating circumstances" in the fact that both arresting officers "detected an odor of marijuana emanating from the vehicle . . . ." Thus, the majority opines that:

> This evidence is sufficient to give rise to a reasonable inference *that someone in the vehicle* was, or had quite recently been, smoking marijuana when the vehicle arrived at the apartment complex, *that the occupants of the vehicle had been passing marijuana around in the vehicle, and that defendant was, in fact, aware of the presence of marijuana in the vehicle.*

(Emphasis added.) I cannot agree, and therefore I respectfully dissent.

Looking to the officers' testimonies of the arrest: Officer Qualls stated that he "detected a *moderate* odor of what he believed to be marijuana," as the vehicle drove past his patrol car. (Emphasis added.) Then Officer Epps stated he smelled a *slight* odor of mari-

juana as he approached the vehicle to inspect it. It is of specific importance that neither officer testified they detected the smell of marijuana emanating from either the person or clothing of any of the passengers of the vehicle—including defendant. More importantly, as cocaine powder has no smell, neither officer detected the smell of the hidden cocaine. Thus, the majority's opinion that the State was entitled to the inference that defendant must have "kn[own] of the presence of the cocaine in the car and had the power and intent to control its disposition or use," is not supported by the evidence.

With this in mind, I can agree that the "evidence is sufficient to give rise to a reasonable inference that *someone* . . . had quite recently been[] smoking marijuana" in the vehicle. However, I cannot and do not agree that that inference points to the defendant. In fact, I do not believe that inference can be attached to any passenger in the vehicle. Consequently, I do not believe or agree that there can be any inference drawn from the evidence to sustain a finding "that the occupants of the vehicle had been passing marijuana around in the vehicle."

If the majority is correct that *Weems* controls, and I believe that it does, then without a showing of some distinction between the present case and *Weems*, the present defendant's conviction should be reversed. In comparing the two fact patterns and giving the State the benefit of every reasonable inference, we see that as in *Weems*, (1) the present defendant neither owned nor controlled the vehicle; (2) drugs were in several areas of the vehicles (here, marijuana seeds found throughout); (3) the drugs seized were concealed from view; (4) the defendant was not found behaving strangely nor did he indicate in any way that he was aware of the drugs' presence in the vehicle; (5) no drugs or drug paraphernalia were found on defendant's person; and (6) there was no evidence of any circumstance indicating the defendant knew or could have known of the *cocaine's* presence—regardless of whether the smell of marijuana should have alerted him to the presence of *marijuana*.Consequently, the only thing distinguishing *Weems* from the case at bar is that in *Weems*, "the officers had personal knowledge [of] how long Defendant[-Weems] had been in the car because of personal observation." However, in the present case, defendant's evidence that he had only been in the car a few minutes before the officers stopped them, went uncontradicted by the State, making the possibility very great that someone other than defendant placed the hidden cocaine between the back seats *before defendant ever got into the vehicle*. Yet, the majority chooses to rely

on "Officer Epps['] testi[mony] that in his opinion defendant was the only occupant of the vehicle who could have placed the plastic bag in the location where it was found [between the back seats]." Moreover, although the majority states the marijuana and cocaine were "found in the area of the car occupied *solely* by defendant[, that d]efendant was the only occupant who exited the vehicle from the right rear passenger seat," the majority and the State both acknowledge that defendant was not the only passenger in the back seat of the car. (Emphasis added.) I am unconvinced, agreeing with defendant that this Court has an obligation to "consider Defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence."

Our courts have long held that the evidence to convict a defendant must be more than a scintilla, raising mere suspicion:

> "It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue. The general rule is that, if there be any evidence tending to prove the fact in issue, or *which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it*, the case should be submitted to the jury."

State v. Brooks, 136 N.C. App. 124, 129, 523 S.E.2d 704, 708 (1999), *disc. review denied*, 351 N.C. 475, 523 S.E.2d 704 (2000) (emphasis added) (quoting *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930)). Further, it has long been established law that:

> *Necessarily, power and intent to control the contraband material can exist only when one is aware of its presence. . . . "However, mere proximity to persons or locations with drugs about them is usually insufficient,* in the absence of other incriminating circumstances, to convict for possession." Annot., 91 A.L.R. 2d 810, 811 (1963). . . .

Weems, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (emphasis added).

Regarding the case at bar, in the record before this Court there is no evidence of any circumstance indicating that defendant knew of the presence of the cocaine hidden in the vehicle, and for which he was charged with possession. The fact that defendant exited the vehicle from the right rear passenger seat—the same side of the car in which the cocaine was found—raises no more of an inference defend-

ant knew of the presence of the cocaine than it raised as to the other occupant of the rear passenger seat who could also have hidden the drugs there without defendant's knowledge. Most importantly, even if defendant had smelled the marijuana before he got into the vehicle, without smelling the cocaine, he still cannot be held to know cocaine was present in the vehicle. Without awareness of the cocaine's presence, there can be no intent to control. *Id.* Thus, taken in the light most favorable to the State, I do not agree that the evidence is sufficient to show that defendant had the "power and intent to control" the cocaine found in the vehicle. *Id.* at 571, 230 S.E.2d at 194. To hold otherwise places innocent persons, riding in a vehicle where cocaine has been hidden, at risk of being charged and convicted of possession of cocaine when there is no evidence of their having knowledge of the cocaine.

Here, as in *Weems*, the evidence only raises a mere suspicion or possibility that defendant knew of the presence of the cocaine. Because I cannot distinguish the present case from this Court's holding in *Weems*, I am bound by the precedent of that case and vote to reverse the trial court's judgment.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, PLAINTIFF v. MSL ENTERPRISES, INC., D/B/A MSL ENTERPRISES, DEFENDANT/THIRD PARTY PLAINTIFF v. TH CONSTRUCTION, INC., D/B/A THC CONSTRUCTION, INC., F/K/A TRAFALGAR HOUSE CONSTRUCTION, INC.; AND KVAERNER CONSTRUCTION, INC., AS PURPORTED SUCCESSOR-IN-INTEREST TO TH CONSTRUCTION, INC., THIRD-PARTY DEFENDANTS/THIRD-PARTY PLAINTIFFS v. MICHAEL S. LOPEZ AND DENISE LOPEZ, THIRD-PARTY DEFENDANTS

No. COA00-403

(Filed 15 May 2001)

Arbitration and Mediation— arbitration—interpretation of term in award

The trial court erred on remand by interpreting an arbitration award to mean that plaintiff was not an unpaid vendor where the trial court was not presented with a motion to correct or modify the award. When asked to interpret an ambiguous term in an arbitration award, the trial court may determine the matter only where the ambiguity may be resolved from the record. Where, as here, the ambiguity is not resolved by the record, the only proper

method is to remand the matter to the arbitration panel for clarification of the disputed term. The arbitration panel in this case must limit its review to a clarification of the meaning of the term "vendors" in the award.

Appeal by third-party plaintiff from order entered 12 January 2000 by Judge Steve A. Balog in Superior Court, Orange County. Heard in the Court of Appeals 6 February 2001.

Brown & Bunch, PLLC, by Scott D. Zimmerman, for defendant/third-party plaintiff MSL Enterprises, Inc., d/b/a MSL Enterprises.

Moore & Van Allen, PLLC, by Christopher J. Blake, for third-party defendants TH Construction, Inc. and Kvaerner Construction, Inc.

WYNN, Judge.

The facts in this dispute are set forth in our decisions from earlier appeals. *See Trafalgar House Constr., Inc. v. MSL Enters., Inc.*, 128 N.C. App. 252, 494 S.E.2d 613 (1998); *General Accident Ins. Co. of Am. v. MSL Enters., Inc.*, No. COA98-130 (N.C. Court of Appeals Feb. 2, 1999). In the more recent appeal, this Court reversed the trial court's grant of summary judgment in favor of MSL. There, a unanimous panel of this Court found that the arbitration award itself did not conclusively determine whether General Accident was an unpaid "vendor"; accordingly, we held that the trial court impermissibly modified the arbitration award by appending the list of named "vendors," including General Accident. Thus, we reversed the order of summary judgment and remanded the matter with instructions that THC was not collaterally estopped from showing that neither the arbitration award nor the superior court's prior confirmation order resolved the "vendor" issue.

On remand, MSL sought indemnification from THC and Kvaerner for any judgment entered against MSL in favor of General Accident. In supporting its motion for summary judgment, THC argued that MSL failed to produce any credible evidence to show that General Accident was an unpaid "vendor" within the meaning of the arbitration award. *See* N.C. Gen. Stat. § 1A-1, Rule 56 (1999); *Weeks v. N.C. Dep't of Natural Resources and Community Dev.*, 97 N.C. App. 215, 224, 388 S.E.2d 228, 233 (1990). The trial court granted summary judgment in favor of THC; MSL appeals to us. General Accident is not a party to this appeal.

In this appeal we address two issues. First, we determine whether the trial court correctly determined as a matter of law that General Accident was not an unpaid "vendor" within the meaning of the arbitration award.

North Carolina's version of the Uniform Arbitration Act, codified in Article 45A, Chapter 1 of the General Statutes, allows for a judicial vacatur or modification of an award in specific instances. N.C. Gen. Stat. §§ 1-567.1 *et seq.* (1999). To vacate an award, the trial court must determine whether there exists one of the specific grounds for vacation of an award under N.C. Gen. Stat. § 1-567.13. *See Carolina Virginia Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 411, 255 S.E.2d 414, 418 (1979); *see also Sentry Bldg. Systems, Inc. v. Onslow County Bd. of Educ.*, 116 N.C. App. 442, 443, 448 S.E.2d 145, 146 (1994). In this case, neither party sought a vacatur of the arbitration award.

To modify or correct an arbitration award, the trial court must determine the existence of one of the exclusive grounds for modifying and correcting an award:

> (a) Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:
>
> (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
>
> (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
>
> (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

N.C. Gen. Stat. § 1-567.14 (1999); *see Sentry Bldg. Systems, Inc.*, 116 N.C. App. at 443-44, 448 S.E.2d at 146. When a court decides to modify or correct an award for one of the statutorily-enumerated reasons,

> it shall do so to effectuate "the intent" of the arbitrators. Clearly, the legislative intent is that only awards reflecting mathematical errors, errors relating to form, and errors resulting from

> arbitrators exceeding their authority shall be modified or corrected by the reviewing courts. *Courts are not to modify or correct matters affecting the merits which reflect the intent of the arbitrators.*

Gunter, 41 N.C. App. at 414, 255 S.E.2d at 419 (emphasis added).

In this case, the trial court was not presented with a motion to modify or correct the award under N.C. Gen. Stat. § 1-567.14. Indeed, the award was previously confirmed, and THC's motion to modify, correct or vacate the award was denied, which denial was affirmed by this Court. *See Trafalgar House Constr., Inc.*, 128 N.C. App. 252, 494 S.E.2d 613. Thus, in granting summary judgment to THC, the trial court necessarily engaged in an interpretation of the arbitration award and construed the term "vendors" to exclude General Accident. This interpretation went to the heart of the arbitrators' intent. As such, the review of the award and entry of summary judgment by the trial court in favor of THC was impermissible. *See id.*; *Sentry Bldg. Systems, Inc.*, 116 N.C. App. at 444-45, 448 S.E.2d at 146-47; *Gunter*, 41 N.C. App. At 414, 255 S.E.2d at 419; *General Accident Ins. Co. of Am.*, No. COA98-130 (N.C. Court of Appeals Feb. 2, 1999) ("By statute, the issue of whether General Accident is a 'vendor' could not have been decided by the superior court.")

Having thus determined that the trial court erred by awarding summary judgment on the issue of whether the arbiters' term "vendors" included General Accident, we now confront the fundamental first-impression issue presented: How may a party seek to clarify an ambiguous term in an arbitration award that has been confirmed under N.C. Gen. Stat. § 1-567.12, following the expiration of the statutorily-prescribed period for vacating the award (N.C. Gen. Stat. § 1-567.13), or modifying or correcting the award (N.C. Gen. Stat. § 1-567.14)?

In *In re Boyte*, 62 N.C. App. 682, 303 S.E.2d 418 (1983), this Court recognized the trial court's authority under the Uniform Arbitration Act to remand an arbitration award to the arbitration panel for clarification in certain circumstances. In that case, the contracting parties included an arbitration clause that provided for disputes to be resolved according to the Construction Industry Arbitration Rules of the American Arbitration Association. *Id.* at 683, 303 S.E.2d at 418. Following an arbitrated award of a disputed matter, the arbitrator declined a request by Boyte to clarify the award. *Id.* at 684, 303 S.E.2d at 419. Thereafter, Boyte filed alternative motions with the trial court

for confirmation, clarification and modification of the award. *Id.* at 684, 303 S.E.2d at 419. Finding that the award was in need of clarification and modification, the trial court remanded the award to the arbitrator for such clarification and modification. On appeal from the subsequent judgment confirming the award as modified by the arbitrator, this Court concluded that N.C. Gen. Stat. § 1-567.10 grants authority to the trial court to remand an ambiguous award for clarification. *Id.* at 688, 303 S.E.2d at 421; *accord Borough of Dunmore v. Dunmore Police Dep't*, 526 A.2d 1250 (Pa. Commw. 1987); *McIntosh v. State Farm Fire and Casualty Co.*, 625 A.2d 63 (Pa. Super. Ct. 1993); *H.E. Sargent, Inc. v. Town of Millinocket*, 478 A.2d 683 (Me. 1984); *Weiss v. Metalsalts Corp.*, 222 N.Y.S.2d 7 (N.Y. App. Div. 1961); *University of Alaska v. Modern Constr., Inc.*, 522 P.2d 1132 (Alaska 1974); *Federal Signal Corp. v. SLC Techs., Inc.*, 743 N.E.2d 1066 (Ill. App. Ct. 2001); *see also Gibbs v. Douglas M. Grimes, P.C.*, 491 N.E.2d 1004 (1986) (stating that, in exceptional circumstances, which usually involve vagueness, a reviewing court may remand an award to the arbitrator for clarification). However, in reaching that determination, this Court neither confronted nor addressed the question of whether a trial court may remand an arbitration award for clarification when (1) there are no motions before the court for the confirmation, clarification or modification of the award, and the time within which to file such motions has expired, and (2) the confirmation of the award has been upheld on appeal.

Indeed, we are unaware of any controlling authority from our courts addressing the re-submission of a confirmed arbitration award for clarification. Furthermore, our research has failed to reveal any decisions from other state courts addressing the matter. *See* N.C. Gen. Stat. § 1-567.20 (providing that North Carolina's version of the Uniform Arbitration Act "shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it").

Nonetheless, several federal court decisions shed some light on the issue presented in the case at bar. In *Tri-State Bus. Machs., Inc. v. Lanier Worldwide, Inc.*, 221 F.3d 1015 (7th. Cir. 2000), the court considered whether a United States District Court could construe the term "inventory" in an arbitration award that had been confirmed by the district court, which had accordingly entered judgment based upon the award in favor of Tri-State. The arbitration award ordered Lanier to repurchase from Tri-State any Lanier inventory that Tri-State then owned.

Tri-State subsequently filed a motion with the district court seeking a writ of execution and an order compelling Lanier to perform its obligations under the award. The district court, following resolution of Lanier's motion for reconsideration, ordered Lanier to pay Tri-State $346,265.20 for Lanier inventory and sales literature in Tri-State's possession. Later, Tri-State filed a second motion for a writ of execution in the amount of $346,265.20; the district court granted this motion also, and ordered the immediate issuance of the second writ of execution. Lanier appealed, challenging the writs of execution by arguing that the district court erred in including certain items—used equipment and sales literature—within the meaning of "inventory" as used in the arbitration award.

In discussing the issue, the Court of Appeals stated, " 'It is well-settled that the district court generally may not interpret an ambiguous arbitration award.' " *Tri-State*, 221 F.3d at 1017 (quoting *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 279 (7th Cir. 1992)). Instead, "[i]f an award is unclear, it should be sent back to the arbitrator for clarification." *Flender*, 953 F.2d at 279-80; *see Tri-State*, 221 F.3d at 1017. Nonetheless, the court recognized that because "remand for clarification is a disfavored procedure," *Flender*, 953 F.2d at 280, where possible, "a court should avoid remanding a decision to the arbitrator because of the interest in prompt and final arbitration." *Teamsters Local No. 579 v. B & M Transit, Inc.*, 882 F.2d 274, 278 (7th Cir. 1989); *see Tri-State*, 221 F.3d at 1017. On the basis of this principle, that court held that "a court is permitted to interpret and enforce an ambiguous award if the ambiguity can be resolved from the record." *Flender*, 953 F.2d at 280; *see Tri-State*, 221 F.3d at 1017. Where a party to the award argues for clarification of a term using general contract law principles, this is a concession that the disputed term requires interpretation. *Tri-State*, 221 F.3d at 1019. In sum, where such ambiguity is resolved by the record, the district court need not remand for clarification, but where the ambiguity is not resolved by the record, the district court may not interpret the term, and must remand the matter to the arbitration panel for clarification. *Id.* at 1019-20.

The *Tri-State* court concluded that, because the term "inventory" in the arbitration award was ambiguous, and such ambiguity was unresolved by the record with respect to the disputed sales literature, the district court had erred in not remanding the issue of the sales literature to the arbitration panel for clarification of the term "inventory." *Id.* The court therefore affirmed the writs of

execution ordered by the district court in part, but reversed and remanded those orders insofar as they ordered the repurchase of the Lanier sales literature, for further remand to the arbitration panel for clarification. *Id.*

In *Office & Prof'l Employees Int'l Union v. Brownsville Gen. Hosp.*, 186 F.3d 326 (3d Cir. 1999), the Third Circuit Court of Appeals considered an action by the Union seeking enforcement of an arbitration award or, in the alternative, a remand of the award to the arbitrator for clarification. The United States District Court for the Western District of Pennsylvania remanded the award to the arbitrator for clarification, and the Hospital appealed.

The question presented to the Court of Appeals was whether the doctrine of *functus officio* prevents a court from remanding a case for clarification of an arbitration award. "*Functus officio* (Latin for 'a task performed') is a shorthand term for a common-law doctrine barring an arbitrator from revisiting the merits of an award once it has issued." *Id.* at 331. The court noted that there are a number of exceptions to the doctrine, including where an ambiguity arises despite the award's seeming completeness. *Id.* (citing *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 332 (3d Cir. 1991)). Furthermore, latent ambiguities are equally worthy of remand as patent ones. *Id.* at 333. In the case of ambiguity in an award, any attempt by the court "to divine the intent of the arbitrator [is] a perilous endeavor." *Id.* Instead, a remand to the arbitrator avoids misinterpretation of the award by the court, and more likely results in the parties obtaining the award for which they bargained. *Id.* (citing *Colonial Penn*, 943 F.2d at 334).

Furthermore, in response to the Hospital's attempts to have the enforcement action barred by the statute of limitations, the court rejected the Hospital's contention that the thirty-day statute of limitations in Pennsylvania's Uniform Arbitration Act, 42 Pa. Cons. Stat. § 7315, pertaining to the judicial modification or correction of an award, applied to bar the action. 42 Pa. Cons. Stat. § 7315 is analogous to N.C. Gen. Stat. § 1-567.14, which imposes a ninety-day statute of limitations on making application to the court to modify or correct an award. The court in *Brownsville Gen. Hosp.* noted that 42 Pa. Cons. Stat. § 7315 "does not deal with a situation in which remand to the arbitrator is necessary in order for the award to be enforceable, which is what is sought here, but with judicial revision of an arbitral award." 186 F.3d at 337.

The grounds listed in 42 Pa. Cons. Stat. § 7315 for judicial revision, like N.C. Gen. Stat. § 1-567.14, "all concern defects in an award that would be apparent on the face of the award, thus justifying the short limitations period." *Id.* On the other hand, "where, as here, we are dealing with what [may be] characterized as a latent ambiguity that only became manifest some time after the award was entered, it would be inequitable . . . to apply the brief limitations period pertaining to requests for correction of mistakes evident on the face of an award." *Id.*

In *In re LLT Int'l Inc. v. MCI Telecomm. Corp.*, 69 F.Supp.2d 510 (S.D.N.Y. 1999), the United States District Court for the Southern District of New York noted that, despite the doctrine of *functus officio*, "courts have routinely provided for the remand of arbitration awards for clarification or completion." 69 F.Supp.2d at 515. "Remand of an ambiguous award is particularly appropriate, given that 'a court should not attempt to enforce an award that is ambiguous or indefinite.' " *Id.* (quoting *Americas Ins. Co. v. Seagull Compania Naviera, S.A.*, 774 F.2d 64, 67 (2d Cir. 1985)). However, where an arbitration award is remanded for clarification of an ambiguity, the arbitrator's review is limited to the specific matter remanded for clarification. *Id.* (citing *La Reunion Francaise v. Martin*, No 93 Civ. 7165, 1995 WL 338291 (S.D.N.Y. May 31, 1995)).

We find the reasoning in *Tri-State*, *Brownsville Gen. Hosp.* and *LLT Int'l* persuasive in resolving the issue before us. As in *Brownsville Gen. Hosp.*, we find it "both ironic and unfortunate that arbitration, a process designed to accomplish the peaceful and speedy resolution of [] disputes, should have devolved into the bitter impasse before us." 186 F.3d at 328. Where, as here, the trial court is asked to interpret an ambiguous term in an arbitration award, we conclude that such matters may be determined by the trial court only where the ambiguity may be resolved from the record. *See Tri-State.* However, as in the instant case, where the ambiguity is not resolved by the record, the only proper method by which to resolve the matter is to remand the matter to the arbitration panel for clarification of the disputed term. *See id.* On remand, the arbitration panel must limit its review to a clarification of the meaning of the term "vendors" in the award. *See LLT Int'l.*

Furthermore, our resolution of this issue comports with the original agreement of the parties to arbitrate all issues arising out of their contractual relationship. Each subcontract that the parties entered contained an arbitration provision reading as follows:

> All claims, disputes and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator or Arbitrators may be entered in any Court having jurisdiction thereof.

As the parties explicitly evidenced their intention to arbitrate all disputes arising out of their contractual relationship, we remand this dispute to the trial court with instructions for the further remand of the matter to the arbitration panel for clarification of the term "vendors" in the award in accordance with this opinion.

Accordingly, the trial court's order is,

Vacated and remanded.

Judges McGEE and BIGGS concur.

IN THE MATTER OF: NAME: JAKE SCHRIMPSHER, DATE OF BIRTH: 12-30-82

No. COA00-442

(Filed 15 May 2001)

1. Juveniles— probation—ability to pay restitution

The trial court did not err in a juvenile proceeding for misdemeanor breaking and entering and injury to real property when it determined a sixteen-year-old juvenile had the ability to pay restitution as a condition of probation, because: (1) the trial court ordered the juvenile to obtain a full-time job as authorized by N.C.G.S. § 95-25.5; (2) the trial court made provisions to adjust the weekly payments required by the order if the juvenile returned to school in the Fall; and (3) N.C.G.S. § 7A-649(2) (now repealed) placed the burden on the juvenile to show he did not have the means to make restitution, but the juvenile presented no evidence as to why he did not have or could not reasonably acquire the means to make restitution.

2. Juveniles— probation—restitution by only one when more than one causes damage error

The trial court erred by making insufficient findings to support the condition of probation that a juvenile alone had to make restitution of no more than $3,000.00 when the record reveals at least one other juvenile codefendant was adjudicated delinquent for breaking and entering and causing injury to real property, because: (1) when a juvenile participates with others in causing damage, all should be held jointly and severally responsible for payment of restitution; (2) the trial court failed to make findings in order to determine whether the participants acted jointly in causing harm; and (3) the trial court failed to make any findings of fact regarding the total amount of damage caused in the October 1998 break-in, or any findings as to how much damage is attributable to the juvenile.

3. Juveniles— probation—submission at any time to urinalysis, blood, or breathalyzer testing error

The trial court erred in a juvenile proceeding for misdemeanor breaking and entering and injury to real property when it required as a condition of probation for a juvenile to submit at any time to urinalysis, blood, or breathalyzer testing if requested by his court counselor or any law enforcement officer, because: (1) a trial judge is expressly forbidden from requiring an adult probationer to submit to a warrantless search by any officer; and (2) to allow such intrusion on a juvenile would be inconsistent with the desire to protect youthful offenders.

4. Juveniles— probation—warrantless searches in any home or vehicle defendant is present error

The trial court erred in a juvenile proceeding for misdemeanor breaking and entering and injury to real property when it required a juvenile as a condition of probation not to reside in a home or to be present in a vehicle unless the residents/owners have consented to a search of the home for controlled substances, because: (1) this condition places responsibility for the juvenile's success on probation in the hands of third parties; (2) the condition does not limit to whom the juvenile must submit for warrantless searches; and (3) the condition is overly burdensome to the juvenile and not specific enough to be enforced.

Appeal by respondent from order entered 29 July 1999 by Judge William M. Neely in Moore County District Court. Heard in the Court of Appeals 6 February 2001.

Michael F. Easley, Attorney General, by Kathleen M. Waylett, Assistant Attorney General, for the State.

Blevins & Costanza, P.A., by Rich Costanza, for respondent-appellant.

BIGGS, Judge.

Respondent-appellant appeals from a juvenile disposition order requiring that he comply with certain conditions of probation. The juvenile assigns error to three of the conditions of probation set forth in the trial court's order. For the reasons stated herein, we vacate in part, and remand this matter for disposition consistent with this opinion.

In October 1998, respondent-appellant (hereinafter "juvenile") and several others broke into the Longleaf Lodge in West End, North Carolina. The juvenile was charged with misdemeanor breaking and entering, injury to real property, and possession of one-half ounce or less of marijuana. On 11 May 1999, the juvenile appeared in Moore County District Court before the Honorable Michael Sabiston. Pursuant to a plea bargain, the juvenile pled guilty to misdemeanor breaking and entering and was adjudicated delinquent. Disposition of the case was continued until 20 July 1999. At the disposition hearing, the court counselor recommended that the juvenile not be placed on probation, but that he serve an active term of five days in detention. The juvenile objected to the court counselor's recommendation, and thereafter, Judge William H. Neely placed the juvenile under supervised probation for a period of twelve months, subject to several terms and conditions. Based on three of the conditions set forth in the order of disposition entered by the trial court, the juvenile now appeals.

I.

First we address the juvenile's contention that the trial court erred in requiring as a condition of probation that the juvenile pay up to $3,000.00 restitution. Condition (j) of the disposition order provides,

> [t]hat [juvenile] obtain a full time job until school starts and that he pay at least one hundred dollars a week under supervision for restitution to the insurance company for the damage caused up to a maximum of three thousand dollars. If he is enrolled as a full time student after school resumes, he must pay at least forty dollars a week on a weekly basis for restitution.

The purpose of a disposition in a juvenile action is to "design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." N.C.G.S. § 7A-646 (1995) (repealed 1 July 1999)[1]; *see* N.C.G.S. § 7B-900 (1999). N.C.G.S. § 7A-649(8) (1995) (repealed 1 July 1999) authorizes the trial court to place a juvenile on probation under the supervision of a court counselor and to specify conditions of probation reasonably related to the needs of the juvenile. *See also*, N.C.G.S. § 7B-2506(8) (1999). As a condition of probation, the trial court can require that the juvenile make specified financial restitution. N.C.G.S. § 7A-649(8)(e) (1995) (repealed 1 July 1999); *see also*, N.C.G.S. § 7B-2506(22) (1999). The court may order a juvenile to pay restitution, full or partial, to any person who has suffered loss or damage as a result of the offense committed. *See* N.C.G.S. § 7A-649(2) (1995) (repealed 1 July 1999); *see* also, N.C.G.S. § 7B-2506 (22) (1999).

However, the court does not have absolute discretion when ordering a juvenile to pay restitution. An order of restitution must be supported by the record, which demonstrates that the condition is fair and reasonable, related to the needs of the child, and calculated to promote the best interest of the juvenile in conformity with the avowed policy of the State in its relation with juveniles. *In re Berry*, 33 N.C. App. 356, 360, 235 S.E.2d 278, 280 (1977). Further, the court "shall not require the juvenile to make restitution if the juvenile satisfies the court that he does not have, and could not reasonably acquire, the means to make restitution." N.C.G.S. § 7A-649(2) (1995) (repealed 1 July 1999); *see also*, N.C.G.S. § 7B-2506(22) (1999).

[1] First, the juvenile asserts that the court erred by failing to make appropriate findings based on the evidence, regarding the juvenile's ability to pay restitution. We disagree.

N.C.G.S. § 95-25.5 (1999) authorizes the employment of youth sixteen (16) years of age and older. The court found as fact that the juvenile was sixteen (16) years old at the time of the disposi-

1. Chapter 7B, the Juvenile Code, became effective July 1, 1999 and is applicable to acts committed on or after that date.

tion. Thereafter, the court ordered the juvenile to obtain a full time job, thus enabling the juvenile to make restitution. *See* N.C.G.S. § 7A-649(8)(f) (1995) (authorizing trial judge to require that juvenile be regularly employed while not attending school); *see also*, N.C.G.S. § 7B-2504(7) (1999). Additionally, the trial court made provisions to adjust the weekly payments required by the order if the juvenile returned to school in the Fall.

N.C.G.S. § 7A-649(2) (1995) (repealed 1 July 1999) places the burden on the juvenile to "satisfy the court that he does not have, and could not reasonably acquire, the means to make restitution." *See* also, N.C.G.S. § 7B-2506(22) (1999). When given an opportunity to be heard through his attorney, the juvenile presented no evidence as to why he did not have or could not reasonably acquire the means to make restitution.

Accordingly, we find that the trial court made appropriate findings of fact based on evidence in the record that the juvenile had or could reasonably acquire the means to pay specified restitution within the twelve month probationary period.

[2] Next, the juvenile contends that the trial court erred in requiring that he alone make restitution when the record reveals that at least one other juvenile co-defendant was adjudicated delinquent for breaking and entering and causing injury to the Longleaf Lodge, and that none of the other co-defendants, whether juvenile or adult, were ordered to pay restitution. We agree.

"A trial judge is permitted to order restitution only to persons who have suffered 'loss or damages as a result of the offense committed by the juvenile'." *In the Matter of Hull*, 89 N.C. App. 138, 140, 365 S.E.2d 221, 222 (1988) (citation omitted); *see* G.S. § 7A-649(2); *see also*, N.C.G.S. § 7B-2506(22). However, as stated above, before ordering a juvenile to pay restitution, the trial court must make findings of fact, supported by the record, which demonstrate that the best interest of the juvenile will be promoted by enforcement of the condition. *In re Berry*, 33 N.C. App. 356, 360, 235 S.E.2d 278, 280-81 (1977). Further, when a juvenile participates with others in causing damage, all should be held jointly and severally responsible for payment of restitution. *In the Matter of Hull* 89 N.C. App. at 141, 365 S.E.2d at 223; *see* G.S. 7A-649(2); *see also*, G.S. 7B-2506(22).

In the present case, although the record indicates that others participated in the break-in, the trial court made no findings from which

we can determine whether the participants acted jointly in the causing harm. Moreover, the trial court failed to make any findings of fact regarding the total amount of damage caused in the October 1998 break-in, or any findings as to how much damage is attributable to the juvenile. Without such findings, it is impossible to determine whether the conditions are fair and reasonable, and in the best interest of the juvenile. The only evidence in the record pertaining to damages is a stipulation by both parties that the State did not seek restitution from any other participants since damages were paid by insurance, and a statement by the Assistant District Attorney at the disposition hearing that there was "substantial damage in the nature of $50,000."

We find that the trial court made insufficient findings to support the condition that the juvenile make restitution in the amount of no more than $3,000.00. Accordingly, the trial court on remand must determine whether the juvenile is responsible only for the damage that he individually caused, the amount of said damages, or whether there should be some form of joint and several liability.

II.

[3] In his next assignment of error, the juvenile contends that the trial court erred when it required the juvenile to "submit at any time to urinalysis, blood, or breathalyzer testing if requested by his court counselor or any law enforcement officer." The juvenile concedes that the trial court was authorized to require that he submit to warrantless searches requested by his court counselor; but asserts that requiring him to submit to testing by "any law enforcement officer," clearly exceeds the authority granted to the trial judge in setting terms and conditions for juvenile probation. We agree.

We find no specific statutory provision or case law that addresses this condition. However, looking to the purpose of the Juvenile Code and case law involving adults in similar circumstances we find guidance. The court is given broad discretion in structuring dispositional alternatives. *In re Groves*, 93 N.C. App. 34, 37, 376 S.E.2d 481, 483 (1989); *In re Lambert*, 46 N.C. App. 103, 104-05, 264 S.E.2d 379, 380 (1980). However, this discretion must be exercised within the stated goals and purposes of the Juvenile Code. One of the Code's stated purposes is to assure fair and equitable procedures and to protect the constitutional rights of juveniles. N.C.G.S. § 7A-516(2) (1995) (repealed 1 July 1999); *see also*, N.C.G.S. § 7B-100(1) (1999). In *State v. Norris*, 77 N.C. App. 525, 335 S.E.2d 764 (1985), the issue presented

was whether evidence obtained in a non-testimonial identification of a juvenile, conducted without a "court order" in violation of N.C.G.S. § 7A-596, should have been excluded. The State argued that since the statute concerning the court order requirement for non-testimonial identification procedure involving adults did not apply to in-custody defendants, by analogy, it did not apply to in-custody juvenile defendants. *Id.* at 528, 335 S.E.2d at 765-66. The court concluded that "[t]he fact that the showup was conducted on a juvenile does not lessen but should actually increase the burden upon the State to see that the child's rights were protected." *Id.* at 529, 335 S.E.2d at 766. In keeping with the duty and desire to protect the interest of juveniles, rights expressly granted to adults are also afforded to children. *Id.* The court stated "[t]o deny a juvenile the very rights expressly granted to adults would be to provide the juvenile a lower, not higher, level of protection." *Id.*

As a condition of probation, a trial judge can require an adult probationer to "submit at reasonable times to warrantless searches by a probation officer of his person and of his vehicle and premises while he is present, for purposes specified by the court and reasonably related to his probation supervision . . . ." N.C.G.S. § 15A-1343(b1)(7) (1999). However, an adult probationer may not be required to submit to warrantless searches conducted by *any officer*. *State v. Grant*, 40 N.C. App. 58, 60, 252 S.E.2d 98, 99 (1979) (emphasis added); *see also*, *State v. McCoy*, 45 N.C. App. 686, 263 S.E.2d 801, *disc. review denied*, 300 N.C. 377, 267 S.E.2d 681 (1980) (requiring a probationer to submit to warrantless testing of blood and urine for controlled substance by his probation officer as a condition of probation is lawful).

Applying the above-mentioned principles to the circumstances before us, since a trial judge is expressly forbidden from requiring an adult probationer to submit to a warrantless search by any law officer, to allow such intrusion on a juvenile would be inconsistent with our desire to protect youthful offenders. We find that the trial court erred in ordering the juvenile to submit to a search by any law enforcement officer without a warrant. Accordingly, that portion of the condition ordering the juvenile to submit to a search by "any law enforcement officer" shall be vacated.

III.

[4] The juvenile's final assignment of error regards condition (n) of the disposition order which requires that the juvenile "not reside in a home or be present in a vehicle unless the residents/owners have

consented to a search of the home for controlled substances." The juvenile argues that this condition is invalid because it places responsibility for the juvenile's success on probation in the hands of third parties and it does not limit to whom the juvenile must submit for warrantless searches. We agree.

In deciding conditions of probation, the trial court is granted wide discretion to "fashion alternatives which are in harmony with the individual child's needs." *In re McDonald*, 133 N.C. App. 433, 434, 515 S.E.2d 719, 721 (1999). However, as stated above, the record must show that the condition is fair and reasonable, related to the needs of the child, and calculated to promote the best interest of the juvenile in conformity with the avowed policy of the State in its relation with juveniles. *In re Berry*, 33 N.C. App. at 360, 235 S.E.2d at 280. Further, the condition must be sufficiently specific to be enforced. *Id.*

As a condition of probation, the court can order "[t]hat the juvenile not associate with specified persons or be in specified places." N.C.G.S. § 7A-649(8)(c) (1995) (repealed 1 July 1999); *see also*, N.C.G.S. § 7B-2506(11). Additionally, the juvenile concedes, and this Court has upheld conditions which require probationers to permit warrantless searches by a probation officer upon request and without the necessity for a search warrant. *See e.g., State v. McCoy*, 45 N.C. App. 686, 263 S.E.2d 801 (1980). The court may not however require that those with whom the juvenile associates submit to warrantless searches as a condition of the juvenile's probation.

It is unfair and unreasonable to place the success of the juvenile's probation on the acts of others. Conditions requiring probationers to submit to warrantless searches have been upheld because,

> persons conditionally released to society . . . may have a reduced expectation of privacy, thereby rendering certain intrusions by governmental authorities "reasonable" which otherwise would be invalid under traditional constitutional concepts, at least to the extent that such intrusions are necessitated by legitimate governmental demands. Thus, a probationer who has been granted the privilege of probation on condition that he submit at any time to a warrantless search may have no reasonable expectation of traditional Fourth Amendment protection.

Id. at 691, 263 S.E.2d at 805 (1980) (quoting *People v. Mason*, 5 Cal. 3d 759, 764-65, 488 P.2d 630, 633 (1971), *cert. denied*, 405 U.S. 1016, 31 L. Ed. 2d 478 (1972)). However, for persons not before the court, and

those who have committed no crime, "[t]he Fourth Amendment generally requires a warrant for a search or seizure . . . ." *State v. Craft*, 32 N.C. App. 357, 360, 232 S.E.2d 282, 285, *disc. review denied*, 292 N.C. 642, 235 S.E.2d 63 (1977).

Under the condition in question, if persons not under the control of the court refuse to waive their constitutional rights, the juvenile could be found in violation of the conditions of his probation, and could be subject to a more severe penalty. Despite his most earnest attempt to comply with the conditions of probation and show that he is capable of being a law-abiding citizen, the juvenile's probation could be revoked, through no fault of his own. This in no way promotes the objectives of accountability and responsibility that the Code seeks to instill in juveniles on probation. *See* N.C.G.S. § 7B-2500(2) (1999).

Further, this condition is overly burdensome to the juvenile and not specific enough to be enforced. Unlike adult probationers, juveniles have limited control over where they reside and with whom they must rely for transportation. *See Schall v. Martin*, 467 U.S. 253, 265, 81 L. E. 2d 207, 218 (1984). (By definition, children are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents.) The juvenile argues quite persuasively that under this condition of probation, the juvenile could be found in violation if his parents refused to consent to a warrantless search of their home, thus rendering the juvenile homeless. It can not be said that this result is in the best interest of the juvenile, nor is it consistent with the many stated purposes of the Juvenile Code. *See* N.C.G.S. § 7A-516 (1995) (repealed 1 July 1999); *see also* N.C.G.S. § 7B-100(1999); N.C.G.S. § 7B-1500 (1999).

For the reasons stated above, we vacate this condition of probation, finding it invalid and not in the best interest of the juvenile.

In summary, those conditions of probation discussed herein which are inconsistent with this opinion shall be vacated and the matter remanded to the trial court for the purpose of structuring a disposition consistent with this opinion.

Vacate in part and remand.

Judges WYNN and McGEE concur.

GENOAL BLALOCK, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, RESPONDENT

No. COA99-1559

(Filed 15 May 2001)

1. Nurses— registration of misconduct—final agency decision—whole record test—substantial evidence

The trial court did not err by affirming the final agency decision of the Department of Health and Human Services to substantiate and register findings of abuse and neglect of nursing home residents, and misappropriation of resident property on the part of petitioner certified nurse assistant, because the whole record test reveals substantial evidence that: (1) four of petitioner's coworkers testified that petitioner engaged in the misconduct at issue on several occasions; (2) petitioner made incriminating statements to her coworkers; and (3) a resident's physical condition improved shortly after petitioner was discharged.

2. Nurses— registration of misconduct—final agency decision—whole record test—not arbitrary and capricious

The trial court did not err by affirming respondent agency's final decision to substantiate and register findings of abuse and neglect of nursing home residents, and misappropriation of resident property on the part of petitioner nurse assistant even though petitioner contends the decision was arbitrary and capricious, because the whole record test reveals that: (1) there was no unfairness or lack of careful consideration on the agency's part when the agency made findings of fact indicating the existence of substantial evidence to support its decision; (2) the agency's final decision stated specific reasons why it did not adopt the administrative law judge's (ALJ) recommended decision as its final decision as required by N.C.G.S. § 150B-36(b); and (3) the agency's final decision provided substantial reasons, including the credibility of witnesses, for rejecting the ALJ's recommended decision.

3. Nurses— registration of misconduct—final agency decision—de novo review—not affected by errors of law

The trial court did not err by affirming respondent agency's final decision to substantiate and register findings of abuse and

neglect of nursing home residents, and misappropriation of resident property on the part of petitioner nurse assistant even though petitioner contends the decision was affected by errors of law, because a de novo review reveals that: (1) petitioner's argument that she was excluded from the agency's investigation, and thus denied due process, is unpersuasive when there is no indication that petitioner was denied adequate notice or a meaningful opportunity to be heard, the agency gave petitioner written notice of its intent to investigate the allegations against her as required by N.C.G.S. § 150B-23(f), the agency gave petitioner written notice of its findings, and petitioner exercised her right to a contested hearing under N.C.G.S. § 150B-25; and (2) although petitioner argues that the agency improperly shifted the burden of proof to petitioner to prove that the accusations lodged against her were untrue, no burden was placed on petitioner to prove a motive for witness fabrication when the agency listed numerous reasons for rejecting the administrative law judge's recommended decision, and the lack of any proof of motive concerning why a witness would fabricate the allegations against petitioner was merely one of the many factors the agency considered in determining witness credibility.

Appeal by petitioner from an order entered 12 July 1999 by Judge Russell G. Walker, Jr. in Stanly County Superior Court. Heard in the Court of Appeals 12 February 2001.

Doran and Shelby, P.A., by Michael Doran, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Jane L. Oliver, for respondent-appellee.

HUNTER, Judge.

Genoal Blalock ("petitioner") appeals from the trial court's order affirming the North Carolina Department of Health and Human Services, Division of Facility Services' ("the agency") decision to substantiate findings of abuse, neglect, and misappropriation of resident property on the part of petitioner. On appeal, petitioner contends that (1) the trial court erred in affirming the agency's final decision because it was not supported by substantial evidence and was arbitrary and capricious, and (2) the agency's decision was affected by errors of law. As to both contentions, we disagree. Accordingly, we affirm the decision of the trial court.

Petitioner worked as a certified nurse assistant ("CNA") at Autumn Care Nursing Home ("the facility") in Salisbury, North Carolina from July 1991 until September 1996. In late August 1996, the facility received a report from another CNA that petitioner had physically and verbally abused a resident during July 1996. Based on this report, the facility reported the allegation of abuse to the agency and then began an internal investigation. From its internal investigation, the facility concluded that petitioner had physically and verbally abused the resident as had been alleged. Consequently, the facility's Assistant Director of Nursing terminated petitioner's employment on 5 September 1996. Petitioner did not appeal her termination.

By letter dated 28 October 1996, the agency notified petitioner that it would conduct its own investigation to determine whether or not her alleged conduct should result in findings of patient abuse on her part and be placed on the Nurse Aide Registry and the Health Care Personnel Registry ("Registries"). The agency's letter informed petitioner that an investigator would contact her to obtain her account of the allegation. Additionally, the letter notified petitioner of her appeals rights and her opportunity to use informal procedures to resolve any dispute she had with the agency's action. Subsequently, Wayne Denning ("Denning"), an abuse investigator, was assigned to petitioner's case. During the course of his investigation, Denning interviewed petitioner by telephone and, petitioner denied any wrongdoing. Additionally, Denning interviewed other facility employees and reviewed the facility's personnel and medical records. Further, Denning interviewed a CNA who was a former facility employee; this individual contacted Denning to provide additional information pertaining to his investigation.

Upon completing his investigation, Denning substantiated twenty-two allegations involving abuse, neglect, or misappropriation of resident property on the part of petitioner. By letter dated 21 August 1997, Denning informed petitioner of the nature of each substantiated allegation and gave her a summary of the evidence. This letter informed petitioner of the agency's intent to place its findings on the Registries and informed her of her rights of appeal.

Subsequently, petitioner filed for a contested case hearing in the Office of Administrative Hearings on 24 September 1997, challenging the agency's decision to place its findings on the Registries. The hearing was held on 4 and 5 December 1997 before Administrative Law Judge ("ALJ") Beecher R. Gray. At the hearing, the agency decided to

limit its prosecution to only six incidents involving five residents. On 12 February 1998, ALJ Gray issued a Recommended Decision that the agency's decision be dismissed as not supported by the evidence.

Thereafter, the agency filed exceptions and objections to the Recommended Decision on 23 April 1998. After its review, the agency issued a Final Agency Decision on 7 May 1998, rejecting the ALJ's Recommended Decision and upholding the agency's initial decision to substantiate findings of abuse, neglect, and misappropriation of resident property on the part of petitioner.

Petitioner filed for judicial review of the Final Agency Decision in Stanly County Superior Court on 12 June 1998. A hearing was held at the 7 June 1999 session of superior court, the Honorable Russell G. Walker, Jr. presiding. By order filed on 12 July 1999, Judge Walker affirmed the Final Agency Decision. Petitioner appeals.

[1] In her first assignment of error, petitioner maintains that the trial court erred in affirming the agency's final decision because it was not supported by substantial evidence. We disagree.

Where there is an appeal to this Court from a trial court's order affirming an agency's final decision, we must "(1) determine the appropriate standard of review and, when applicable, (2) determine whether the trial court properly applied this standard." *In re Appeal by McCrary*, 112 N.C. App. 161, 166, 435 S.E.2d 359, 363 (1993). "[T]he standard of review which should be employed in reviewing an agency decision depends upon the nature of the alleged error." *Id.* Where petitioner alleges that the agency's decision was not supported by substantial evidence, or was arbitrary and capricious, the whole record test is applied. *See ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). The trial court's order affirming the agency's decision indicates that the whole record test was applied. Therefore, we must determine whether the test was applied properly.

Under the whole record test, the entire record is examined to determine whether the agency decision is supported by substantial evidence. *See id.* " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982) (quoting *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977)). If substantial evidence supports an agency's decision after the entire

record has been reviewed, the decision must be upheld. *See In re Appeal by McCrary*, 112 N.C. App. 161, 168, 435 S.E.2d 359, 365.

Significantly, the whole record test requires the court to consider both evidence justifying the agency's decision and contrary evidence that could lead to a different result. *Id.* at 167-68, 435 S.E.2d. at 364. However, the test "does not allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo* . . . ." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). We further recognize that witness credibility and the probative value of testimony are determined by the administrative agency, which may accept or reject any or all of a witness's testimony. *See Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980).

Primarily, petitioner contends that the eyewitness testimony the agency relied upon in reaching its decision is inadequate to support the conclusion that she committed the alleged misconduct. To support her contention, petitioner asserts that testimony by the agency's witnesses was inconsistent, the agency's witnesses were biased and delayed reporting the alleged misconduct, and there was no evidence of significant physical injury to residents. However, a review of the entire record shows substantial evidence that supports the agency's decision: (1) credible eyewitness testimony from four of petitioner's coworkers that petitioner engaged in the misconduct at issue on several occasions; (2) testimony regarding incriminating statements that petitioner made to her coworkers, and; (3) evidence that a resident's physical condition improved shortly after petitioner was discharged. Based upon our review of the entire record, we conclude that the agency's final decision is supported by substantial evidence. Therefore, petitioner's first assignment of error is rejected.

[2] Petitioner's second assignment of error is that the trial court erred in affirming the agency's final decision because it was arbitrary and capricious. Again, we disagree.

In addition to her contention that the decision was not supported by the evidence, petitioner asserts as additional evidence of the agency's arbitrariness: (1) the agency's reliance on petitioner's credibility in a case in 1996 when she reported a coworker's act of abuse and its later rejection of petitioner's credibility in reference to her

denials of misconduct in this case, (2) the manner in which the agency conducted its investigation, and (3) the agency's disregard of petitioner's character witnesses. We begin by noting that the

> "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are . . . "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment'. . . ."

Lewis v. N.C. Dept. of Human Resources, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (quoting *Comr. of Insurance*, 300 N.C. 381, 420, 269 S.E.2d 547, 573). Moreover, "the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law." *Lewis*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714.

Our review of the whole record reveals no unfairness or lack of careful consideration on the agency's part. The agency made findings of fact indicating the existence of substantial evidence to support its decision. Within those findings, the agency considered petitioner's credibility, petitioner's character witnesses, and Denning's investigation. Furthermore, we note that the agency met the requirements for rejecting the ALJ's recommendation. As required by N.C. Gen. Stat. § 150B-36(b) (1999), the agency's final decision stated specific reasons why it did not adopt the ALJ's Recommended Decision as its final decision. Also, the agency's final decision provided substantial reasons, including the credibility of witnesses, for rejecting the ALJ's Recommended Decision. We reiterate that although an ALJ makes a Recommended Decision, it is for the agency to decide the credibility of witnesses and conflicts in the evidence. *See Oates v. N.C. Dept. of Correction*, 114 N.C. App. 597, 601, 442 S.E.2d 542, 545 (1994). In sum, the record does not demonstrate that the agency acted in less than good faith. Thus, the entire record before us indicates that the agency's final decision was neither arbitrary nor capricious. Petitioner's second assignment of error, therefore, is overruled.

[3] Finally, petitioner's third assignment of error is that the agency's decision was affected by errors of law. Yet again, we disagree.

Where a petitioner argues that the agency's final decision was based on an error of law, the trial court must conduct a *de novo* review. *See Eury v. N.C. Employment Security Comm.*, 115 N.C. App. 590, 597, 446 S.E.2d 383, 387 (1994). *De novo* review requires a

court to consider the question anew, as if the agency has not addressed it. *See id.* Therefore, "where the trial court should have utilized *de novo* review, this Court will directly review the agency's decision under a *de novo* review standard." *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (emphasis in original). At bar, petitioner's argument can be distilled into two parts.

The first part of petitioner's argument is that the agency "excluded petitioner from any meaningful participation or input in the investigative process" and thus violated her state and federal constitutional rights to due process. Specifically, petitioner claims the investigation was "inadequate" and she was denied a meaningful opportunity to be heard because the agency's investigator only spoke with her in a single twenty-minute telephone call during his entire investigation.

"In North Carolina, due process requires adequate notice and an opportunity to be heard." *Frizzelle v. Harnett County*, 106 N.C. App. 234, 239, 416 S.E.2d 421, 423 (1992). The opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66 (1965). Here, petitioner's argument that she was excluded from the agency's investigation, thus denied due process, is unpersuasive. Viewing the record *de novo*, we find no indication that petitioner was denied adequate notice or a meaningful opportunity to be heard. As required by N.C. Gen. Stat. § 150B-23(f) (1999), the agency gave petitioner written notice in October 1996 of its intent to investigate the allegations against her. Subsequently, petitioner had an interview with Denning and remained free to contact him during the remainder of his investigation. After concluding its investigation, the agency gave petitioner written notice in August 1997 of its findings. Both letters to petitioner described her rights to appeal. Further, petitioner exercised her right to a contested case hearing. Pursuant to N.C. Gen. Stat. § 150B-25 (1999), the hearing afforded petitioner the opportunity to present arguments and evidence, and to cross-examine her accusers before the agency made its final decision.

In support of her argument, petitioner cites *Bishop v. N.C. Dept. of Human Resources*, 100 N.C. App. 175, 394 S.E.2d 702 (1990). However, *Bishop* is distinguishable from the present case. In *Bishop*, the petitioner was a state employee whose due process rights were violated when her employer made a final decision to discharge her *without first* giving her an opportunity to be heard. *See id.* In con-

trast, petitioner in the present case was given notice and an opportunity to be heard *before* the agency made its final decision.

The second part of petitioner's argument is that the agency improperly shifted "the burden of proof to petitioner to prove that the accusations lodged against her were untrue." Petitioner points out that, among its reasons for rejecting the ALJ's Recommended Decision, the agency noted four times that "there was no motive presented as to why [the witness] would fabricate [the allegations against petitioner]." Petitioner asserts that these four comments indicate that the burden of proof was improperly shifted to her. We find that this fabrication issue was not mentioned within the "Findings of Fact" or "Conclusions of Law" sections of the agency's final decision. Instead, the four comments were mentioned in the "Memorandum" section of the agency's final decision. Additionally, in that portion of its decision, the agency listed numerous other reasons for rejecting the ALJ's Recommended Decision. Based on those reasons, it is clear that no burden was placed upon petitioner to prove a motive for fabrication. Rather, the lack of any proof of motive was merely one of many factors the agency considered in determining witness credibility.

The only case petitioner cites on this issue is *Dillingham v. N.C. Dep't of Human Res.*, 132 N.C. App. 704, 513 S.E.2d 823 (1999). Petitioner quotes this Court's holding in *Dillingham* as follows: "To the extent respondent agency's final decision was based upon petitioner's failure to present sufficient *written* evidence to support his claim that the asset transfers occurred for a purpose exclusive of eligibility for Medicaid benefits, the decision was affected by an error of law." *Id.* at 711, 513 S.E.2d at 828 (emphasis in original). No improper shift in the burden of proof was at issue in *Dillingham*. Thus, the quotation, taken out of context, is irrelevant to the case *sub judice*. Our *de novo* review leads us to conclude that the agency's final decision was not affected by errors of law.

Thus, we hold that the agency's final decision is supported by substantial evidence, was neither arbitrary nor capricious, and was not affected by errors of law.

Affirmed.

Chief Judge EAGLES and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. LEE ISAAC BLUE

No. COA00-235

(Filed 15 May 2001)

Homicide— manslaughter—defense of home—porch as part of home

There was no error in a prosecution for voluntary manslaughter in the court's instruction on the curtilage of defendant's home where defendant contended that the court erred by failing to instruct the jury that the front porch was part of defendant's home and thus included in the right to self-defense under N.C.G.S. § 14-51.1. The jury was instructed that defendant's actions are excused if death occurred while he was preventing forcible entry and, when the jury asked whether the front porch was part of the home or inside the home, the court replied that a front porch "is a part of the home" and "is not inside the home." This instruction is sufficient read in context.

Judge HUNTER dissenting.

Appeal by defendant from judgment entered 16 September 1999 by Judge B. Craig Ellis in Forsyth County Superior Court. Heard in the Court of Appeals 19 February 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General James P. Longest, Jr., for the State.

Donald K. Tisdale, Sr., for defendant-appellant.

EAGLES, Chief Judge.

Defendant appeals from judgment entered 16 September 1999 based on the jury's verdict finding him guilty of voluntary manslaughter. Defendant contends that the trial court erred in its charge to the jury concerning the curtilage of defendant's home. We disagree.

The evidence tended to show the following: On 10 July 1998 James Hilton came to defendant's home in search of Deirdre Schuler, a prostitute. Ms. Schuler lived next door to defendant. Hilton, who seemed intoxicated, began yelling Schuler's name, after which a fight ensued between Hilton and defendant on defendant's porch. During the tussle, defendant pulled out a knife. The two fell over the porch bannister onto the grass. At some point Hilton was fatally stabbed.

Defendant testified that a few days earlier, Hilton had told defendant that Hilton was going to "blow [defendant's] head off." Ms. Schuler testified that defendant started the fight by hitting Hilton on the head. Another witness, Mr. Spencer Lee Wilson, testified that the fight started when Hilton attempted to forcibly enter defendant's home and defendant struck him. Dr. Patrick Lantz, the forensic pathologist who performed the autopsy, testified that the fatal stab wound was not consistent with a fall. Defendant was charged with second degree murder and convicted of voluntary manslaughter.

At the charge conference, defendant requested that the jury be instructed on self-defense. Defendant further requested that the court give a special instruction on defendant's right to defend himself pursuant to G.S. § 14-51.1. The trial court agreed to give the instructions and twice instructed on self-defense as follows:

> If the defendant was not the aggressor and he was on his own premises, he could stand his ground and repel force with force regardless of the character of the assault made upon him; however, the defendant would not be excused if he used excessive force.

Further the trial court stated:

> If the defendant killed the victim to prevent forcible entry into his place of residence or to terminate the intruder's unlawful entry, the defendant's actions are excused and he is not guilty. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in a lawful defense of his home.
>
> The defendant was justified in using deadly force if, (1) such force was being used to prevent a forcible entry into the defendant's place of residence; and (2) the defendant reasonably believed that the intruder might kill or inflict serious bodily harm to the defendant or others in the place of residence; and (3) the defendant reasonably believed that the degree of force he used was necessary to prevent a forcible entry into his place of residence.
>
> A lawful occupant within a place of residence does not have the duty to retreat from an intruder in these circumstances. It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to the defendant at the time.

After instructing the jury the trial court inquired of counsel as to whether "there [were] any requests for additions or corrections to the charge." Neither party made requests. During the jury's deliberations, it asked whether the front porch was "a part of the home or inside the home." The trial court allowed argument by the parties, and instructed the jury that the "front porch is a part of the home," and "a front porch is not inside the home."

Defendant argues that the trial court committed prejudicial error when it failed to instruct the jury that the front porch was part of the home's curtilage and thus covered under G.S. § 14-51.1. Because we believe the substance of the instructions read in context was clear, we disagree.

Defendant does have a right to "stand his ground" to prevent an intruder from entering.

> (a) A lawful occupant within a home or other place of residence is justified in using any degree of force that the occupant reasonably believes is necessary, including deadly force, against an intruder to prevent a forcible entry into the home or residence or to terminate the intruder's unlawful entry (i) if the occupant reasonably apprehends that the intruder may kill or inflict serious bodily harm to the occupant or others in the home or residence, or (ii) if the occupant reasonably believes that the intruder intends to commit a felony in the home or residence.
>
> (b) A lawful occupant within a home or other place of residence does not have a duty to retreat from an intruder in the circumstances described in this section.
>
> (c) This section is not intended to repeal, expand, or limit any other defense that may exist under the common law.

G.S. § 14-51.1 (Reg. Sess., 1994). The trial court's instruction was substantially similar to this statute. This Court has held that "[a]n inaccuracy in the [jury] instruction will not be held prejudicial error when it is apparent from the charge, construed contextually, that the jury could not have been misled." *State v. Lankford*, 31 N.C. App. 13, 17, 228 S.E.2d 641, 644 (1976); *Houston v. Rivens*, 22 N.C. App. 423, 427, 206 S.E.2d 739, 742 (1974). We believe that when the trial court instructed the jury that "[i]f the defendant killed the victim to prevent forcible entry into his place of residence or to terminate the intruder's unlawful entry, the defendant's actions are excused and he is not guilty," the substance of the law of curtilage was given. The jury

was instructed that if death occurred while the defendant was **preventing forcible entry**, the defendant's **actions are excused.** Additionally, the trial court instructed the jury that

> [i]f the defendant was not the aggressor and he was on his own premises, he could stand his ground and repel force with force regardless of the character of the assault made upon him; however, the defendant would not be excused if he used excessive force.

Thus, the instruction included the curtilage in the area within which a defendant has the right to "stand his ground."

The defendant argues that the question raised by the jury required further explanation. The jury asked whether the front porch was "a part of the home or inside the home." The trial court replied that the "front porch is a part of the home," and "a front porch is not inside the home." When read in context this instruction is sufficient.

Defendant argues that there is no duty to retreat from attacks made within the curtilage of the home. *State v. Frizzelle,* 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955). "[C]urtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *Id.*

Defense argues that the gist of the jury's question is whether the privilege not to retreat extends to the front porch. The trial court instructed the jury that when a person is on his own *premises* he has no duty to retreat. Always, a person has the right to use only the force necessary so as to "overcome the assault and secure himself from all harm." G.S. § 14-51.1; *State v. Johnson,* 261 N.C. 727, 729, 136 S.E.2d 84, 86 (1964). Since there was no instruction stating a circumstance where this defendant (a) had a duty to retreat or (b) was authorized to use force other that what was reasonably necessary to repel the assault, on this record we hold that further clarification was unnecessary.

Accordingly we conclude that in the trial there was

No error.

Judge CAMPBELL concurs.

Judge HUNTER dissents.

HUNTER, Judge, dissenting.

The majority rests its opinion on the fact that the trial court "twice instructed on self defense" in that it instructed the jury that if defendant was on his own *premises* and was preventing forcible *entry into his place of residence*, then defendant had a right to defend himself pursuant to N.C. Gen. Stat. § 14-51.1. I agree that this is a correct statement of the law; however, because the trial court—at no time—explained the legal perimeters of one's home or mentioned defendant's right to defend himself within the curtilage of his home, I am of the opinion that the majority has effectively removed from the jury's consideration defendant's right to defend himself on the porch of his home. Therefore, I respectfully dissent.

There can be no dispute, our Supreme Court having stated that a "jury, being laymen, [often is] not [] so apt to see the connection between the principles of law laid down and the facts in [a] case which so clearly appears to an experienced lawyer or judge." *Smith v. Bus Co.*, 216 N.C. 22, 23, 3 S.E.2d 362, 363 (1939). However, the majority states that: "Because we believe the substance of the [jury] instructions read in context was clear," defendant was not prejudiced by the trial court's failure to explain "curtilage" to the jury. I must disagree.

Having looked in two separate extensive dictionaries (The American Heritage College Dictionary, 3rd Ed., Houghton Mifflin Co., and; Webster's II New Riverside Dictionary, Revised, Houghton Mifflin Co.), the word "curtilage" cannot be found. Instead, "curtilage" is a legal term, "*the meaning of which term* ***in law is****, a piece of ground, either enclosed or not, that is commonly used with the dwelling-house.*" *State v. Twitty*, 2 N.C. 102, 102 (1794) (emphasis added). Thus, I believe—under the circumstances of this case—that the "evidence should have been considered [by the trial court] and the [trial] court should have *declared* ***and explained*** *the law arising on* th[e] evidence in its instruction to the jury . . . ." *State v. Greenidge*, 102 N.C. App. 447, 452, 402 S.E.2d 639, 642 (1991) (emphasis added). Specifically, the trial court should have explained to the jury that defendant was just as entitled to "stand his ground" and defend himself (pursuant to the statutory provisions) on his front porch, as he was to do so in his home.

It is clear from the trial court's own statements that it gave the N.C. Gen. Stat. § 14-51.1 jury instruction because the evidence presented at trial would support the jury's finding that defendant acted

pursuant to the statute's self defense provisions. However, later, during its deliberations, the jury sent a note inquiring, "[i]s the front porch considered to be a part of the home or inside of the home?" Following discussion between the trial court and counsel for both sides, and noting defendant's exception to its ruling, the trial court instructed the jury that "a front porch is a part of the home but a front porch is not inside the home." I believe, once the jury inquired particularly about whether the porch was part of the home, the trial court had an obligation (pursuant to defendant's request) to *clearly explain* that the porch, although not "within" the home, was part of the curtilage of the home and as such, was covered under the statute.

Moreover, I do not agree with the majority's apparent rationale that because the trial court used the word "premises," the jury knew and understood that the privilege included the porch, extending beyond the "within" or "inside" or "into" the home language as stated in both the statute and the trial court's instructions. Thus, I believe that, without further instruction from the trial court, the jury—as laymen—most likely understood the law to require defendant to retreat while on the porch of his home, and did not remove that duty until defendant was defending himself *inside* his home. Therefore, in light of the jury's query to that effect, and the trial court's obvious agreement that the evidence could support such a finding, I would hold that the trial court's response to the jury's query regarding the porch was prejudicial to defendant because it did not clarify that the porch was part of the curtilage of the home and thus, was covered under N.C. Gen. Stat. § 14-51.1's self defense provisions.

> "It is the duty of the court to instruct the jury on all substantial features of the case arising on the evidence, . . . and the court's failure to do so will be held for error." (citing cases) "The statute, G.S. 1-180, makes it incumbent on the trial judge to declare and explain the law arising on the evidence given in the case." *Finch v. Ward*, 238 N.C. 290, 77 S.E.2d 661.
>
> "Implicit in the meaning of this statute (G.S. 1-180) as interpreted by numerous decisions of this Court is the requirement that the judge must declare and explain the law as it relates to the various aspects of the evidence . . . in the case." *Bank v. Phillips*, 236 N.C. 470, 73 S.E.2d 323[, 327]. "It is the duty of the court to state the evidence to the extent necessary and to declare and explain the law as it relates to the pertinent aspects of the testi-

> mony offered [citing cases] and *the duty of the court to* ***declare and explain*** the law arising on such evidence remains unchanged by the present provisions of G.S. 1-180." *Chambers v. Allen*, 233 N.C. 195, 63 S.E.2d 212[, 214] . . . .
>
> [In the present case t]he confusion in the minds of the jurors probably arose with respect to the application of the law to the facts. The evidence [of the victim's tussle with defendant on his porch] was not in dispute. When the court, therefore, charged again as to the law it was its duty to do more than read from the book. . . .

Ammons v. Insurance Co., 245 N.C. 655, 657-58, 97 S.E.2d 251, 252-53 (1957) (emphasis added).

> In the present case:
>
> Defendant's requested instruction concerned a subordinate feature of the case since it did not relate to elements of the crime itself nor to defendant's criminal responsibility therefore. Absent defendant's request, the jury instructions would have been entirely proper since a Court is not required to give instructions on subordinate features of a case. *When a requested instruction, however, is correct in law and supported by the evidence, the Court must give the instruction in substance.* The requested instruction in the instant case was a correct application of the law to the evidence.
>
> The failure to so instruct constituted prejudicial error, entitling defendant to a new trial.

State v. Bradley, 65 N.C. App. 359, 363, 309 S.E.2d 510, 513 (1983) (citations omitted) (emphasis added). With curtilage being a legal term and the statute and jury instruction emphasizing only defendant's right to defend himself *within* his home or from an intruder attempting to enter *into* his home, I believe the curtilage instruction was necessary to apprize the jury of the applicable case law. "The rule . . . that *a person is not obliged to retreat when he is assaulted* while in his dwelling house or *within the curtilage thereof*," still prevails and thus, the trial court was obligated to so instruct the jury. *State v. Browning*, 28 N.C. App. 376, 379, 221 S.E.2d 375, 377 (1976) (emphasis added). Therefore, I am of the opinion defendant is entitled to a new trial.

STATE OF NORTH CAROLINA v. JEFFREY REED PICKARD

No. COA00-298

(Filed 15 May 2001)

1. Larceny— felonious—doctrine of recent possession

The trial court did not err in a prosecution for felonious larceny by instructing the jury on the doctrine of recent possession, because: (1) if a stolen article is of a type not normally or frequently traded, then the inference of guilt would survive a longer period of time for the interval of time between the theft and finding a defendant in possession of the item; (2) an officer observed the victim's address book in defendant's vehicle less than three days after the victim's purse was stolen; (3) the victim's address book is unique in that it contains names, addresses, and phone numbers of her family and friends; and (4) at the time the address book was seen by an officer, the vehicle and its contents were in the possession and under the control of defendant.

2. Criminal Law— trial court's questions and statements—no expression of opinion

The trial court did not err in a prosecution for felonious larceny by posing questions and making statements that allegedly showed a judicial leaning that a detective had acted properly in selecting pictures for the photo lineup, allegedly belittled defendant's line of questioning regarding the victim's statements of her assailant's skin color, allegedly notified the jury that a crime had been committed by referring to "the victim," and allegedly admonished the jury not to visit the scene of the crime, because: (1) the comments and questions were to clarify testimony or to explain proper procedures to the jury; and (2) even though the trial court had the propensity to scatter leading questions among its inquiries, it was of minimal effect and did not rise to the level of harmless error.

3. Robbery— common law—instruction on larceny from the person

The trial court did not err by instructing the jury on larceny from the person as a lesser included offense of common law robbery, because: (1) larceny from the person has been consistently recognized as a lesser included offense of common law robbery; (2) robbery is an aggravated form of larceny; (3) the evidence suf-

ficiently established larceny from the person since it showed defendant took and carried away the victim's purse from her person and without her permission; and (4) even though defendant's request for this instruction followed by the withdrawal of the request was not invited error, the trial court properly instructed the jury based on the foregoing reasons.

Appeal by defendant from judgment entered 22 September 1999 by Judge Michael E. Helms in Rockingham County Superior Court. Heard in the Court of Appeals 14 March 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Kathryn Jones Cooper for the State.

Marjorie S. Canaday for the defendant-appellant.

THOMAS, Judge.

Defendant, Jeffrey Reed Pickard, was found guilty by a jury on 22 September 1999 of felonious larceny from the person and occupying the status of a habitual felon. He was sentenced to a term of not less than 150 months nor more than 189 months. On appeal, defendant argues three assignments of error.

The state's evidence showed Darlene Lemons (whose name was Darlene Musick at trial) was using a pay phone in Eden, North Carolina between 5:00 and 5:30 p.m. on 19 December 1998. During her conversation on the phone, she noticed a man with three or four days of beard growth standing on the curb dressed in blue jeans, stocking cap and fatigue coat. Lemons, in a subsequent photo lineup and at trial, identified defendant as that person. Turning her back to him in order to hear better and obtain more privacy, Lemons suddenly found defendant at her side. He grabbed her purse from her arm, cutting her finger in the process. He then left the scene in a dark colored automobile with Lemons getting a clear view of the vehicle's license plate number. Among the items in her purse was an address book which listed names of Lemons' family members and friends.

Officer Tim Harbour of the Eden Police Department took a statement from Lemons which included her recitation of the license plate number. The vehicle was actually registered to defendant's brother, Arnold Jerome Pickard, a soldier at Fort Bragg, N.C., who had allowed defendant to assume the payments and take possession of it. Arnold Pickard, defendant's father, testified defendant and two other

children lived with him and his wife in Reidsville, which is Eden's close neighbor in Rockingham County. He saw the defendant leave his home with the vehicle shortly after 5:00 p.m. on 19 December 1998.

The vehicle was found by Reidsville police officers at approximately 1:43 a.m. on 20 December 1998. It was parked on Turner Street, unoccupied, with the keys in the ignition and the headlights on. After checking the vehicle identification number and talking with defendant's father, the officers had it towed to his residence.

On 22 December 1998 Detective Greg Light saw the vehicle in question parked in the driveway of defendant's parents' house in Reidsville. After talking with the defendant's father, Light observed what he termed a "partial address book with certain names, addresses and phone numbers" in plain view on the front passenger seat of the vehicle. He wrote down some of the information. When Light returned the next day with a search warrant, however, the address book was not in the vehicle. Lemons testified that the names, phone numbers and addresses Light had written down were those of her family and friends and were from an address book which had been in her stolen purse.

Defendant presented evidence to show that he was elsewhere at the time of the incident and was known to "loan the vehicle out" to people in exchange for drugs. In fact, a friend of the defendant, Anthony Thomas, testified the defendant was at his house in Reidsville at 5:30 p.m. on 19 December 1998 but that he did not notice defendant's vehicle.

[1] By his first assignment of error, defendant argues the trial court erred in instructing the jury on the doctrine of recent possession. We disagree.

The doctrine of recent possession allows the jury to infer that the possessor of certain stolen property is guilty of larceny.

> For this doctrine to apply, the state must prove three things beyond a reasonable doubt. First that the property was stolen; second, that the defendant had possession of this same property. Now, a person has possession when he is aware of its presence and has, either by himself or together with others, both the power and intent to control its disposition or use. Third, that the defendant had possession of this property so soon after it was stolen

> and under such circumstances as to make it unlikely that he obtained possession honestly.

State v. Barnes, 345 N.C. 184, 240, 481 S.E.2d 44, 75 (1997) *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997); and *cert denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). This inference, by itself, is not absolute, as the Court in *Barnes* noted.

> The inference derived from recent possession is to be considered by the jury merely as an evidentiary fact along with other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. The inference which arises, however, is that the possessor is the thief.

Id. at 184, 481 S.E.2d at 76. In applying the *Barnes* test, 1) the partial address book is the property which was stolen; 2) defendant had possession of the property; and 3) it was discovered soon after the theft.

We note there is a time interval of approximately three days between the theft and the discovery. "Obviously if the stolen article is of a type normally and frequently traded in lawful channels, then only a relatively brief interval of time between the theft and finding a defendant in possession may be sufficient to cause the inference of guilt to fade away entirely." *State v. Blackmon*, 6 N.C. App. 66, 76, 169 S.E.2d 472, 479 (1969). In the alternative, "if the stolen article is of a type not normally or frequently traded, then the inference of guilt would survive a longer time period." *Id.* at 76, 169 S.E.2d at 479. This Court in *Blackmon* determined the stolen item, a hand-made tool, to be unique and that a time interval of twenty-seven days between the theft and discovery was permissible to allow an instruction on the doctrine of recent possession. Here, Lemons' address book is unique in that it contains names, addresses and phone numbers of her family and friends. It was observed in defendant's vehicle less than three days after the purse was stolen. At the time the address book was seen, the vehicle and its contents were in the possession and under the control of the defendant. This is sufficient evidence to allow an instruction on the doctrine of recent possession.

As an additional argument, however, defendant contends that because the address book was not listed in the bill of indictment it cannot be the basis for an instruction on the doctrine of recent possession. We find no merit in this contention. Our Supreme Court has

held that when a defendant "is indicted for stealing items different from those actually found in his possession, the inference cannot arise unless it is also shown that the property in his possession was stolen at the same time and place as the property listed in the bill of indictment." *State v. Fair*, 291 N.C. 171, 174, 229 S.E.2d 189, 190-91 (1976). Here, Lemons testified at trial that the address book was among the items contained in her purse when it was stolen. Defendant was identified as the perpetrator of the crime. The address book was last seen in defendant's vehicle less that three days after the theft. At that time, the vehicle was parked in the driveway of defendant's residence. The evidence presented is sufficient to allow an inference under the doctrine of recent possession, thus we reject this assignment of error.

[2] By his second assignment of error, defendant argues the trial court erred in posing questions and making statements that constituted impermissible comments on the evidence in violation of defendant's due process right to a fair trial and in violation of N.C. Gen. Stat. §15A-1222. We disagree.

Our Supreme Court in *State v. Fleming*, 350 N.C. 109, 512 S.E.2d 720 (1999), held that:

> The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury. N.C.G.S. § 15A-1222 (1997) . . . 'The law imposes on the trial judge the duty of absolute impartiality.' *Nowell v. Neal*, 249 N.C. 516, 520, 107 S.E.2d 107, 110 (1959). The trial judge also has the duty to supervise and control a defendant's trial, including the direct and cross-examination of witnesses, to ensure fair and impartial justice for both parties. *State v. Agnew*, 294 N.C. 382, 395, 241 S.E.2d 684, 692, *cert. denied*, 439 U.S. 830, 58 L. Ed. 2d 124 (1978). 'Furthermore, it is well recognized that a trial judge has a duty to question a witness in order to clarify his testimony or to elicit overlooked pertinent facts.' *State v. Rogers*, 326 N.C. at 220, 341 S.E.2d at 723; *see also State v. Jackson*, 306 N.C. 642, 651, 295 S.E.2d 383, 388 (1982).
>
> 'In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized.' [State v.] *Larrimore*, 340 N.C. [119,] 155, 456 S.E.2d [789,]808 [(1995)]. 'The trial court has a duty to control the examination of witnesses, both for the purpose of conserving the trial court's time and for the purpose of protecting the witness from

> prolonged, needless, or abusive examination.' *State v. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 861, *cert. denied*, [516] U.S. [994], 133 L. Ed. 2d 436 (1995). In performing this duty, however, the trial court's position as the 'standard bearer of impartiality' requires that 'the trial judge must not express any opinion as to the weight to be given to or credibility of any competent evidence presented before the jury.' *Larrimore*, 340 N.C. at 154-55, 456 S.E.2d at 808.

Id. at 125-26, 512 S.E.2d at 732-33.

Specifically, defendant contends the trial judge 1) made comments to show a judicial leaning that Detective Light had acted properly in selecting pictures for the photo lineup; 2) belittled defendant's line of questioning regarding Lemons' statements of her assailant's skin color; 3) notified the jury that a crime had been committed by referring to Lemons as "the victim," and 4) admonishing the jury not to visit the "scene of the crime."

"Not every improper remark made by the trial judge requires a new trial. When considering an improper remark in the light of the circumstances under which it was made, the underlying result may manifest mere harmless error." *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361 (1990). Our review of the record, viewed in the light of the totality of the circumstances, shows no prejudicial remarks. The comments and questions by the trial judge were to clarify testimony or to explain proper procedures to the jury. Even though the trial court had a propensity to scatter leading questions among its inquiries, such was of minimal effect and did not even rise to the level of non-prejudicial or harmless error. Accordingly, we reject this assignment of error.

[3] By his third assignment of error, defendant contends the trial court erred by instructing the jury on larceny from the person as a lesser included offense of common law robbery. We disagree.

Common law robbery is an open and violent larceny from the person or the felonious and forcible taking, from the person of or in the presence of another, of goods or money against his will by violence or by putting him in fear. *State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362, (1991).

The essential elements of larceny are that the defendant: 1) took the property of another; 2) carried it away; 3) without the owner's

consent; and 4) with the intent to deprive the owner of the property permanently. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982). "As no statute defines the phrase 'from the person' as it relates to larceny, the common law definition controls." *Buckom*, 328 N.C. at 317, 401 S.E.2d at 365. Our Supreme Court has held that

> At common law, larceny from the person differs from robbery in that larceny from the person lacks the requirement that the victim be put in fear. *State v. Henry*, 57 N.C. App. 168, 169-70, 290 S.E.2d 775, 776, *disc. rev. denied*, 306 N.C. 561, 294 S.E.2d 226 (1982); *see* N.C.G.S. § 14-72. Larceny from the person forms a middle ground in the common law between the 'private' stealing most commonly associated with larceny, and the taking by force and violence commonly associated with robbery. *See State v. John*, 50 N.C. (5 Jones) 163, 166-70 (1857) (Pearson, J., *seriatim* opinion).

Buckom, 328 N.C. at 317, 401 S.E.2d at 365 (1991). Our Supreme Court has further held that:

> The necessity of instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. *The presence of such evidence* is the determinative factor.

State v. Jones, 291 N.C. 681, 687, 231 S.E.2d 252, 255 (1977) (citations omitted) (emphasis original).

Larceny from the person has been consistently recognized as a lesser included offense of common law robbery. Robbery, in turn, is an aggravated form of larceny. *See State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988); *State v. Young*, 305 N.C. 391, 289 S.E.2d 374 (1982). Our Supreme Court has held that a defendant who has been formally charged with common law robbery, may be convicted of the "lesser included" offense of larceny from the person upon proper instructions to the jury by the trial court. *Young*, 305 N.C. at 393, 289 S.E.2d at 376. In the instant case, the evidence presented at trial established that defendant took and carried away Lemons' purse from her person and without her permission. This is sufficient to establish larceny from the person.

We also note the State argues that even if there were error in the instruction it was invited. Defendant initially requested an instruction

on larceny from the person during the instruction conference and prior to the court's charge to the jury. One who invites the trial court to commit error is not in a position to then assign it as error and the basis of a request for a new trial. *See State v. Payne*, 280 N.C. 170, 185, S.E.2d 101 (1971); *Medford v. Davis*, 62 N.C. App. 308, 302 S.E.2d 838 (1983).

In the instant case, however, defendant rescinded his request and objected to its inclusion *before* the charge was given to the jury. The initial request was made in the late afternoon and the instruction conference was continued until the following morning. When the conference was reconvened though, defendant withdrew the request. At that point, the State asked for the instruction. Defendant objected and after the instruction was given to the jury, objected again. Clearly, the timing of defendant's rescission did not work a hardship on the court or cause undue delay. There was no evidence the request followed by the rescission was done in such a manner so as to subvert the proceedings.

Defendant, therefore, did appropriately and successfully withdraw his request. Although the right to assign the giving of the instruction as error was preserved, we nevertheless hold the trial court properly instructed the jury as to the lesser included offense of larceny from the person. Accordingly, this assignment of error is rejected.

We find the defendant received a fair trial, free from the errors assigned.

NO ERROR.

Judges WYNN and McGEE concur.

KIM CROOM, PLAINTIFF v. DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY; SUE PERRY COLE, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF COMMERCE FOR THE STATE OF NORTH CAROLINA; AND JOEL NEW, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE COMMERCE DEPARTMENT'S DIVISION OF EMPLOYMENT AND TRAINING, DEFENDANTS

No. COA00-156

(Filed 15 May 2001)

1. Jurisdiction— personal—improper service of process—no consent or voluntary general appearance

The trial court erred by asserting jurisdiction over defendant Employment Security Commission (ESC) in an action where plaintiff former employee of the state sued four coworkers in their individual and official capacities, because: (1) there is no evidence indicating that ESC was ever named as a defendant in the action, or that it ever received the required service of process in the manner stated under N.C.G.S. § 1A-1, Rule 4(j)(4) or in any other manner authorized by the Rules of Civil Procedure; (2) no summons was ever issued naming ESC as a defendant; and (3) ESC did not consent to personal jurisdiction nor did it make a voluntary general appearance in this action.

2. Civil Procedure— motion in the cause for relief—improper attempt to amend judgment

The trial court erred by allowing plaintiff's motion in the cause for relief which effectively amended the 2 October 1997 judgment awarding plaintiff treble damages, costs, and attorney fees but not granting the injunction sought by plaintiff against defendants, because: (1) plaintiff failed to appeal from the 2 October 1997 judgment and has not sought relief from the judgment under either N.C.G.S. § 1A-1, Rule 59 or Rule 60; (2) plaintiff's motion in the cause for relief was an ineffective manner to attempt to alter the 2 October 1997 judgment; and (3) our law does not permit a party to claim that a judgment is defective after relying upon its validity and accepting its benefits, and plaintiff admits that the 2 October 1997 judgment was paid in full.

Appeal by defendant Department of Commerce and the North Carolina Employment Security Commission from order entered 14 September 1999 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 21 February 2001.

Pueschel Law firm, by Janet I. Pueschel, for the plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Jane T. Friedensen, for the defendant-appellant North Carolina Department of Commerce.

C. Coleman Billingsley, Jr., and Fred R. Gamin, for the appellant North Carolina Employment Security Commission.

WYNN, Judge.

This appeal arises from a complaint, originally filed on 10 July 1995, wherein the plaintiff, a former Social Research Assistant II employed by the State, sued four individuals in their individual capacities as well as their official capacities as employees of the State of North Carolina Department of Commerce. Defendants Sue Perry Cole and Joel New are not parties to this appeal. On 14 August 1995, the plaintiff filed an amended complaint naming the same four defendants as in the original complaint.

On 15 July 1996, the plaintiff filed a motion for leave to amend her complaint. On 23 July 1996, the trial court—per Judge Henry V. Barnette, Jr.—entered an order dismissing the plaintiff's claims against the four named individuals, in their individual and official capacities, and allowed the plaintiff to file a second amended complaint incorporating the changes in her amendments to the complaint. Accordingly, the plaintiff filed a "Second Amended Complaint" on 23 July 1996, naming the "Department of Commerce, Division of Employment Security Commission" as a defendant, together with defendants Cole and New.

On 22 August 1996, the Department of Commerce, Division of Employment Security Commission filed a motion to dismiss the Second Amended Complaint with prejudice. On 1 July 1997, the trial court, per Judge Jack A. Thompson, entered an order dismissing the Second Amended Complaint with prejudice as to the Department of Commerce, Division of Employment Security Commission on grounds of lack of jurisdiction, insufficiency of process, and insufficiency of service of process. The plaintiff did not appeal from this order.

The plaintiff obtained an alias and pluries summons for the "Department of Commerce, Division of Employment Security Commission" on 1 August 1997, which summons was served on

Assistant Attorney General Jane T. Friedensen on 6 August 1997. On 20 August 1997, the defendant "Department of Commerce, Division of Employment Security Commission" filed a motion to dismiss the second amended complaint, or in the alternative to quash the summons issued on 1 August 1997. The trial court apparently took no direct action on this motion.

On 2 October 1997, the trial court—per Judge Donald W. Stephens—entered judgment against defendant New, acting in both his individual capacity and in his official capacity as manager of the Department of Commerce, Division of Employment and Training, and dismissing with prejudice all claims against defendant Cole. The trial court awarded the plaintiff damages, in addition to costs and reasonable attorneys' fees, "to be paid by the North Carolina Department of Commerce, Division of Employment and Training and by Joel New, individually." This judgment was paid on or about 13 February 1998.

The plaintiff filed a "Motion in the Cause for Relief" on 14 July 1999, seeking reinstatement to her former position with the Department of Commerce. The Department of Commerce filed a response seeking to have the plaintiff's motion denied. On 14 September 1999, the trial court—per Judge Stephens—entered an order declaring that the court does have jurisdiction over the Department of Commerce and the Employment Security Commission, based on the court's findings in its 2 October 1997 judgment. The court therefore ordered that the plaintiff be reinstated to the previous position she held with the Department of Commerce, or to a comparable position at the Department of Commerce, the Employment Security Commission, or such other agency as can locate a comparable position. The court further ordered that if no such position is available, the plaintiff should be accorded all applicable rights due to her under the State Personnel Act. Both the Department of Commerce and the Employment Security Commission appealed from the 14 September 1999 order. We consider the arguments of each appellant in turn.

I. Employment Security Commission

[1] The Employment Security Commission argues that the trial court erred in asserting jurisdiction over the Employment Security Commission as the trial court had no basis for asserting such jurisdiction. We agree.

Regarding personal jurisdiction, our Supreme Court has stated:

> Jurisdiction of the court over the person of a defendant is obtained by service of process, voluntary appearance, or consent. Rule 4 of the North Carolina Rules of Civil Procedure provides the methods of service of summons and complaint necessary to obtain personal jurisdiction over a defendant, and the rule is to be strictly enforced to insure that a defendant will receive actual notice of a claim against him.

Grimsley v. Nelson, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) (internal citations omitted). In other words, "[t]he issuance and service of process is the means by which the court obtains jurisdiction. Where no summons is issued the court acquires jurisdiction over neither the persons nor the subject matter of the action." *In re Mitchell*, 126 N.C. App. 432, 433, 485 S.E.2d 623, 624 (1997) (internal citations omitted).

N.C. Gen. Stat. § 1A-1, Rule 4(j) (1999) dictates the manner in which a defendant must be served with process to effect personal jurisdiction. For an agency of the State such as the Employment Security Commission (*see Prudential Ins. Co. of Am. v. Powell*, 217 N.C. 495, 8 S.E.2d 619 (1940)), process must be served "by personally delivering a copy of the summons and of the complaint to the process agent appointed by the agency . . . or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to said process agent." N.C. Gen. Stat. § 1A-1, Rule 4(j)(4)a. N.C. Gen. Stat. § 96-4(u) (1999) confirms that "[s]ervice of process upon the [Employment Security] Commission in any proceeding instituted before . . . [a] court of this State shall be pursuant to" Rule 4(j)(4).

In the instant case, there is no evidence in the record indicating that the Employment Security Commission was ever named as a defendant in the action (*see* N.C. Gen. Stat. § 1A-1, Rule 10(a) (1999)), or that it ever received the required service of process in the manner stated in Rule 4(j)(4) or in any other manner authorized by the Rules of Civil Procedure. No summons was ever issued naming the Employment Security Commission as a defendant. Because the Employment Security Commission was never properly served with process, and did not consent to personal jurisdiction, a trial court may exercise personal jurisdiction over the Employment Security Commission only if it voluntarily appeared in the case. N.C. Gen. Stat. §§ 1-75.3(b) (1999); 1-75.7 (1999). As the Employment Security

Commission has made no voluntary general appearance in this action, the trial court had no personal jurisdiction over the Employment Security Commission. *See Grimsley*, 342 N.C. at 546, 467 S.E.2d at 94.

We note that the plaintiff's Second Amended Complaint named as a defendant the "Department of Commerce, Division of Employment Security Commission." In response, Assistant Attorney General Friedensen filed a motion to dismiss the complaint as to this defendant, arguing a lack of jurisdiction in that "[n]either the Department of Commerce nor the Employment Security Commission has been served with a summons in this matter since the Department [of Commerce, Division of Employment Security Commission] was added as a defendant in the Plaintiff's Second Amended Complaint." The court, per Judge Thompson, agreed and dismissed the Second Amended Complaint "with prejudice as to the Defendant Department of Commerce, Division of Employment Security Commission on the grounds of lack of jurisdiction, insufficiency of process and insufficiency of service of process."

Nonetheless, in its 14 September 1999 Order, the trial court, per Judge Stephens, ordered that the court does have jurisdiction over the Employment Security Commission "based on the Court's findings in its [2 October 1997 Judgment that defendant] New acted in his official capacity as Director of the Commerce Department's Division of Employment and Training through his actions with the Employment Security Commission." The trial court, however, lacked personal jurisdiction to render the 2 October 1997 judgment binding against the Employment Security Commission, and cannot simply declare personal jurisdiction over the Employment Security Commission based on findings made in that previous judgment that tangentially implicate the Employment Security Commission. In his findings of fact in that judgment, Judge Stephens actually notes that the Employment Security Commission is a "stand-alone agency" separate from the Department of Commerce, Division of Employment and Training. As the trial court lacked such personal jurisdiction, it was without power to render the 2 October 1997 judgment enforceable against the Employment Security Commission, and likewise was without personal jurisdiction over the Employment Security Commission for purposes of entering the 14 September 1999 order. *See* N.C. Gen. Stat. § 1-75.3(b); *Mitchell*, 126 N.C. App. at 433, 485 S.E.2d at 624.

II. Department of Commerce

[2] The defendant Department of Commerce first argues that the trial court lacked the authority to grant the plaintiff's motion in the cause for relief. We agree.

The Department of Commerce contends that the 2 October 1997 judgment entered by Judge Stephens was a final judgment that had already been satisfied. According to the Department of Commerce, the plaintiff's 14 July 1999 "Motion in the Cause For Relief" seeks to impermissibly modify and enlarge the 2 October 1997 judgment without any statutory authority. The plaintiff counters by arguing that the 2 October 1997 judgment was interlocutory as it did not constitute a final determination of all issues, and was thus subject to change.

"A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of 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); *see Russ v. Woodard*, 232 N.C. 36, 41, 59 S.E.2d 351, 355 (1950) (final judgment "decides the case upon its merits, without any reservation for other and future directions of the court") (citation omitted). In contrast, "[a]n order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). Our Supreme Court has stated:

> A judgment is conclusive as to all issues raised by the pleadings. When issues are presented it is the duty of the court to dispose of them. Parties, even by agreement, cannot try issues piecemeal. The courts and the public are interested in the finality of litigation. This idea is expressed in the Latin maxim *interest reipublicae ut sit finis litium*, that there should be an end of litigation for the repose of society. The law requires a lawsuit to be tried as a whole and not as fractions. Moreover, it contemplates the entry of a single judgment which will completely and finally determine all the rights of the parties. A party should be required to present his whole cause of action at one time in the forum in which the litigation has been duly constituted.

Hicks v. Koutro, 249 N.C. 61, 64, 105 S.E.2d 196, 199-200 (1958) (internal citations omitted).

In *Bunker v. Bunker*, 140 N.C. 18, 52 S.E. 237 (1905), our Supreme Court addressed a situation similar to that in the instant case, stating:

> [The issue is] whether a judgment was an estoppel as to the issues raised by the pleadings, and which *could* be determined in that action, or *only* as to those *actually named in the judgment.* [] It was only intended to say that *the cause of action embraced by the pleadings was determined by a judgment thereon, whether every point of such cause of action was actually decided by verdict and judgment or not.* The determination of the action was held to be a decision of *all* the points raised therein, those not submitted to actual issue being deemed abandoned by the losing party, who did not except.

Id. at 23, 52 S.E. at 239 (emphasis added) (citations omitted).

In her second amended complaint, the plaintiff sought to "permanently enjoin Defendants from depriving Plaintiff of her job duties and functions by manipulating her job placement and return her to her former position, job duties, and location." She also sought reasonable damages, treble damages, costs and attorneys' fees. In the 2 October 1997 judgment, Judge Stephens awarded the plaintiff treble damages, costs and attorneys' fees, but did not grant the injunction sought by the plaintiff against the defendants; nor did the judgment reserve for judgment the issue of injunctive relief against the defendants. The 2 October 1997 judgment was therefore a final judgment on the merits as to the issues presented by the plaintiff in the pleadings, including the issue of injunctive relief against the defendants. *See Bunker*, 140 N.C. at 22, 52 S.E. at 239 ("[I]f the plaintiff had an opportunity of recovering something in litigation formerly between him and his adversary, and but for the failure to bring it forward or to press it to a conclusion before the court, he might have recovered it in the original suit; whatever does not for that reason pass into and become a part of the adjudication of the court is forever lost to him.") (Citing *U.S. v. Leffler*, 11 Pet. 101, 9 L. Ed. 642).

Rules 59 and 60 of the North Carolina Rules of Civil Procedure, in addition to a party's right to appeal a final judgment, provide the manner by which a party may seek relief from a final judgment. Rule 59 provides that a party may seek a new trial by serving a motion for new trial, or a motion to alter or amend the judgment, within ten days after entry of the judgment. N.C. Gen. Stat. § 1A-1, Rule 59 (1999).

Rule 60 allows a party to obtain relief from a final judgment for certain enumerated reasons upon motion, which motion "shall be made within a reasonable time," and for certain reasons not more than one year after entry of the judgment. N.C. Gen. Stat. § 1A-1, Rule 60(b) (1999).

The plaintiff failed to appeal from the 2 October 1997 judgment, and has not sought relief from the judgment under either Rule 59 or Rule 60. The plaintiff's "Motion in the Cause For Relief" was an ineffective manner by which to proceed to attempt to alter the 2 October 1997 judgment. Furthermore, "our law does not permit a party to claim that a judgment is defective after relying upon its validity and accepting its benefits." *Kimzay Winston-Salem, Inc. v. Jester*, 103 N.C. App. 77, 80, 404 S.E.2d 176, 178, *cert. denied*, 329 N.C. 497, 407 S.E.2d 534 (1991). The plaintiff in the instant case admits in her motion for relief that the 2 October 1997 judgment was paid in full. The trial court therefore erred in permitting the plaintiff to effectively amend the 2 October 1997 judgment by allowing the plaintiff's motion.

As the trial court had no personal jurisdiction over the Employment Security Commission, and the plaintiff's attempts to amend the 2 October 1997 final judgment were improper and ineffective, the court's 14 September 1999 order is therefore vacated.

Vacated.

Judges McGEE and THOMAS concur.

ADRIENNE M. FOX, AS GUARDIAN AD LITEM FOR GAIL HOWARD, PLAINTIFF V. HEALTH FORCE, INC., DURHAM COUNTY, VELMA JOHNSON, DORLENE BRUCE AND APRIL GREEN, DEFENDANTS; ADRIENNE M. FOX, AS GUARDIAN AD LITEM FOR GAIL HOWARD, PLAINTIFF V. HEALTH FORCE, INC., ST. PAUL MARINE AND FIRE INSURANCE COMPANY, VELMA JOHNSON, DORLENE BRUCE AND APRIL GREEN, DEFENDANTS

No. COA00-197

(Filed 15 May 2001)

1. Appeal and Error— appealability—interlocutory order—certification

An appeal from an order allowing a Rule 60(b)(6) motion for relief from a dismissal was interlocutory, but was allowed because the trial court certified that there was no just reason for delay.

2. Rules of Civil Procedure; Guardians— action on behalf of incompetent—guardian not correctly appointed—Rule 60 relief

N.C.G.S. § 1A-1, Rule 60(b)(6) was the appropriate remedy where plaintiff's mother sought to bring an action after plaintiff suffered permanent brain damage after choking while being fed by an employee of defendant; the attorney hired by plaintiff's mother brought an action before a guardian was appointed; the eventual appointment order was riddled with errors; and defendants' motions to dismiss were granted. Defendants cited no authority to support the contention that a finding of inexcusable neglect renders the trial court powerless to apply Rule 60(b)(6); while Rule 60(b)(1) cannot be used to excuse attorney error because the negligence is imputed to the client, none of the parties in this case was entitled to act on plaintiff's behalf. Furthermore, the trial court found that the attorney's inexcusable neglect could not be charged against plaintiff because she is an incompetent, entitled to the greatest possible protection by the court, and the statute of limitations was correctly tolled until the time a guardian was appointed.

Appeal by defendants from judgment entered 8 October 1999 by Judge Thomas C. Ross in Durham County Superior Court. Heard in the Court of Appeals 21 February 2001.

Twiggs, Abrams, Strickland & Trehy by Donald H. Beskind and Karen M. Rabenau, M. Lynette Hartsell, and Mitchell & Logan by P. Susan Mitchell for plaintiff-appellee.

Womble, Carlyle, Sandridge & Rice by Robert H. Sasser, III, Coleman M. Cowan and Christopher W. Jones for defendant-appellants Health Force, Inc. and April Green.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan by John D. Madden and Christopher G. Smith for defendant-appellants.

Durham County, St. Paul Fire and Marine Insurance Co., Dorlene Bruce and Velma Johnson.

THOMAS, Judge.

This appeal is the result of three separate lawsuits. The factual history is as follows. Gail Howard (Gail), born 3 March 1956, suffered from multiple sclerosis and lived with her parents. Until the incident in question, which occurred on 20 October 1993, Gail was a lively individual, able to do almost everything except walk and feed herself. Her condition, however, did make it difficult for her to hold items in her hands. When both of her parents needed to be out of the home, they would at times take her to a respite care center operated by defendant Durham County, staffed in part by defendant Health Force, Inc. (Health Force), and insured by St. Paul Marine and Fire Insurance Company (St. Paul). Defendants Velma Johnson, Dorlene Bruce and April Green were Durham County employees working at the center.

Gail's mother, Addie C. Howard (Howard), left explicit written and oral instructions with personnel at the center to feed Gail only small pieces of food because she easily choked. Plaintiff alleges that on 20 October 1993, Gail choked while being fed by an employee of Health Force with CPR (cardiopulmonary resuscitation) not immediately performed. She suffered permanent brain damage and ever since has been in a permanent vegetative state.

Howard hired Attorney Laurence Colbert (Colbert) soon after the incident to represent Gail's interests. Howard alleges she paid Colbert $1,000 to cover the costs of an expert witness with Colbert filing the first case on 31 January 1996. Howard was listed in the caption as guardian *ad litem* for Gail with both Howard and Gail named in the complaint as plaintiffs. However, Gail had not yet been adjudicated incompetent, nor had Howard been appointed either Gail's

legal guardian or guardian *ad litem*. Defendants filed an answer and moved to dismiss, but before the hearing on 19 February 1997, Howard, through Colbert, took a voluntary dismissal. Earlier, on 22 October 1996, and prior to the voluntary dismissal, Colbert filed a motion for an extension of the statute of limitations in a medical malpractice action. The court granted the motion.

On 19 February 1997, Colbert and Howard filed a second claim. Howard was yet again named the plaintiff as "guardian *ad litem*." As before, she had not been appointed guardian or guardian *ad litem*. Gail had not been adjudicated incompetent. Defendants filed answers and motions to dismiss based in part on the expiration of the statute of limitations and governmental immunity. However, on 20 October 1997, while the 19 February 1997 action was pending, Colbert submitted a petition stating that Gail was an incompetent with *no* general or testamentary guardian and requested the court appoint a guardian *ad litem* in order for Gail to bring an action against defendants. On the same date, a Durham County Assistant Clerk of Superior Court inappropriately appointed Howard as Gail's guardian *ad litem*. The appointment order is riddled with deficiencies, however. Rule 17 of the N.C. Rules of Civil Procedure governs the appointment procedure. For an incompetent plaintiff, the appointment must be made at any time prior to or at the commencement of the action. N.C. Gen. Stat. § 1A-1, Rule 17(c)(1) (2000). Here, the appointment petition and order were filed over eight months after the commencement of the action filed on 19 February 1997. Moreover, the order refers to the then forty-one year-old Gail as an "infant" and states that Howard may bring an action on "his" behalf. Further, the petition, signed by Colbert, was unverified. Consequently, Howard was not a validly appointed guardian *ad litem*.

Included with the petition and order erroneously appointing Howard as Gail's guardian *ad litem*, was an application and order extending the time to file a complaint even though the 19 February 1997 action remained pending. We note that Howard did not attempt to amend her second complaint to allege unfair and deceptive trade practices, but filed a third complaint on 12 November 1997, which was identical to the second complaint except for the hand-written substitution of St. Paul as a defendant in place of Durham County, an allegation of unfair and deceptive trade practices and a request for treble damages. Defendants filed new motions to dismiss based on insufficiency of service and process and failure to state a claim upon which relief can be granted. Howard sought to amend the third com-

plaint to allege that Durham County had purchased liability insurance. The defendants' motions were granted and Howard's motion to amend denied in December 1997.

Throughout these various actions and filings, Howard alleges she was often in contact with Colbert and was always assured by him that the case was progressing well. In subsequent hearings, the trial court taxed costs and attorney fees against Howard in a total amount of $9,282.67. On 11 June 1998, the hearing date of Howard's motion to amend the first dismissal order in the second case, Colbert moved to withdraw as counsel for Howard and Gail, saying he was "under a doctor's care and can not handle the stress of this case[.]" R. p. 102. The motion was granted. Howard claims she never had notice of the 11 June 1998 hearing.

Soon thereafter, Howard hired another attorney. Gail was properly adjudicated legally incompetent and Howard was appointed her legal guardian on 28 September 1998. Adrienne Fox was appointed as Gail's guardian *ad litem* and filed a Rule 60 Motion for Relief on 8 December 1998. In the motion, plaintiff moved for relief from the orders of dismissal and penalties as to the complaints filed on 19 February 2001 and 12 November 1997 arguing the orders were voidable due to extraordinary circumstances. On 16 December 1997, the trial court had allowed defendants Durham County, Velma Johnson and Dorlene Bruce's motions to dismiss in the action filed 19 February 1997. On 29 December 1997, the trial court had allowed defendants Health Force and April Green's motions to dismiss in the action filed 19 February 1997 and in the action filed 12 November 1997, with the exception of the unfair and deceptive trade practice claim, which was not before the court at that time. On 18 March 1998, attorney fees for these defendants had been allowed and the remaining claim was dismissed. On 30 March 1998, the trial court had allowed defendants St. Paul, Velma Johnson and Dorlene Bruce's motions to dismiss and request for attorney fees in the action filed on 12 November 1997.

Plaintiff argued, in a memorandum in support of the Rule 60(b) motion, that 1) Rule 60(b)(1) relief is proper due to excusable neglect by plaintiff; and 2) Rule 60(b)(6) relief is proper since Gail had no validly appointed general guardian or guardian *ad litem*. In an order dated 4 October 1999, the trial court granted plaintiff's motion, pursuant to Rule 60(b)(6), giving plaintiff relief from all dismissals, costs, and fee orders entered in the previous cases. The trial court

also concluded that the statute of limitations for Gail's claims began to run no sooner than 28 September 1998. That was the date she was adjudicated incompetent and her mother was appointed her legal guardian. On 28 October 1999, defendants entered timely notices of appeal.

By their only assignment of error, defendants argue the trial court erred as a matter of law in allowing plaintiff's motion for relief under Rule 60(b)(6). We disagree and for the following reasons, affirm the trial court's nullification of its previous orders.

[1] Although this issue was not raised by the parties, we note that this appeal would normally be considered interlocutory as it directs some further proceeding preliminary to a final decree and the case remains in the trial court. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). 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). An immediate appeal may also be obtained if a trial judge certifies a case for immediate appeal pursuant to Rule 54(b) of the N.C. Rules of Civil Procedure. The statute provides "the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal[.]" In the instant case, the trial judge made such a certification at the conclusion of the order allowing plaintiff's Rule 60(b) motions, stating that there was no just reason for delay. R. p. 180. We, therefore, allow the appeal of the trial court's order.

[2] Rule 60(b) provides:

> (b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2000). Defendants argue the trial court erred in basing its conclusion on Rule 60(b)(6) because of its factual finding of Colbert's inexcusable neglect. They contend granting relief for acts or omissions amounting to inexcusable neglect is specifically disallowed under Rule 60(b)(1). *See Briley v. Farabow*, 348 N.C. 537, 501 S.E.2d 649 (1998). However, the trial court's order was based on Rule 60(b)(6), not Rule 60(b)(1). Moreover, defendants cite no authority, legal or otherwise, to support its contention that a finding of inexcusable neglect renders the trial court powerless to apply Rule 60(b)(6). Further, *Briley v. Farabow*, *supra*, applies to the case where the plaintiff-victim hired an attorney, who then committed error. In such case, Rule 60(b)(1) cannot be used to excuse attorney error because the negligence is imputed to the client. *Id.* In the case at bar, however, Gail was never the client. The person representing Gail as her "guardian *ad litem*" was not in actuality her guardian or guardian *ad litem*. At that time, none of the parties was entitled to act on Gail's behalf, as incompetent plaintiffs *must* be represented by a general or testamentary guardian or guardian *ad litem*. N.C. Gen. Stat. § 1A-1, Rule 17(b)(1) (1999). Moreover, the trial court specifically stated that Colbert's inexcusable negligence could not be charged against Gail because she is an incompetent "entitled to the greatest possible protection by this court." R. p. 179.

Defendants also cite *Bruton v. Sea Captain Properties*, 96 N.C. App. 485, 386 S.E.2d 58 (1989), stating a party cannot proceed under Rule 60(b)(6) if one of the other Rule 60(b) bases were more appropriate. However, *Bruton* can be distinguished from the instant case in that *Bruton* was based solely on the neglect of the attorney. The *Bruton* Court clarified that Rule 60(b)(6) concerns "any *other* reason, i.e., any reason other than those contained in Rule 60(b)(1)-(5)." *Id.* (Quoting *Akzona, Inc. v. American Credit Indem. Co. of New York*, 71 N.C. App. 498, 505, 322 S.E.2d 623, 629 (1984) (Emphasis original). In the instant case, relief was granted because "[e]xtraordinary circumstances exist in this case, *including but not*

limited to the fact that an incompetent person has lost all of her legal rights to address negligence that may have rendered her incompetent through no fault of her own." R. p. 179. (Emphasis added). This basis does not cleanly conform to Rule 60 (b)(1)-(5).

Because Gail was not yet adjudicated incompetent, although in fact she clearly was, the statute of limitations was tolled. N.C. Gen. Stat. § 1-17(a)(3) (2000). Once her guardian was appointed to represent her interests, the limitation period began to run from the time of the appointment. N.C. Gen. Stat. §97-50 (2000); *Jefferys v. Tolin*, 90 N.C. App. 233, 368 S.E.2d 201 (1988). Thus, the trial court correctly designated 28 September 1998 as the first day of the limitation period.

For the reasons stated above, we find Rule 60(b)(6) the appropriate remedy for plaintiff and affirm the trial court.

AFFIRMED.

Judges WYNN and McGEE concur.

SHELLEY AUSTIN WOOD, PLAINTIFF v. GUILFORD COUNTY, BURNS INTERNATIONAL SECURITY SERVICES CORPORATION, F/K/A BORG-WARNER PROTECTIVE SERVICES CORPORATION AND BURNS INTERNATIONAL SECURITY SERVICES, DEFENDANTS

No. COA00-592

(Filed 15 May 2001)

1. Tort Claims Act; Counties— assault in courthouse— AOC employee—action against county—Tort Claims Act inapplicable

The Tort Claims Act did not apply and the trial court thus had jurisdiction of an action against a county brought by a plaintiff employed in the clerk of court's office by the Administrative Office of the Courts for failure to provide adequate security to protect her from a sexual assault in the county courthouse because the Tort Claims Act does not apply to county agencies regardless of whether the county agencies are acting as an agent of the State.

2. Cities and Towns; Counties— public duty doctrine—private security company–assault in courthouse

Claims against a county arising from an assault in a courthouse were not barred by the public duty doctrine where defendant had hired a private company to provide security. Defendant was acting as the owner and operator of the courthouse, not in a law enforcement capacity or exercising its general duty to protect the public, and the public duty doctrine is not applicable.

3. Immunity— governmental—contractor required to purchase insurance

The trial court did not err in an action arising from an assault in a courthouse by denying defendant county's motion to dismiss based upon governmental immunity where defendant did not purchase a liability insurance policy but required its private security company to obtain a policy and name defendant as an additional insured.

4. Contracts— security service—third-party beneficiary—only incidental benefit

The trial court did not err in an action arising from an assault in a courthouse by not dismissing plaintiff's fourth claim, which was based upon her being an intended beneficiary of defendant county's contract with a private security company. The contract provides that it is entered into for the security of the courthouse and does not evidence the parties' intention to provide other than an incidental benefit to plaintiff or other users of the courthouse.

Appeal by defendant Guilford County from order dated 29 March 2000 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 27 March 2001.

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

Guilford County Attorney Jonathan V. Maxwell, by Assistant County Attorney Mercedes O. Chut, for defendant-appellant Guilford County.

Kilpatrick Stockton LLP, by James H. Kelly, Jr. for defendant-appellee Burns International Security Services Corporation.

GREENE, Judge.

Guilford County (Defendant) appeals an order dated 29 March 2000 (the Order) in favor of Shelley Austin Wood (Plaintiff) denying Defendant's Rule 12(b)(6) motion to dismiss the first, second, and fourth claims for relief of Plaintiff's complaint.

On 30 July 1999, Plaintiff filed a complaint against Defendant and Burns International Security (Burns), f/k/a Borg-Warner Protective Services Corporation and Burns International Security Services. Plaintiff's complaint alleges she was employed in the Office of the Clerk of Superior Court, Guilford County, by the Administrative Office of the Courts (the AOC) at all times relevant to the complaint. Plaintiff was stationed in the Guilford County Courthouse located in High Point (the Courthouse). On 31 March 1998 at approximately 10:00 a.m., Plaintiff was attacked in a restroom located on the second floor of the Courthouse. "Plaintiff's assailant grabbed her by the shoulders, threw her to the floor, and repeatedly punched her about the face and head, demanding that she roll over on her back." Plaintiff's assailant was later convicted of attempted first-degree rape and assault with a deadly weapon inflicting serious injury.

As a result of her attack, Plaintiff alleges she: "suffered trauma to the left eye, severe facial bruising, a bruised coccyx, as well as great pain, terror and mental anguish"; "suffered from depression and sleeplessness"; "missed several weeks of work and lost wages"; and "incurred expenses for medical treatment and psychological counseling."

Defendant and Burns entered into a contract (the Contract) on 10 October 1996 for Burns to provide security to the Courthouse. Plaintiff alleges Defendant has waived its governmental immunity by requiring Burns to obtain a liability insurance policy and name Defendant as an additional insured in the insurance policy. Plaintiff alleges the following claims for relief: 1) Defendant breached its duty by failing to provide adequate security to the Courthouse (the first claim); 2) Burns breached its duty to provide adequate security to the Courthouse (the second claim); 3) as a result of Defendant's willful and wanton conduct, Plaintiff was entitled to punitive damages (the third claim); and 4) Plaintiff, as an employee of the AOC stationed at the Courthouse, was "an intended third party beneficiary of the Contract" and Defendant and Burns "breached the Contract as well as their duty to . . . Plaintiff as an intended third party beneficiary by

failing to provide reasonable and adequate security" to the Courthouse (the fourth claim).

Defendant filed its answer to Plaintiff's complaint on 2 September 1999. In its answer, Defendant denied all of Plaintiff's claims for relief and specifically pleaded "the unavailability of punitive damages against a local government under North Carolina law." Defendant also asserted: Plaintiff's complaint failed to state a claim against Defendant "upon which relief may be granted and the Complaint should be dismissed" with respect to Defendant pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure; Defendant's governmental immunity as a complete bar to Plaintiff's action; and the public duty doctrine as a complete bar to Plaintiff's action.

The trial court, after reviewing the pleadings and hearing the arguments of Plaintiff and Defendant, granted Defendant's motion to dismiss the third claim.[1] The trial court, however, denied Defendant's motion to dismiss the first claim, the second claim, and the fourth claim. The trial court did not dismiss any of Plaintiff's claims against Burns.

The issues are whether: (I) a negligence action against a county is an action against the State and, thus, requires the action be brought before the North Carolina Industrial Commission; (II) Defendant was exercising its police powers in the operation of the Courthouse, and, thus, the public duty doctrine bars Plaintiff's claims against Defendant; (III) Defendant waived its governmental immunity by requiring Burns to purchase insurance and name Defendant as an additional insured; and (IV) the complaint sufficiently alleges the Contract was entered into for Plaintiff's direct benefit.

I

[1] Defendant argues because the AOC "has the primary duty to protect its own employees," Plaintiff's claim against Defendant is a claim against an agent of the State, and, thus, the North Carolina Industrial Commission has exclusive subject matter jurisdiction. We disagree.

The North Carolina Industrial Commission has jurisdiction to hear and pass upon tort claims against "departments, institutions, and agencies of the State" arising from "the negligence of any officer,

1. We note Plaintiff did not appeal the trial court's dismissal of the third claim.

employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority." N.C.G.S. § 143-291(a) (1999). The Tort Claims Act, however, "applies only to actions against state departments, institutions, and agencies and does not apply to claims against . . . agents of the State." *Meyer v. Walls*, 347 N.C. 97, 107, 489 S.E.2d 880, 885-86 (1997). Consequently, the Tort Claims Act does not apply to county agencies, regardless of whether the county agencies are acting as an agent of the State. *Id.* at 108, 489 S.E.2d at 886.

In this case, Plaintiff brought suit against Defendant, a county. Plaintiff did not bring suit against any agency of the State and, thus, it is immaterial whether Defendant is an agent of the AOC. As such, the Tort Claims Act does not apply to Plaintiff's claim against Defendant. Accordingly, the trial court had subject matter jurisdiction over Plaintiff's claims against Defendant.[2]

II

[2] Defendant next argues the trial court erred in failing to dismiss Plaintiff's claims because Plaintiff's claims are barred by the public duty doctrine. We disagree.

"A motion to dismiss for failure to state a claim upon which relief may be granted under [N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)] is addressed to whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiff[], give rise to a claim for relief on any theory." *Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986), *disc. review denied*, 318 N.C. 694, 351 S.E.2d 746 (1987).

Generally, a municipality and its agents "act[] for the benefit of the general public when exercising [their] police powers, and therefore cannot be held liable for negligence or gross negligence" in failing to furnish police protection to specific individuals. *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 337, 511 S.E.2d 41, 43, *cert.*

2. In its brief to this Court, Defendant relies on *Vaughn v. N.C. Dept. of Human Resources*, 296 N.C. 683, 252 S.E.2d 792 (1979) to support its argument that Defendant is an agent of the State and, thus, the Tort Claims Act applies. In *Vaughn*, the plaintiff sued the Department of Human Resources, which was a State agency, alleging the Durham County DSS was acting as an agent of the Department of Human Resources. *Vaughn*, 296 N.C. at 684, 252 S.E.2d at 793-94. *Vaughn*, while determining that a county agency was an agent of the State, did not hold the county agency could be sued under the Tort Claims Act. *Meyer*, 347 N.C. at 108, 489 S.E.2d at 886 (affirmatively overruling any cases holding a county agency is a state agency subject to suit under the Tort Claims Act).

denied, 350 N.C. 851, 539 S.E.2d 13 (1999). The public duty doctrine, as it applies to local government, is limited to "law enforcement departments when they are exercising their general duty to protect the public." *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000); *see Thompson v. Waters*, 351 N.C. 462, 465, 526 S.E.2d 650, 652 (2000).

In this case, viewing Plaintiff's allegations in the light most favorable to Plaintiff, Defendant is not protected by the public duty doctrine. Defendant, as a local government, was not acting in a law enforcement capacity or exercising its general duty to protect the public by providing security to the Courthouse, but was acting as owner and operator of the Courthouse. Defendant was statutorily required to provide "courtrooms, office space, . . . and related judicial facilities." N.C.G.S. § 7A-302 (1999) ("each county in which a district court has been established" is required to provide "courtrooms, office space, . . . and related judicial facilities"). In this capacity, Defendant was not acting to provide police protection to the general public, and, thus, the public duty doctrine is not applicable. Accordingly, the trial court did not err in failing to dismiss Plaintiff's claims due to the public duty doctrine.

III

[3] Defendant next argues that "the common law doctrine of sovereign immunity provides" a basis for the dismissal of Plaintiff's claims. We disagree.

The doctrine of sovereign immunity provides counties and its officials with immunity from suits against them 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). A county, however, "may contract to insure itself and any of its officers, agents, or employees against liability" for torts. N.C.G.S. § 153A-435(a) (1999). The "[p]urchase of insurance pursuant to [section 153A-435(a)] waives the county's governmental immunity, to the extent of insurance coverage." *Id.* "Purchase" means to acquire, buy, obtain, procure or secure. *Burton's Legal Thesaurus* 440 (3d ed. 1998). If a plaintiff fails to allege a waiver of immunity by the purchase of insurance in her complaint, the plaintiff has failed to state a claim against the county. *Mullins v. Friend*, 116 N.C. App. 676, 681, 449 S.E.2d 227, 230 (1994).

In this case, viewing Plaintiff's allegations in the light most favorable to Plaintiff, Defendant waived its governmental immunity.

Plaintiff alleges Defendant entered into the Contract with Burns requiring Burns to obtain a liability insurance policy and name Defendant as an additional insured. Although Defendant did not "purchase" a liability insurance policy from an insurance company, we do not read section 153A-435(a) as requiring the purchase of insurance from an insurance company in order to waive governmental immunity. By requiring Burns to obtain an insurance policy and name Defendant as an additional insured, Defendant contracted, within the meaning of section 153A-435(a), to have itself insured and, thus, waived its governmental immunity.[3] Accordingly, the trial court did not err in denying Defendant's motion to dismiss Plaintiff's complaint based on governmental immunity.

IV

[4] Defendant finally argues the trial court erred in failing to dismiss Plaintiff's fourth claim because Plaintiff was not an intended beneficiary of the Contract. We agree.

A plaintiff who alleges a claim based on third-party beneficiary contract doctrine must establish in her complaint: "(1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for [her] direct, and not incidental, benefit." *Leasing Corp. v. Miller*, 45 N.C. App. 400, 405-06, 263 S.E.2d 313, 317, *disc. review denied*, 300 N.C. 374, 267 S.E.2d 685 (1980). As to the third element, an allegation in a complaint that a plaintiff is "a member of a class of persons 'intended' by the contracting parties to be benefi[t]ted falls far short of alleging that the contract was entered into for the direct, not incidental, benefit of [the] plaintiff." *Hoots v. Pryor*, 106 N.C. App. 397, 409, 417 S.E.2d 269, 277, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148 (1992). It is not enough that the contract benefits the plaintiff " 'if in fact it was not intended for [her] direct benefit.' " *Snyder v. Freeman*, 300 N.C. 204, 220, 266 S.E.2d 593, 603-04 (1980) (citation omitted). A complaint failing to allege any of the required elements of

3. We note in *Cross v. Residential Support Services*, this Court held "[a]ssuming *arguendo* that the Area Authority's requirement, in the contract, that [a service provider] purchase insurance, is a waiver of immunity by the Authority . . . , it does not necessarily follow that the County has thereby waived immunity." *Cross v. Residential Support Services*, 123 N.C. App. 616, 619, 473 S.E.2d 676, 678 (1996), *remanded on other grounds*, 345 N.C. 341, 483 S.E.2d 164 (1997). In *Cross*, it was "the Area Authority, not the County, that [was] indemnified by a decision to purchase insurance." *Id.* Thus, *Cross* left unanswered the question, now present in the case *sub judice*, of whether a county requiring a service provider to purchase insurance waives the county's governmental immunity.

the third-party beneficiary doctrine is subject to dismissal under Rule 12(b)(6). *Hoots*, 106 N.C. at 408, 417 S.E.2d at 276.

In this case, Plaintiff's complaint fails to allege the Contract was entered into for her direct benefit. Plaintiff alleges nothing more than as an employee of the AOC and a user of the Courthouse, the parties intended to benefit Plaintiff. The Contract provides that it is entered into for the security of the Courthouse. It does not evidence the parties' intention, other than incidental, to provide a benefit to Plaintiff or other users of the Courthouse. Accordingly, the trial court erred in failing to dismiss the fourth claim for failure to state a claim upon which relief can be granted.

In summary, the trial court: has subject matter jurisdiction over Plaintiff's claims against Defendant; did not err in failing to dismiss Plaintiff's negligence claim against Defendant based on the public duty doctrine or governmental immunity; and did err in failing to dismiss Plaintiff's claim to enforce the Contract based on the third party beneficiary doctrine.

Affirmed in part, and reversed in part.

Judges McGEE and CAMPBELL concur.

STATE OF NORTH CAROLINA v. JAMES DOUGLAS JONES, DEFENDANT

No. COA00-68

(Filed 15 May 2001)

Sexual Offenses— sexual activity by custodian–Job Corps employee

The trial court did not err in a prosecution against a Job Corps employee for voluntary sexual activity with a sixteen-year-old Job Corps participant by refusing to grant motions to dismiss the charge of sexual activity by a custodian. *State v. Raines*, 319 N.C. 258, does not require that a victim be involuntarily or physically confined or that an institution obtain legal custody for the victim to be considered in "custody" under N.C.G.S. § 14-27.7(a). In accordance with *Raines*, the victim here was in the Job Corps'

care, preservation, and protection and was therefore within its "custody."

Appeal by defendant from judgment entered 1 July 1999 by Judge Charles C. Lamm, Jr. in Superior Court, Transylvania County. Heard in the Court of Appeals 22 February 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth L. Oxley, for the State.

Timithy R. Cosgrove for defendant-appellant.

TIMMONS-GOODSON, Judge.

James Douglas Jones ("defendant") was indicted on two counts of sexual activity by a custodian in violation of North Carolina General Statutes section 14-27.7(a). The jury found defendant guilty of one indictment count, and the trial court imposed an active term of imprisonment. Defendant now appeals.

The State's evidence established that defendant was employed as a recreational assistant at the Schenck Job Corps Civilian Conservation Center ("Job Corps" or "the Corps") in Pisgah Forest, North Carolina. Job Corps is a facility operated by the United States Forest Service for the purpose of providing "a safe and secure living environment in which students experience personal growth, [and] learn self-management [and] personal responsibility in both independent and community living skills." To enroll in Job Corps, an individual must be between the ages of sixteen and twenty-one and must be "a low-income individual." 29 U.S.C.A. § 2884 (West 1999). According to the Corps' Director, Roger Mullens ("Mullens"), individuals must also be "[h]igh risk," in that they "dropped out of school," have a "lack of skills," be "in unemployed areas," or are "not . . . able to make a living on their own." Participants in the Job Corps program do so on a voluntary basis and are allowed to withdraw at any time. Upon arrival, the students' orientation manuals congratulate them on their "new job," and inform them that they are "working for the Federal Government" and that their "job is to participate in a training program." Job Corps provides students with job training and placement, employment, education opportunities, a clothing allowance, food, and on-campus housing and medical care. Job Corps further provides a variety of recreational activities.

Mullens testified that the program has "portal to portal responsibility legally [to participants], . . . meaning [legal responsibility] from

their front door back to their front door." As such, Job Corps maintains an accountability policy, pursuant to which students are required to sign in and out when going off-campus and abide by a nightly curfew, which is enforced with two "bed checks." Students are not allowed to have cars and rely on the Corps for transportation. The Corps periodically checks lockers and routinely checks the luggage of students returning from off-campus visits for contraband.

Students are allowed to leave Job Corps for "on-the-job training" and other employment. Students are further allowed unsupervised weekend and night visits, if they obtained a certain status and receive permission. If a student is absent for more than a twenty-four-hour period without permission, they are considered "[a]bsent without leave" or "AWOL," and as a result, Job Corps discontinues their pay. The Corps "is not responsible for students" who are classified as "AWOL" and cannot therefore provide help "if [the students are] arrested or injured." If a student is AWOL or in a prohibited area, that student could receive a "write-up" and be restricted to the center or receive a fine. If a student receives too many "write-ups," he or she could be terminated from the program. If an unemancipated minor goes unaccounted for within an hour of when they are to return to the Corps' campus, the Corps notifies the local authorities and the participant's parents.

A panel evaluates the students on a monthly basis to determine their status, which in turn determines their privileges. Job Corps policy provides that the program does not treat minor participants and young adults differently, with two exceptions. First, parents of unemancipated minors must consent to their child's enrollment in the program and must further give authorization for medical treatment. Second, for an unemancipated minor to receive an unsupervised pass, the parents must sign a consent form.

Pursuant to an "Employee Standards of Conduct with Students" form signed by all employees, Job Corps employees are strictly prohibited from dating or engaging in sexual relations with students. Defendant in this case signed a standard of conduct form.

Bobbie Jo McClendon ("McClendon"), the alleged victim, began the Job Corps program in June 1997 at the age of sixteen. According to McClendon, she decided to enroll because "[she] was doing real bad at home, . . . needed to do something better . . . [, and] [t]here was nothing there at home to do[.]" McClendon and her mother signed a

"Job Corps Consent Record," in which they both consented to McClendon's participation in the program and authorized routine medical treatment. McClendon's mother further gave permission for McClendon to receive unsupervised weekend passes. According to McClendon's own testimony, she understood that Job Corps' rules were strict, in that it had a "zero tolerance" policy, "[no] drugs, violence, sexual harassment and fighting."

While at Job Corps, McClendon was a full-time residential participant and was housed in one of the dormitories with other female participants between the ages of sixteen and twenty-six. Pursuant to Job Corps policy, McClendon received ten dollars every two weeks, an amount which was gradually increased to thirty-four dollars. McClendon also worked at a local fast food restaurant to supplement her income. McClendon attended classes during the week and a mandatory "dorm meeting" everyday. There were no scheduled activities on the weekends, and during all free periods, McClendon could go anywhere on campus for social or recreational activities.

Defendant was a recreational assistant in McClendon's physical education class during the Spring and Summer of 1998. One day after class, defendant approached McClendon in "a sexual way," at which time, he and McClendon began a sexual relationship that lasted until July 1998. McClendon testified that she and defendant had sexual intercourse between five or six times, in a variety of places on the Job Corps campus. According to McClendon, all of her sexual encounters with defendant were consensual, and defendant never came to her dormitory or any scheduled activities.

A Job Corps instructor learned of the relationship between defendant and McClendon, and an investigation ensued. Defendant subsequently gave a written statement to local authorities, in which he confessed to having consensual sex with McClendon. Defendant was thereafter arrested.

Prior to trial, defendant moved to dismiss the charges against him, arguing that there was no custodial relationship between Job Corps and the prosecuting witness. After a hearing on the motion, the trial court denied defendant's motion without prejudice. Following the presentation of evidence at trial, defendant again moved to dismiss, arguing the lack of a custodial relationship. Defendant did not present any evidence. The trial court denied defendant's motion, and defendant's appeal is now before this Court.

Defendant's only argument on appeal is that the trial court erred in denying his motions to dismiss. In ruling on a motion to dismiss, the trial court must examine, in the light most favorable to the State, whether substantial evidence exists to support the essential elements of the charged offense. *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988) (citation omitted).

Defendant was charged with sexual activity by a custodian, pursuant to section 14-27.7(a) of our General Statutes. Section 14-27.7(a) provides, *inter alia*:

> [I]f a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, *having custody of a victim of any age* engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E Felony. Consent is not a defense to a charge under this section.

N.C. Gen. Stat. § 14-27.7(a) (1999) (emphasis added). Defendant's only contention on appeal is that Job Corps did not have "custody" of McClendon, as defined by section 14-27.7(a), because like all Job Corps participants, she was "under no physical or mental disability . . . and [her] freedom to come and go has not been restricted in any manner but for a number of the institution's [r]ules and [r]egulations." Defendant's arguments further suggest that we adopt the definition of "custody" previously applied in the context of custodial interrogation, wherein custody implies physical force or legal control. Defendant argues that this narrow interpretation of "custody" is dictated by the principle that criminal statutes should be strictly construed against the State. With defendant's argument, we cannot agree.

Our Supreme Court has previously rejected a similar interpretation of "custody" under section 14-27.7(a) in *State v. Raines*, 319 N.C. 258, 354 S.E.2d 486 (1987). In *Raines*, the defendant, a nurse at a private hospital, repeatedly sexually assaulted a voluntary patient and was subsequently convicted pursuant to section 14-27.7(a). On appeal, the defendant argued that the patient was not in custody, as defined by the statute, because "the patient voluntarily submit[ted] to the hospital's care and control and thus c[ould] leave or refuse treatment at any time." *Id.* at 262, 354 S.E.2d at 489. Therefore, the defend-

ant, like defendant in the case *sub judice*, argued that the meaning of custody should be limited "to legal control or restraint." *Id.*

The North Carolina Supreme Court rejected the defendant's interpretation of "custody," holding:

> We do not believe the General Assembly intended such a narrow construction. Words in a statute generally must be construed in accordance with their common and ordinary meaning, unless a different meaning is apparent or clearly indicated by the context. *State v. Koberlein*, 309 N.C. 601, 605, 308 S.E.2d 442, 445 (1983). The ordinary meaning of the word "custody" is not limited to legal control or restraint. The word's definitions include an aspect of care, preservation, and protection as well. *See* Burton, Legal Thesaurus 131 (1980) ("care, charge, control"); Black's Law Dictionary 347 (5th ed. 1979) (the "care and control of a thing or person"); Webster's New International Dictionary (3d ed. unabridged 1964) (the "act or duty of guarding and preserving"). Voluntary patients in a private hospital place themselves in the care, charge, and control of the institution. The normal role of the hospital is to guard, preserve, and restore the health of patients who are in its care, charge or control. We thus conclude that the ordinary meaning of the word "custody," in the context in which it is used here, applies to voluntary patients in a private hospital.

Id. The Court further noted that: "While voluntary patients in private hospitals may have the legal power to terminate their stay, in reality their physical freedom is normally restricted by the condition that motivated their admission." *Id.* at 262-63, 354 S.E.2d at 489.

The Supreme Court recognized that strict construction of criminal statutes against the State was favored. *Id.* at 263, 354 S.E.2d at 489. However, the Court concluded that this well-established canon of construction was " 'not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.' " *Id.* (alteration in original) (quoting *United States v. Brown*, 333 U.S. 18, 25-26, 92 L. Ed. 442, 448, *reh'g denied*, 333 U.S. 850, 92 L. Ed. 1132 (1948)).

In the case *sub judice*, residential Job Corps participants, like the hospital patients in *Raines*, voluntarily relinquished much, but not

all, of their freedom to the care, charge, and control of Job Corps staff in "a safe and secure living environment." Job Corps provides basic needs to participants, including food, clothing, and medical care. The Corps' staff monitors resident participants through an extensive accountability system. This system is particularly strict in regards to un-emancipated minors like McClendon, whose parents or legal guardians must give consent for their enrollment and are alerted if the minor becomes missing. The program enforces a "zero tolerance" drug, alcohol, and violence policy and disciplines participants for violating that policy and other rules. The Corps grants unsupervised visitation only if a student attains a certain status and is given permission. In accordance with *Raines*, we conclude that McClendon was in Job Corps' care, preservation, and protection and was, therefore, within its "custody" as defined by section 14-27.7(a).

Defendant argues that *Raines* is inapplicable to the present case because the facts presented in *Raines* are wholly distinguishable from those in the case *sub judice*. We agree that there may be a significant difference between patients in hospitals, some of whom are physically unable to leave a facility due to the condition that motivated their admission, and Job Corps participants. However, the *Raines* Court did not limit its holding to the facts presented by that case. Rather, the crux of the *Raines* decision was that the General Assembly did not intend "custody" under section 14-27.7(a) as a narrow concept, limited "to legal control or restraint." *Id.* at 262, 354 S.E.2d at 489.

We further recognize that this is a close case concerning whether "custody" existed under section 14-27.7(a), particularly given the freedoms periodically granted Job Corps participants and their ability to withdraw from the program at anytime. Nevertheless, as noted *supra*, the Supreme Court's decision in *Raines* does not require that a victim be involuntarily or physically confined, or that an institution obtain legal custody of the victim for the victim to be considered in "custody" under section 14-27.7(a). Being bound by the *Raines* decision, we consequently find that the very specific factual scenario presented by this case, construed in the light most favorable to the State, constitutes the offense of sexual activity by a custodian in violation of section 14-27.7(a). Accordingly, we conclude that the trial court did not err in refusing to grant defendant's motions to dismiss.

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

No error.

Judges MARTIN and TYSON concur.

TRIANGLE BANK, PLAINTIFF v. MARGARET P. EATMON, BEXLEY J. EATMON, LETTIE A. EATMON, BRENDA E. DORSETT, LARRY C. DORSETT, R.W. HARRISON, JR., TRUSTEE, THOMAS J. RHODES, TRUSTEE, AND WILLIAM L. PRICE, JR., DEFENDANTS

No. COA00-489

(Filed 15 May 2001)

1. Fraud— fraudulent conveyances of property—guarantor of loan

The trial court did not err by granting summary judgment to plaintiff bank as to defendant guarantor's fraudulent transfers under deeds one and three of the interests in land in tracts one, two, four, and five, because: (1) the guarantor's conveyance of deed one under N.C.G.S. § 39-15 (conveyance before 1 October 1997) to a family member was voluntary, without consideration, and the guarantor did not retain property fully sufficient and available to pay her existing debts; (2) the guarantor's conveyance of deed three under N.C.G.S. § 39-23 (conveyance after 1 October 1997) was to a family member, the guarantor retained control and income of the property after the transfer, the transfers were made after a suit had been threatened or initiated, almost all of guarantor's assets were transferred, and the guarantor received less than reasonably equivalent value for deeded property; and (3) the language in the subject guaranty agreement made defendant guarantor primarily liable for the debt.

2. Appeal and Error— appealability—interlocutory order—denial of summary judgment

Although defendants contend the trial court erred by denying defendants' motion for summary judgment with respect to the conveyance of deed number three, this assignment of error is dismissed because: (1) the denial of a motion for summary judgment is interlocutory and not immediately appealable unless it affects a substantial right; and (2) defendants have not asserted a substantial right, nor did the Court of Appeals find one.

Appeal by defendants from judgment entered 18 January 2000 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Court of Appeals 14 March 2001.

Fields & Cooper, P.L.L.C., by John S. Williford, Jr., for plaintiff-appellee Triangle Bank.

Warren, Perry & Anthony, P.L.L.C., by Michael Perry and Fred B. Amos, II, for defendant-appellants, Bexley J. and Lettie A. Eatmon and Brenda E. and Larry C. Dorsett.

Gay, Stroud & Jackson, L.L.P., by Andy W. Gay, for defendant-appellant, Margaret P. Eatmon.

Narron & Holdford, P.A., by I. Joe Ivey, for defendants William L. Price, Jr., R.W. Harrison, Jr. and Thomas J. Rhodes.

WYNN, Judge.

This is another appeal regarding the ill-fated loans that Triangle Bank (successor to Unity Bank and Trust Company) made to Bennie J. Eatmon which were guaranteed by his mother, Margaret P. Eatmon. In the previous appeal, we upheld the trial court's grant of summary judgment against Mrs. Eatmon. The facts supporting the grant of summary judgment against her showed that two loans were made to Bennie J. Eatmon for substantial amounts in 1995. In addition to a security interest in farm equipment, the loans were guaranteed by Mrs. Eatmon. When the loans were not paid in January 1998, Triangle Bank brought an action against the Eatmons to recover payments. Ultimately, the trial court granted summary judgment against Mrs. Eatmon for the uncollected loan payments and we upheld that judgment.

The present appeal stems from another action brought by Triangle Bank to set aside as fraudulent conveyances, three deeds executed by Mrs. Eatmon conveying all of her real property to her children and their spouses:

1. Deed from Margaret P. Eatmon, GRANTOR, to Bexley J. Eatmon, GRANTEE, dated 28 October 1996, recorded 20 February 1997 conveying five tracts—60 acres, 59.8 acres, 30 acres, 1 acre, and 29.5 acres less two parcels, reserving a life estate for Margaret P. Eatmon.

2. Deed from Margaret P. Eatmon, Bexley J. Eatmon and wife, Lettie A. Eatmon, GRANTORS, to Bexley J. Eatmon and wife,

Lettie A. Eatmon—a one-half undivided interest as tenants-in-common, and Brenda Dorsett and husband Larry C. Dorsett—a one-half undivided interest as tenants-in-common, GRANTEES, dated 30 January 1998 and recorded 2 February 1998 conveying a 30-acre tract.

3. Deed from Margaret P. Eatmon, GRANTOR, to Bexley J. Eatmon, GRANTEE, dated 3 February 1998, recorded 19 February 1998 conveying six tracts—60 acres, 59.8 acres, 30 acres, 1 acre, and 29.5 acres less two parcels, and 40,000 square feet.

Following a hearing, the trial court granted summary judgment in favor of Triangle Bank on its claim that the transfers under deeds one and three constituted fraudulent conveyances. However, the trial court denied motions of both parties for summary judgment as to the conveyances under deed two. The defendants appealed to this Court.

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[1] On appeal, the defendants contend that the trial court erred granting summary judgment to Triangle Bank as to the transfers under deeds one and three of the interests in tracts one, two, four and five.[1] They argue that Mrs. Eatmon was not indebted to Triangle Bank at the time of the conveyances and that there was no evidence in the record that the conveyances were fraudulent. We disagree.

Rule 56 of the North Carolina Rules of Civil Procedure permits summary judgment upon the showing that there is no genuine issue as to any material fact, and that one party is entitled to judgment as a matter of law. *See* N.C. Gen. Stat. § 1A-1, Rule 56 (1999); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980). 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 judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). To prevail against a summary judgment motion, the opposing party "must set forth specific facts showing that there is a genuine issue [of material fact] for trial." *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 149, 229 S.E.2d 278, 281 (1976) (quoting Rule 56(e)).

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1. Tract number three consisting of 30 acres was conveyed in fee by deed number two, and therefore was not the subject of the summary judgment against the defendants regarding deeds one and three.

In this case, N.C. Gen. Stat. § 39-15 (1984) governed the transfer under deed one of the remainder interests of tracts one, two, four and five recorded on 20 February 1997.[2] That statute provided in part that "feigned, covinous and fraudulent . . . conveyances . . . shall be deemed . . . utterly void and of no effect."

In *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914), our Supreme Court set forth five scenarios for the finding of a fraudulent conveyance. The second principle for establishing a fraudulent conveyance applies to this case:

> (2) If the conveyance is *voluntary* and the grantor does not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors, but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally.

Id. at 226, 81 S.E. 162, 164 (emphasis added).

Applying this *Aman* principle to the facts of this case, we first observe that the conveyance under deed one was voluntary. A conveyance is voluntary "when it is not for value, i.e., when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud." *Nytco Leasing, Inc. v. Southeastern Motels, Inc.*, 40 N.C. App. 120, 128, 252 S.E.2d 826, 832 (1979); *see also Michael v. Moore*, 157 N.C. 462, 465, 73 S.E. 104, 105 (1911) (In order to divest her of title to the properties fraudulently conveyed to her it need not be shown that she either participated in or even had knowledge of the fraud; for "[i]t is a principle of the common law, as old as the law itself . . . that [a debtor] shall be just to his creditors before he is generous to his family.").

Here, the record shows that the disputed conveyances under deed one were "voluntary", i.e., without adequate consideration. Indeed, Mrs. Eatmon's sworn testimony establishes the conveyance was without consideration. Her testimony was corroborated by her son's sworn statement that he gave no consideration for the property.

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2. N.C. Gen. Stat. § 39, Article 3A, entitled Uniform Fraudulent Transfer Act governs fraudulent conveyances in North Carolina occurring on or after 1 October 1997.

Second, the record in this case shows that Mrs. Eatmon did not retain property fully sufficient and available to pay her existing debts. Fraudulent intent may be established by circumstances, and a close family relationship coupled with less than reasonable consideration and outstanding debts that the debtor is unable to pay is strong evidence of fraud. N.C. Gen. Stat. § 8C-1, Rule 833 (1999); *Nytco Leasing, Inc. v. Southeastern Motels, Inc.*, 40 N.C. App. at 130, 252 S.E.2d at 833; *see also Kirkhart v. Saieed*, 107 N.C. App. 293, 294, 419 S.E.2d 580 (1992) (holding that a creditor is entitled to protection from fraudulent transfers even though a debtor transfers the assets prior to the creditor obtaining judgment against the debtor).

Here, the record shows that at the time of the conveyances under deed one, Mrs. Eatmon did not retain properties sufficient to cover the existing debt to Triangle Bank. Moreover, at the time that Bennie J. Eatmon applied to the bank for the loans, Mrs. Eatmon's financial statement disclosed a net worth of $413,328, which consisted primarily of unencumbered real estate. As in *Nytco*, her fraudulent intent in conveying that unencumbered real estate is established by the circumstances which include a transfer of property to her son without consideration in the face of outstanding debts that she was unable to pay. Thus, the trial court properly found that the conveyances under deed one were fraudulent under N.C. Gen. Stat. § 39-15.

As to the conveyances under deed three, N.C. Gen. Stat. § 39-23 (1999), the Uniform Fraudulent Transfer Act governs since the conveyance occurred after 1 October 1997. N.C. Gen. Stat. § 39-23.4(a)(1) establishes as fraudulent, a transfer with intent to hinder, delay, or defraud a creditor. N.C. Gen. Stat. § 39-23.4(b) sets out thirteen factors to be considered, among others in determining whether the transferor possessed actual fraudulent intent. These factors include: A transfer to an insider; a transferor retaining possession or control of the property after transfer; a suit being filed or threatened against the transferor prior to transfer; a transfer being substantially all of the transferor's assets; and receipt of less than the reasonably equivalent value for the deeded property. N.C. Gen. Stat. § 39-23.4(b). The payment of consideration is only one of the several factors to be considered by the court determining intent. N.C. Gen. Stat. § 39-23.4(b)(8).

The record indicates evidence of the following statutory factors in Mrs. Eatmon's transactions: Transferring the property to insiders; retaining control and income of the property after the transfer; making the transfers after a suit had been threatened or initiated; trans-

ferring almost all of the transferor's assets; and receiving less than reasonably equivalent value for deeded property.

Applying the N.C. Gen. Stat. § 39-23.4(b) factors to this case, we find that Mrs. Eatmon transferred the property to an insider, her son, Bexley J. Eatmon. *See* N.C. Gen. Stat. § 39-23.1 (7) and (11) (setting forth that insiders include relatives within the third degree). The record also shows that Mrs. Eatmon retained possession and control over the property. While the deed on its face conveyed the remainder interest to her son, Bexley J. Eatmon, the record shows that Mrs. Eatmon and Bexley J. Eatmon agreed that upon Mrs. Eatmon's death, he would deed certain portions of the property to his sister, Brenda E. Dorsett and brother, Bennie J. Eatmon and retain a certain portion for himself. He further agreed to divide the property as specified by Mrs. Eatmon's will.

Moreover, the record shows that Mrs. Eatmon made these transfers after suit had been threatened and filed. On 4 December 1996, an attorney writing on behalf of the bank demanded payment from Mrs. Eatmon. Subsequently, she was personally served with a complaint. Mrs. Eatmon testified that she gave away all of her assets with her net worth being reduced to "nothing." The record also indicates that the grantee, Bexley J. Eatmon, did not pay any consideration for the transfer. Thus, the trial court properly found that the conveyances under deed three were fraudulent under the Uniform Fraudulent Transfer Act.

Nonetheless, the defendants argue that Triangle Bank was not a creditor of Mrs. Eatmon for fraudulent conveyance law purposes because at the time Mrs. Eatmon transferred the land, she was only a guarantor and not a maker of the promissory notes. However, this Court rejected a similar argument in *North Carolina National Bank v. Johnson Furniture Company of Mount Airy, Inc.*, 34 N.C. App. 134, 237 S.E.2d 313 (1977). In that case, the guarantor conveyed her property to herself and her husband to create a tenancy by the entirety. On appeal, the guarantor argued since she was a guarantor and not a debtor, the bank could not establish any fraudulent intent to defraud creditors. *Id.* at 134, 237 S.E.2d 314. We rejected that argument by examining the language of the guaranty agreement and holding that the guaranty language made the guarantor primarily liable for the debt. *See North Carolina National Bank.*

Likewise, the guaranties signed by Mrs. Eatmon stated that her liability was "direct and immediate and not conditional or contingent

upon either the pursuit of any remedies against the Debtor or any other person or foreclosure of any security interests or liens available to the Bank." *See Jennings Communication* Corp. *v. PCG Golden Strand, Inc.*, 126 N.C. App. 637, 641, 486 S.E.2d 229, 231 (1997) ("The nature and extent of the liability of a guarantor depends on the terms of the contract as construed by the general rules of construction."). *Id.* As in *Johnson*, we hold that the language in the subject guaranty agreement made Mrs. Eatmon primarily liable for the debt. *See also Graebur v. Sides*, 151 N.C. 596, 66 S.E. 600 (1909).

We uphold the trial court's grant of summary judgment in favor of Triangle Bank on this issue.

[2] In their final argument, the defendants contend that the trial court committed reversible error by not granting their motion for summary judgment in respect to the conveyance of deed number three. However, the denial of a motion for summary judgment is interlocutory, and not immediately appealable unless it affects a substantial right. N.C. Gen. Stat. §§ 1-277(a) (1999) and 7A-27(d)(1) (1999); *N.C. Coastal Motor Line, Inc. v. Everette Truck Line, Inc.*, 77 N.C. App. 149, 153, 334 S.E.2d 499, 502 (1985), *rev. denied*, 315 N.C. 391, 338 S.E.2d 880 (1986). The defendants have not asserted such an affected substantial right and we have found none. Accordingly, this assignment of error is dismissed.

Affirmed in part, dismissed in part.

Judges McGEE and THOMAS concur.

LAURA JEAN CHURCH AND ROB WADE CHURCH, PLAINTIFFS v. ALLSTATE INSURANCE COMPANY, DEFENDANT

No. COA00-563

(Filed 15 May 2001)

1. Insurance— underinsured motorist–settlement with driver—right of insurance company to appear unnamed

An underinsured motorist carrier had a right under N.C.G.S. § 20-279.21(b)(4) to appear as an unnamed defendant in the liability phase of an injured passenger's action against the driver even though the passenger had settled with the driver.

2. Appeal and Error— appealability—right of insurance company to appear unnamed

An appeal was interlocutory but involved a substantial right where it concerned an underinsured motorist insurance company's motion to appear unnamed in the liability phase of a trial.

3. Insurance— underinsured motorist action—bifurcated trial

In cases where a UIM carrier defends the liability issues as an unnamed defendant, the trial of the coverage issues should be bifurcated.

4. Parties— action against underinsured motorist carrier—settlement with alleged tortfeasor—necessary party

In an action in which plaintiffs sought recovery from their underinsured motorist carrier, the trial court should have added as a necessary party the person driving the car in which the accident occurred where plaintiffs had settled all claims against her. Plaintiffs must prove that the driver was negligent and that her negligence was the proximate cause of their injuries under the policies in question.

Appeal by defendant from order entered 9 March 2000 by Judge Michael E. Helms in Wilkes County Superior Court. Heard in the Court of Appeals 26 March 2001.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Jay Vannoy, for the plaintiff-appellees.

Willardson & Lipscomb, L.L.P., by William F. Lipscomb, for the defendant-appellant.

EAGLES, Chief Judge.

Defendant appeals the denial of its motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(7) and its motion for separate trials pursuant to N.C.R. Civ. P. 42(b). The evidence presented at the hearing tended to show the following. Laura Jean Church (hereinafter "plaintiff") sustained injuries on 25 October 1996 when she was a passenger in the car driven by Argie Coffey. Coffey's insurance company, Integon, tendered its limits. Plaintiffs Laura Jean Church and Rob Wade Church were residents of Wade Church's household and as such are covered by a business auto policy issued by Allstate

Insurance Company (hereinafter "defendant"). On 13 February 1998 plaintiffs settled all claims against Argie Coffey and her spouse. The plaintiffs reserved their rights to prosecute a claim against defendant based on their underinsured motorist coverage. This agreement was executed with the approval of defendant.

Thereafter, plaintiffs filed a complaint seeking to recover underinsured motorists coverage benefits from defendant. Defendant appears as the named defendant. On 5 May 1999 defendant filed a motion to dismiss based on N.C.R. Civ. P. 12(b)(7) for failure to join a necessary party. On 7 January 2000 defendant filed a motion for separate trials. Defendant's motions were heard and denied by the trial court 9 March 2000.

[1] Defendant asserts that G.S. 20-279.21(b)(4) guarantees that an underinsured motorist (UIM) carrier has the right, at its election, to appear in the liability phase of a trial as an unnamed defendant. Because we believe that a UIM carrier-defendant, at its election, must be permitted to appear as an unnamed defendant in the liability phase of a trial and we believe that this is a substantial right, we reverse the trial court.

G.S. 20-279.21 (b)(4) states in part:

> Upon receipt of notice, the underinsured motorist insurer **shall have the right to appear in defense of the claim without being named as a party therein**, and without being named as a party may participate in the suit as fully as if it were a party. The underinsured motorist insurer may elect, but may not be compelled, to appear in the action in its own name and present therein a claim against other parties; provided that application is made to and approved by a presiding superior court judge, in any such suit, any insurer providing primary liability insurance on the underinsured highway vehicle may upon payment of all of its applicable limits of liability be released from further liability or obligation to participate in the defense of such proceeding.

Id. (emphasis added). This Court in *Sellers v. N.C. Farm Bureau Mut. Ins. Co.*, 108 N.C. App. 697, 424 S.E.2d 669 (1993), held that "even if the tortfeasor is released from the action, the case can continue, if requested, in the tortfeasor's name only." *Id.* at 699, 424 S.E.2d at 670. In *Sellers*, the plaintiff filed a complaint and an amended complaint against the driver of the vehicle and the UIM carrier. *Id.* at 698, 424 S.E.2d at 669. The driver was the named defend-

ant and the UIM carrier was the unnamed defendant. *Id.* Plaintiff admitted in discovery that she had settled and released the driver. *Id.* at 698, 424 S.E.2d at 670. The trial court granted the driver's motion for summary judgment and "signed an order which substituted the unnamed defendant, Farm Bureau, for the named defendant in the action." *Id.* This Court held that "[a] jury would more likely concentrate on the facts and the law as instructed, rather than the parties, . . ." if the named defendant in the liability phase was an individual and not an insurance company. *Id.* at 699, 424 S.E.2d at 670. This Court further held "that a release or settlement of an action against the tortfeasor does not vitiate the express statutory terms of N.C.G.S. § 20-279.21(b)(4) such that the action can continue with the insurance carrier remaining as an unnamed defendant." *Id.* at 699-700, 424 S.E.2d. at 670.

In *Braddy v. Nationwide Mutual Liability Ins. Co.*, 122 N.C. App. 402, 470 S.E.2d 820 (1996), this Court, relying on *Sellers*, held that when the plaintiff voluntarily dismissed the tortfeasor the UIM carrier's right to remain as an unnamed defendant for the liability phase of the trial is not affected. That the named defendant is no longer a party to the action does not vitiate the UIM carrier's statutory right to appear unnamed. *Id.* at 407, 470 S.E.2d at 823. *Braddy* relied on the *Sellers* holding that:

> [Section 20-279.21(b)(4)] is, to us, clear and unambiguous. The [UIM] insurer . . . "*shall* have the right to appear in defense of the claim *without being named as a party therein, and . . . may participate* in the suit as fully as if it were a party." This language and the cases which demonstrate its application convince us that even if the tortfeasor is released from the action, the case can continue, if requested [by the UIM insurer pursuant to section 20-279.21(b)(4)], in the tortfeasor's name only.

Braddy, 122 N.C. App. at 407-08, 470 S.E.2d at 823; *Sellers*, 108 N.C. App. at 699, 424 S.E.2d at 670 (citation omitted).

Here plaintiffs argue that *Wilmoth v. State Farm Mut. Auto Ins. Co.*, 127 N.C. App. 260, 488 S.E.2d 628 (1997) requires that in situations where a UIM carrier remains as the only defendant, it must appear as the named defendant. We disagree. In *Wilmoth*, this Court held that although the plaintiff's right to recover from a UIM carrier is derivative of the claim against the tortfeasor, the fact that the tortfeasor settled does not quash the claim against the

UIM carrier. *Id. Wilmoth* only addresses whether or not a cause of action exists. *Wilmoth* does not address under what name the suit must be prosecuted.

The plaintiffs argue that to substitute the tortfeasor's name for the UIM carrier's name would produce absurd results, because the direct action would lie against the UIM carrier but allow the real defendant to be unnamed at trial. This is precisely what the General Assembly has mandated by enacting G.S. 20-279.21(b)(4). The General Assembly states that UIM carriers cannot be compelled to be named defendants in the liability phase of a trial. Previously, this Court has reasoned that the legislature has done so because "[a] jury would more likely concentrate on the facts and the law as instructed, rather than the parties, . . ." if one party was not an insurance company. *Sellers*, 108 N.C. at 699, 424 S.E.2d at 670.

Plaintiffs also argue that an impermissible conflict of interest would arise if the UIM carrier's attorney were to represent to the jury that he represented the interests of the tortfeasor. Here, where the tortfeasor has been released from liability, no conflict arises. The nature of UIM claims is such that in the liability phase of a trial, the UIM's defenses are the same as the tortfeasor's defenses would be if the tortfeasor was a party to the action. The parties would be codefendants. The comments to the Revised Rules of Professional Conduct 1.7 state in part:

> Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil.

N.C.R. Prof. Cond. 1.7 cmt (1998). We believe that here, the codefendants do not have incompatible positions. Argie Coffey, the tortfeasor, has no position except to be the named defendant. Coffey's liability exposure has been extinguished by the Settlement Agreement and Covenant Not to Enforce Judgment. This agreement was approved by the UIM carrier.

[2] We note that this appeal is interlocutory. 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. G.S. 1-277(a); G.S. 7A-27(d)(1). It is well-established that an interlocutory order is appealable under the "substantial right" exception where (1) the right itself is substantial, and (2) the order deprives the appellant of a substantial right which will be lost if the order is not reviewed before final judgment. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5-6, 362 S.E.2d, 812, 815 (1987). The test is more easily stated than applied: "It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

In *Sellers* this Court did not address whether the appeal was interlocutory or whether the right asserted was substantial. This Court addressed the merits—holding that the UIM carrier had the statutory right to appear unnamed. The procedural history in *Sellers* is very similar to this case. The appeal arose out of an interlocutory order substituting the UIM carrier for the tortfeasor as the named defendant. *Sellers*, 108 N.C. App. at 698, 424 S.E.2d at 669. Here defendant appeals from an order denying defendant's motion to appear unnamed in the liability phase of the trial.

In *Anderson v. Atlantic Casualty Ins. Co.*, 134 N.C. App. 724, 518 S.E.2d 786 (1999), this Court dismissed a similar appeal on the grounds that it was interlocutory and that the right for a UIM carrier to appear unnamed was not substantial. The *Anderson* court made no reference to the *Sellers* court. In *Anderson*, the UIM carrier appealed an order denying the carrier's motion for summary judgment asserting that the action " '[was] improperly brought against [defendant] as named defendant in violation of [N.C.G.S. § 20-279.21(b)(4) (1993)],' and that plaintiff's claim was barred as a matter of law by virtue of plaintiff's execution of a general release without preserving his right to pursue a UIM claim against defendant." *Anderson*, 134 N.C. App. at 725, 518 S.E.2d at 787. The *Anderson* court held as follows:

> In the case *sub judice*, the issues presented on appeal concern whether plaintiff's action is barred by a general release and whether G.S. § 20-279.21(b)(4) prevents plaintiff from compelling defendant to participate as a named defendant herein. Indeed, the only possible "injury" defendant will suffer if not permitted immediate appellate review is the necessity of proceeding to trial

> before the matter is reviewed by this Court. Avoidance of trial is not a substantial right entitling a party to immediate appellate review.

Id. at 727, 518 S.E.2d at 789 (citation omitted). However, the *Anderson* court made no inquiry into the substance of the question by considering the particular facts of that case to determine whether the right asserted was substantial and thus immediately appealable. *Waters*, 294 N.C. at 208, 240 S.E.2d at 343.

It has long been the law in this state that "the avoidance of a rehearing or trial is not a 'substantial right' entitling a party to an immediate appeal." *Banner v. Hatcher*, 124 N.C. App. 439, 442, 477 S.E.2d 249, 251 (1996) (citation omitted). However, the General Assembly has specifically legislated that a UIM carrier may appear in the liability phase of a trial as the unnamed defendant. G.S. 20-271.21(b)(4). Our Supreme Court defines a substantial right as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right." *Oestreicher v. Stores*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976). After reviewing the substance of the question by considering the particular facts and resolving the question, we hold that on this record the right of a UIM carrier to defend unnamed is substantial.

[3] Defendant also assigns as error the trial court's refusal to bifurcate the trial. Defendant argues that since the UIM carrier has the right to appear unnamed as to the tort issues, all coverage issues must be handled in a separate phase of the trial. The issue of whether this defendant provides coverage for these plaintiffs is separate from whether Argie Coffey is liable for the accident. In cases where the UIM carrier defends the liability issues as an unnamed defendant, we hold that trial of the coverage issues should be bifurcated.

[4] Defendant next assigns as error the trial court's refusal to add Argie Coffey as a necessary party. The insurance policies in question provide UIM coverage for damages which an insured is entitled to recover from the owner or operator of an underinsured vehicle. Thus, plaintiffs must prove that Argie Coffey was negligent and that her negligence was the proximate cause of plaintiff's injuries. Here, plaintiffs fully released Larry and Argie Coffey from any personal liability whatsoever as a result of the incident and covenanted to hold the

Coffeys harmless. The plaintiffs also covenanted to enforce any judgment against the Coffeys against Allstate only. The Coffeys, if added, incur no additional risk. Accordingly, we hold that on this record Argie Coffey is a necessary party. N.C.R. Civ. P. 12(b)(7).

Accordingly the order of the trial court is

Reversed and remanded.

Judges McCULLOUGH and BRYANT concur.

TONY HARRIS TEW, PLAINTIFF v. DORIS CROSS WEST, DEFENDANT

No. COA00-507

(Filed 15 May 2001)

1. **Costs— settlement offer and verdict identical—costs allowed—attorney fees**

The trial court did not err by awarding attorney fees to plaintiff under N.C.G.S. § 6-21.1 in an action arising from a car accident where defendant had twice offered to settle for $5,000, the jury returned a verdict of $5,000, and the court also awarded plaintiff $555 in costs. The trial court made findings on the factors set out in *Washington v. Horton*, 132 N.C. App. 347, and the judgment was more favorable than the settlement offer.

2. **Costs— settlement offer and verdict identical—costs and attorney fees allowed—final judgment controlling**

The trial court did not err in an action arising from an automobile accident by taxing plaintiff's costs against defendant where defendant had twice offered $5,000 to settle, the jury returned a verdict of $5,000, and the court allowed plaintiff costs and attorney fees. Due to the granting of costs and attorney fees, the judgment finally obtained is more favorable because plaintiff receives the full $5,000 without having to reimburse court costs or compensate counsel. The verdict by the jury is not synonymous with the judgment finally obtained. N.C.G.S. § 1A-1, Rule 68.

3. Costs— settlement offer and verdict identical–plaintiff's attorney fees and costs allowed–denial of defendant's costs

The trial court did not err in an action arising from an automobile accident by denying defendant's Rule 68 motion for costs where defendant had twice offered to settle for $5,000, the jury returned a verdict for $5,000, and the court allowed plaintiff attorney fees and costs. The judgment finally obtained was more favorable than defendant's offer.

Appeal by defendant from judgment entered 31 January 2000 by Judge William A. Christian in Harnett County District Court. Heard in the Court of Appeals 1 February 2001.

Tart, Willis & Fusco by O. Henry Willis, Jr. for plaintiff-appellee.

Walker, Clark, Allen, Herrin & Morano by Donald E. Clark, Jr. and Gay Parker Stanley for defendant-appellant.

THOMAS, Judge.

Defendant appeals from an order entered by the trial court taxing plaintiff's costs and attorney fees against defendant. Defendant sets forth two assignments of error. For reasons discussed herein, we affirm the trial court.

The facts are as follows: On 15 December 1997, plaintiff was injured in a car accident involving defendant. Before plaintiff filed suit, defendant offered to settle for $5,000.00. Plaintiff refused. After the institution of the suit, defendant served plaintiff with an offer of judgment on 18 December 1999 for $5,000.00, which plaintiff also refused. The case went to trial on 22 November 1999 and the only matter submitted to the jury was the issue of damages. The jury returned with a verdict for plaintiff in the amount of $5,000.00. Plaintiff accepted the verdict and made a motion for attorney fees, which was denied. In January 2000, defendant made a motion for costs and plaintiff filed motions for costs and for reconsideration of the motion for attorney fees. On 31 January 2000, the trial court granted plaintiff's motions and denied that of defendant. Defendant appeals the grant of plaintiff's motions for attorney fees and costs and the denial of her motion for costs.

[1] By defendant's first assignment of error, she argues the trial court abused its discretion by reconsidering and granting plaintiff's motion for attorney fees. We disagree.

> The North Carolina General Statutes provide:
>
> 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.

N.C. Gen. Stat. § 6-21.1 (1999). Under this statute, the trial judge is given the discretion to award attorney fees to the prevailing party. *See Porterfield v. Goldkuhle*, 137 N.C. App. 376, 528 S.E.2d 71 (2000). The trial court's ruling will not be disturbed on appeal absent a showing of abuse of discretion. *West v. Tilley*, 120 N.C. App. 145, 461 S.E.2d 1 (1995). 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) (citations omitted).

When determining whether to award attorney fees, the trial court must consider the entire record, including the following factors: 1) settlement offers made prior to institution of the action; 2) offers of judgment made 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 a case of unwarranted refusal by an insurance company, the context in which the dispute arose; 5) the timing of settlement offers; and 6) the amounts of settlement offers as compared to jury verdict. *Washington v. Horton*, 132 N.C. App. 347, 351-52, 513 S.E.2d 331, 334-35 (1999). We now, in the aggregate, review these factors.

As to factor one, the trial judge found that defendant's insurance carrier, Allstate Insurance Company, mailed a check for $5,000 to

plaintiff prior to the institution of the lawsuit in finding of fact two. This offer was rejected. As to factor two, the trial judge found in finding of fact three that after suit had been filed, counsel for defendant served an offer of judgment on plaintiff's counsel for the same amount. This offer was also rejected by plaintiff. The trial judge further found in findings of fact three and four that plaintiff had incurred costs of $555 and that plaintiff and his counsel had a contingency agreement. In finding of fact twelve, the trial judge found that the offer of judgment tendered by defendant to plaintiff on 18 December 1998 was less than the judgment finally obtained by the plaintiff, which also satisfies factor six. As to factor three, the trial judge, in finding of fact thirteen, found that defendant incurred deposition costs of $295.98, but did not mention that defendant may have unjustly exercised superior bargaining power. As to factor four, there was no unwarranted refusal by the insurance company. This finding is not necessary since the suit was not on an insurance policy. *Crisp v. Cobb*, 75 N.C. App. 652, 331 S.E.2d 255 (1985). Finally, as to factor five, the trial court found, in findings of fact two and three, that the settlement offers were made both prior to the institution of the lawsuit, and after in the amount of $5,000.00.

Because detailed findings are not required for each factor, these excerpts are adequate findings of fact based on the whole record. The timing and amount of the settlement offers and the amount of the jury verdict are the most crucial factors in the case at bar. *See Culler v. Hardy*, 137 N.C. App. 155, 526 S.E.2d 698 (2000).

As aforementioned, defendant twice offered to settle the lawsuit for $5,000. Twice, plaintiff rejected the offer. Defendant argues that the judgment offered was not more favorable than the judgment finally obtained because the jury awarded plaintiff $5,000. However, plaintiff was also awarded $555 in costs and, additionally, attorney fees were taxed as part of the costs of the action, pursuant to section 6-21.1. Nonetheless, even without attaching the attorney fees, the judgment is still $5,555.00 and therefore, more favorable than the offer of $5,000.00. We therefore hold the trial court did not err in awarding attorney fees to plaintiff.

[2] By defendant's second assignment of error, she argues the trial court erred in taxing costs against her and denying her motion for costs because the offer of judgment equaled the jury's verdict. We disagree. Offers of judgment are governed by the Rules of Civil Procedure as follows:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer . . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

N.C. Gen. Stat. § 1A-1, Rule 68 (1999). The N.C. Supreme Court recently held that "costs incurred after the offer of judgment but prior to the entry of judgment should be included in calculating the 'judgment finally obtained[.]' " *Roberts v. Swain*, 353 N.C. 246, 250-51, 538 S.E.2d 566, 569 (2000). We note that "costs" include reasonable attorney fees. N.C. Gen. Stat. § 6-21 (1999).

Defendant argues the judgment finally obtained does not include the costs because the record reflects a recovery of $5,000 in the Order and Judgment. The attorney fees were awarded as part of the costs in a post-trial hearing. The N.C. Supreme Court has defined "judgment" as " '[t]he final decision of the *court* resolving the dispute and determining the rights and obligations of the parties,' and '[t]he law's last word in a judicial controversy." *Poole v. Miller*, 342 N.C. 349, 352, 464 S.E.2d 409, 411 (1995), *reh'g denied*, 342 N.C. 666, 467 S.E.2d 722 (1996) (quoting *Black's Law Dictionary* 841-42 (6th ed. 1990). The *Poole* Court also stated that the judgment finally obtained is not merely the jury's verdict. Only a court can render a judgment, not a jury. *Id.* In the instant case, the post-trial order dated 31 January 2000 is the final decision resolving the dispute and determining the obligations of defendant to plaintiff. That order contains the $5,000 jury verdict, the court costs of $555 and attorney fees of $3,937.50.

Defendant argues the judgment finally obtained by plaintiff is more favorable than the offer only because of the addition of attorney fees and court costs. It is correct that the amount of the verdict and offer were in equal amounts. However, due to the granting of costs and attorney fees, the judgment finally obtained is more favorable because plaintiff receives the full $5,000.00 without having to reimburse court costs or compensate counsel. The verdict by the jury is not synonymous with the judgment finally obtained. We therefore hold the trial court did not err in taxing plaintiff's costs against defendant.

[3] Finally, defendant argues the trial court erred in denying her Rule 68 motion for costs. We disagree. To recover costs under Rule 68, the

amount of the offer of judgment must exceed plaintiff's total recovery. *Poole v. Miller*, 342 N.C. 349, 353-55, 464 S.E.2d 409, 411-12 (1995), *reh'g denied*, 342 N.C. 666, 467 S.E.2d 722 (1996). Specifically, under Rule 68, "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." N.C. Gen. Stat. § 1A-1, Rule 68(a). We have held that the judgment finally obtained was more favorable than defendant's offer. Thus, defendant cannot have costs paid on her behalf.

The trial court did not err in its analysis and conclusion that the judgment finally obtained was greater than defendant's offer of judgment. Likewise, the trial court did not err in denying defendant's motion for costs.

We, accordingly, reject defendant's assignments of error and affirm the trial court.

AFFIRMED.

Judges MARTIN and TIMMONS-GOODSON concur.

LEWIS WILLIAMSON, PLAINTIFF v. TOWN OF SURF CITY, DEFENDANT

No. COA00-710

(Filed 15 May 2001)

Cities and Towns— closing portion of street—vested interest—compliance with procedural requirements

The trial court did not err by dismissing plaintiff's appeal with prejudice on the issue of defendant town's closing of a 20-foot portion of the street contiguous to plaintiff's and defendant's properties under N.C.G.S. § 160A-299 even though plaintiff contends defendant's intent for closing the street was for the improper purpose of constructing public facilities on the portion of the street vested in defendant as a result of the street closing, because: (1) defendant obtained a vested interest in a portion of the street as a result of the closing of the street; and (2) nothing in N.C.G.S. § 160A-299 limits the authority of the town to close a street based on the town's intent when ordering the closing, pro-

vided the town complies with the procedural requirements of the statute.

Appeal by plaintiff from judgment filed 19 April 2000 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 17 April 2001.

Robert W. Kilroy for plaintiff-appellant.

Lanier & Fountain, by Charles S. Lanier, for defendant-appellee.

GREENE, Judge.

Lewis Williamson (Plaintiff) appeals a judgment filed 19 April 2000 in favor of Town of Surf City (Defendant).

The record contains the following undisputed facts: Plaintiff is the owner of property located on North Shore Drive in Surf City, described in the Onslow County Registry at Map Book 9, Page 71 as "Lot 6, Block 20, Section 4, Old Settlers Beach." Defendant also owns property located on North Shore Drive in Surf City, described in the Onslow County Registry at Map Book 9, Page 71 as "Lots 4, 5, 6, 7, 8, 9, Block 26, Section 4, Old Settlers Beach." North Shore Drive, a public street maintained by Defendant, is a dead end street that terminates in front of Plaintiff's and Defendant's properties. Plaintiff's property is located directly across the street from Defendant's property; Defendant's property is adjacent to Old Settlers Beach and has been used in the past as a means of public access to the beach.

Prior to 1999, Defendant applied for and received a grant from North Carolina to improve its property on North Shore Drive for beach access. Defendant then applied for and received a CAMA Minor Development Permit from the North Carolina Department of Environment, Health, and Natural Resources and the Coastal Resources Commission. The permit allowed Defendant to make improvements to its property, including the construction of storage and bathroom facilities on the property. The setback requirements contained in the permit, however, necessitated that Defendant utilize a portion of the right-of-way of North Shore Drive for the construction of the improvements. On 2 March 1999, the Town Council of the Town of Surf City (the Town Council), therefore, passed a "Resolution of Intent" entitled: "A Resolution Declaring the Intention of the Town Council . . . to Consider the Closing of North Shore Drive

Between 2111 N. Shore Drive and 2112 N. Shore Drive" (Resolution of Intent), pursuant to N.C. Gen. Stat. § 160A-299 (procedure for permanently closing streets and alleys). The proposed closing would result in the closing of a 20-foot portion of North Shore Drive contiguous to Plaintiff's and Defendant's properties. The Resolution of Intent stated a meeting would be held on 6 April 1999 for the purpose of considering the closing. On 4 March 1999, Defendant notified Plaintiff by registered mail of its intent to consider closing a portion of North Shore Drive. Additionally, Defendant posted the Resolution of Intent "in two conspicuous places . . . in the vicinity of the road to be closed." Finally, the Resolution of Intent was published for four consecutive weeks in the *Topsail Voice*.

On 6 April 1999, the Town Council held a meeting "which included a public hearing of . . . Defendant's intention to close a portion of North Shore Drive." The Town Council "allowed all interested persons to appear and register any objections that they might have to the closing of North Shore Drive" and the Town Council calendered a vote on the proposed closing for 4 May 1999. At the 4 May 1999 meeting, the Town Council approved the closing by a majority vote and issued a "Street Closing Order" (the Order) containing the following pertinent provisions:

> WHEREAS, after full and complete consideration of the matter and having granted full and complete opportunity for all interested persons to appear and register any objections that they might have with respect to the closing of said Street in the public hearing held on April 6, 1999; and
>
> WHEREAS, it now appears to the satisfaction of the Town Council that the closing of said street is not contrary to the public interest, and that no individual owning property, either abutting the street or in the vicinity or in the subdivision in which the street is located, will as a result of the closing be thereby deprived of a reasonable means of ingress and egress to his property;
>
> NOW, THEREFORE, . . . the portion of North Shore Drive lying between 2111 North Shore Drive and 2112 North Shore Drive (20 feet) is hereby ordered closed, and all right, title, and interest that may be vested in the public to said area for street purposes is hereby released and quitclaimed to the abutting property owners in accordance with the provisions of G.S. 160A-299.

On 1 June 1999, Plaintiff filed an appeal of the Order in the Superior Court of Onslow County, pursuant to N.C. Gen. Stat. § 160A-299(b). Plaintiff's appeal alleged, in pertinent part: "The Order contravenes public policy and deprives Plaintiff of the full width of the right[-]of[-]way of North Shore Drive to which his property is entitled and as enjoyed by all other lot owners on North Shore Drive for full width of their lots." Plaintiff sought a declaration "that the action of Defendant . . . in closing a 20[-]foot portion of North Shore Drive was not in accordance with the statutory provisions of [N.C. Gen. Stat. §] 160A-299(a)." In an answer filed 3 August 1999, Defendant moved to dismiss Plaintiff's appeal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure "on the ground[] that [P]laintiff's 'Appeal' fails to state a ground upon which relief can be granted." Plaintiff and Defendant waived their right to a hearing on Plaintiff's appeal and stipulated to the facts before the trial court. In its 19 April 2000 judgment, the trial court made the following pertinent conclusions of law:

> 10. The Town Council . . . did not exceed its authority or discretion in closing the twenty[-]foot portion of North Shore Drive as described in its resolution. [It] made a decision in good faith in respect to a matter within [its] exclusive jurisdiction. The closing was a legitimate exercise of the [Defendant's] governmental discretion.
>
> 11. That upon closing of the street, [Defendant] being the owner of the adjacent lot, may use the adjacent lot and land acquired by virtue of said street closing for any lawful purpose.

The trial court, therefore, dismissed Plaintiff's appeal with prejudice.

The issue is whether a town has the authority to close a street pursuant to N.C. Gen. Stat. § 160A-299 when the town intends to use a portion of the closed street which is vested in the town as a result of the closing to construct public facilities.

N.C. Gen. Stat. § 160A-299 sets forth the procedure a town must follow when it "proposes to permanently close any street." N.C.G.S. § 160A-299(a) (1999). Section 160A-299(a) requires that a town council must first adopt a resolution declaring its intent to close the street and calling a public hearing on the issue, and the resolution must be published once a week for four consecutive weeks prior to the hearing. *Id.* Additionally, the resolution must be "sent by regis-

tered or certified mail to all owners of property adjoining the street . . . and a notice of the closing and public hearing shall be prominently posted in at least two places along the street." *Id.* Section 160A-299(a) provides:

> At the hearing, any person may be heard on the question of whether or not the closing would be detrimental to the public interest, or the property rights of any individual. If it appears to the satisfaction of the council after the hearing that closing the street . . . is not contrary to the public interest, and that no individual owning property in the vicinity of the street . . . or in the subdivision in which it is located would thereby be deprived of reasonable means of ingress and egress to his property, the council may adopt an order closing the street . . . .

Id. When a street is closed in accordance with section 160A-299,

> all right, title, and interest in the right-of-way shall be conclusively presumed to be vested in those persons owning lots or parcels of land adjacent to the street . . . and the title of such adjoining landowners, for the width of the abutting land owned by them, shall extend to the centerline of the street[.]

Id. § 160A-299(c) (1999).

In this case, Plaintiff concedes Defendant complied with all procedural requirements for closing a street under section 160A-299(a). Additionally, Plaintiff does not argue the closed portion of the street was not properly vested in part in Plaintiff and in part in Defendant, in compliance with section 160A-299(c). Rather, Plaintiff contends the Order does not comply with section 160A-299 because Defendant intended, at the time the Order was approved, to construct public facilities on the portion of North Shore Drive vested in Defendant under section 160A-299(c) as a result of the street closing. Plaintiff contends Defendant's intent resulted in the street being closed for an improper purpose. In support of this argument, Plaintiff cites *Wooten v. Town of Topsail Beach*, 127 N.C. App. 739, 493 S.E.2d 285 (1997), *disc. review denied*, 348 N.C. 78, 505 S.E.2d 888 (1998). In *Wooten*, a town sought to construct a park on a portion of a public street without first complying with the procedural requirements of section 160A-299(a). *Id.* at 742, 493 S.E.2d at 287. On appeal, this Court held the trial court erred in issuing an injunction " 'until the [t]own complies with [section 160A-299]' " because if the town did comply with section 160A-299, "the land would go one-half each to property own-

ers on the north and south sides of the dedicated street" under section 160A-299(c). *Id.* at 742, 493 S.E.2d at 288. Because the town was not one of these property owners, the town would not obtain any property rights in the closed portion of the street and, thus, would not be permitted to construct a park on the closed portion of the street. *Id.* In the case *sub judice*, however, Defendant obtained a vested interest in a portion of North Shore Drive as a result of the street closing; thus, the teaching of *Wooten* does not support Plaintiff's argument. Moreover, we find nothing in section 160A-299 that limits the authority of a town to close a street based on the town's intent when ordering the closing, provided the town complies with the procedural requirements of the statute. Accordingly, the trial court's 19 April 2000 judgment is affirmed.[1]

Affirmed.

Judges McGEE and CAMPBELL concur.

JOHN R. HENDRICKS, JR. v. DEBORAH GAIL SANKS

No. COA00-91

(Filed 15 May 2001)

1. Child Support, Custody, and Visitation— support—child reached age of eighteen but still in school—subject matter jurisdiction

The trial court did not lack subject matter jurisdiction in a child support case even though defendant mother contends her child with Down's Syndrome had reached the age of eighteen prior to the hearing and was not otherwise entitled to support under N.C.G.S. § 50-13.4, because: (1) the child was still enrolled in school and attended his specialized program on a regular basis; and (2) testimony revealed the child's attendance at school is in his best interests, that he would continue to benefit in the future from the curriculum, and that he is making satisfactory academic progress toward a nontraditional graduation.

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1. Plaintiff argues in his brief to this Court that a town may not close *a portion* of a street under section 160A-299; rather, a town must close the entire "length and breadth" of a street under this statute. We find nothing in section 160A-299 to support Plaintiff's contention that the Legislature intended to provide a town with the author-

2. Child Support, Custody, and Visitation— support—sufficiency of evidence—specific amount

Although the trial court's order continuing child support obligation is supported by the findings of fact and conclusions of law, the trial court erred by failing to make the appropriate findings and conclusions on the issue of the specific amount of child support because: (1) no evidence was presented, nor were there findings made, concerning the reasonable needs of the child for support and the parents' ability to pay; (2) the trial court simply divided the original support obligation of $806.50 in half when one of the two children reached the age of eighteen and was not otherwise covered by N.C.G.S. § 50-13.4; (3) the remaining child has special needs and an amount higher than one-half of the original total may be appropriate; and (4) a lower amount may be mandated considering the income of the parties.

Appeal by defendant from judgment entered 27 September 1999 by Judge Bruce B. Briggs in Mitchell County District Court. Heard in the Court of Appeals 14 February 2001.

Harrison & Poore, PA by Hal G. Harrison for plaintiff-appellee.

Hall & Hall by Douglas L. Hall for defendant-appellant.

THOMAS, Judge.

There are two issues in this child support case.

The first issue is whether child support is required from the noncustodial parent where the child is over 18 years old, regularly attends high school but because of suffering from Down syndrome is not making progress toward a traditional diploma. The second question is whether, if child support is mandated, the trial court can set the amount by merely halving the sum due under a prior order where one of the two children earlier included has now moved beyond required support.

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ity to close a street only if the entire length and breadth of the street is closed. Furthermore, in interpreting a statute permitting municipal corporations to "close any street or alley," the North Carolina Supreme Court has held that "[w]hether a street lies in a subdivision or is of other origin, the city may close all or part of it upon compliance with statutory procedure." *Wofford v. Highway Commission*, 263 N.C. 677, 684, 140 S.E.2d 376, 382 (citing N.C.G.S. § 160-200(11) (repealed 1972)), *cert. denied*, 382 U.S. 822, 15 L. Ed. 2d 67 (1965). We, therefore, overrule this assignment of error.

The facts of this case are as follows: John R. Hendricks, Jr. plaintiff, and Deborah Gail Sanks, defendant, are parents of two children. Pursuant to a court order entered 31 January 1991, plaintiff was awarded custody with defendant directed to pay child support in the amount of $806.50 per month.

Defendant filed a motion to modify her child support obligation in October 1997 alleging that their older child born 29 September 1979, Wesley Hendricks, was no longer subject to mandatory support from her. There was no issue as to her obligation to continue support for their second child, John Hendricks, III, born 18 May 1981. Then, in May 1999, defendant filed a motion to terminate support for the younger child since he, by that point, had reached his eighteenth birthday as well.

The two motions were finally heard together on 22 September 1999 but, during the interim between that date and the filing date of the first motion, defendant had on her own volition reduced child support payments by more than half.

The trial court granted defendant's motion as to Wesley, but denied the motion to terminate support as to John. John, while 18 years old and still attending high school, was not making progress toward a traditional, mainstream graduation. He had been born with Down syndrome and was in special classes within a traditional high school setting. According to plaintiff's evidence, however, he was regularly participating in a non-standard curriculum and was making satisfactory progress toward his own special type of graduation.

The trial court ordered defendant to continue making payments for the benefit of John and set the support at $403.25 per month. That amount is one-half of the total set for both children in the prior order. Support was to continue until John reached the age of 20 or graduated from Mitchell High School, whichever occurred first. From this order, defendant appeals.

[1] By her first assignment of error, defendant argues the trial court lacked subject matter jurisdiction in this case as the child had reached the age of 18 prior to the hearing and was not otherwise entitled to support pursuant to N.C. Gen. Stat. § 50-13.4. We disagree.

N.C. Gen. Stat. § 50-13.4 provides that a parent has a legal obligation of support until the child reaches the age of 18 except as noted:

> If the child is still in primary or secondary school when the child reaches 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress toward graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

N.C. Gen. Stat. § 50-13.4(c)(2) (1999). See also *Bridges v. Bridges*, 85 N.C. App. 524, 355 S.E.2d 230 (1987) and *Leak v. Leak*, 129 N.C. App. 142, 497 S.E.2d 702 (1998).

Defendant relies on *Jackson v. Jackson*, 102 N.C. App. 574, 402 S.E.2d 869 (1991) to argue that support for a mentally disabled child ends at that child's 18th birthday. This reliance is misplaced. We agree with the Court's holding in *Jackson* that "*nothing else appearing* our law does not now require parents to support their disabled children after they are of age." *Id.* at 575, 402 S.E.2d at 870 (emphasis added). However, in the instant case, there are other factors "appearing" which distinguish it from *Jackson*. We note that in *Jackson*, unlike the instant case, there was no evidence the child was still enrolled in school. If John were not mentally disabled but instead was enrolled in a traditional high school curriculum, it is clear support would be continued. To treat a mentally disabled child any differently than a mainstream child in terms of support obligations would be patently unfair, against public policy and not in keeping with the legislative directive. Here, John is enrolled in school and attending his specialized program on a regular basis.

In *Leak*, this Court determined that if a child is eighteen and enrolled in school, the obligor has an affirmative duty to move the court for termination of any support obligations on the ground that the child was failing to make satisfactory progress or was no longer in school. "In fact, to allow a parent to unilaterally determine whether a child is regularly attending school, or is making satisfactory progress towards graduation would undermine the purpose of this statute, which is to provide continuing child support for children in school." *Leak*, 129 N.C. App. at 143, 497 S.E.2d at 704. The defendant in the instant case properly filed her motion to terminate support rather than unilaterally ceasing payment. Therefore, the key question is whether John is making satisfactory academic progress toward graduation within the meaning of N.C. Gen. Stat. § 50-13.4(c)(2). John is mentally disabled and attending a special program at Mitchell High School which teaches vocabulary and activities of daily living such as

how to count money. It is undisputed that he will not receive a traditional diploma. However, testimony at trial by his teacher and school counselor showed John's attendance at school is in his best interests, that he would continue to benefit in the future from the curriculum and that he is making satisfactory academic progress toward a non-traditional graduation. As we find this is sufficient to comply with the requirements of N.C. Gen. Stat. § 50-13.4(c)(2) and confer jurisdiction on the trial court, we reject this assignment of error.

[2] By her second assignment of error, defendant argues the trial court's order continuing the child support obligation is not supported by findings of fact and conclusions of law. We disagree as to the sufficiency of the findings and conclusions to continue the child support obligation itself, but do hold the trial court erred as to its findings and conclusions or lack thereof on the issue of setting the specific amount of child support.

The trial court found that John is enrolled in school, is regularly attending and is receiving appropriate and needed education and training. He is satisfactorily progressing toward graduation. However, the trial court failed to support its monetary directive in any way and instead merely halved the earlier support obligation.

Child support orders are accorded substantial deference by appellate courts and we must limit our review to a "determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "Under this standard of review, a trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Biggs v. Greer*, 136 N.C. App. 294, 296-97, 524 S.E.2d 577, 581 (2000).

The original child support order was issued to cover two children. Wesley reached the age of 18 and is not otherwise covered by the statute. Therefore, support is required only for John. The amount of child support due is to be determined using the North Carolina Child Support Guidelines (guidelines) unless the application of the guidelines would be inequitable. "To compute the appropriate amount of child support the trial court must rely upon the Guidelines wherein presumptive amounts of child support are set forth." *Biggs*, 136 N.C. App. at 297, 524 S.E.2d at 581. "Child support is to be set in such amount 'as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the

parties.' " *Blair v. Jackson*, 138 N.C. App. 284, 287, 531 S.E.2d 240, 243 (2000) (citing N.C. Gen. Stat. § 50-13.4(c)). "Child support set consistent with the Guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support." *Blair*, 138 N.C. App. at 287, 531 S.E.2d at 243. If the trial court determines that the application of the guidelines would be inequitable or otherwise deviates from the guidelines, "the court must hear evidence and find facts related to the reasonable needs of the child for support and the parents ability to pay." *Biggs*, 136 N.C. App. at 297, 524 S.E.2d at 581. No such evidence has been presented nor findings made. In this case, the trial court appears to have simply divided the original support obligation of $806.50 in half. There is no evidence in the record to show otherwise. Considering that John has special needs, it may well be that an amount higher than one-half of the original total is appropriate. Considering the income of the parties, which is also not included in the trial court's findings, a lower amount may be mandated.

Accordingly, we remand to the trial court for further findings of fact and conclusions of law consistent with this opinion. It is left in the trial court's discretion whether the taking of additional evidence is necessary.

AFFIRMED in part, REVERSED AND REMANDED in part.

Judges WYNN and McGEE concur.

KENNETH DEAN, DBA KENNETH DEAN CONSTRUCTION v. MANUS HOMES, INC., AND GARY MANUS

No. COA00-491

(Filed 15 May 2001)

1. Partnerships— existence—agreement to split profits

The trial court did not err by denying defendants' motion for a directed verdict in an action to determine the existence of a partnership where plaintiff testified to an agreement to split profits, there was a letter detailing duties and referring to the splitting

of profits, and defendant MHI in its counterclaim requested an accounting and payment of one-half of plaintiff's profits.

2. Appeal and Error— assignments of error—not supported by argument

Assignments of error which were not supported by argument were deemed waived.

3. Partnerships— existence—accounting—sufficiency of evidence

In an action to determine the existence of a partnership and for an accounting, there was sufficient evidence to support findings that plaintiff and defendants had formed a partnership to share profits on fifteen homes with those profits being divided 50/50; that defendants maintained control of all relevant records and that plaintiff had demanded an accounting which defendants refused; that plaintiffs had been wrongfully excluded from partnership property; and that an accounting would be just and reasonable.

4. Partnerships— intent to dissolve—filing of claim

There was sufficient evidence to support the trial court's conclusions that a partnership existed between plaintiff and defendants, that plaintiff expressed his intent to dissolve the partnership by filing this claim, and that plaintiff was entitled to an accounting.

5. Partnerships— accounting—refusal—control of records

The court did not err by ordering an accounting where a partnership existed, plaintiff made demands for an accounting which defendants refused, defendants maintained control of all partnership records, and plaintiff was wrongfully excluded from partnership property.

Appeal by defendants from judgment entered 25 October 1999 by Judge Hollis M. Owens in Iredell County Superior Court. Heard in the Court of Appeals 1 February 2001.

Eisele, Ashburn, Greene & Chapman, by John D. Greene for plaintiff-appellee.

Richard H. Tomberlin for defendant-appellant.

THOMAS, Judge.

Defendants appeal from a jury verdict finding the existence of a partnership and awarding plaintiff $15,000.00. They also appeal from an order entered by the trial court requiring an accounting as well as from a denial of defendants' motions for a directed verdict and judgment notwithstanding the verdict. Defendant sets forth seventeen assignments of error. For the reasons discussed herein, we hold the trial court did not err.

The facts are as follows: Plaintiff is a residential building subcontractor specializing in the areas of framing and structural construction. On or about October 1994, plaintiff entered into a business relationship with defendants Manus Homes, Inc. (MHI), a corporation, and Gary Manus (Manus), a general contractor who is also president of MHI.

The agreement called for defendants to purchase residential lots and provide full financial backing while the plaintiff supplied labor in the framing and structural part of the building process and thereafter acted as supervisor for the remaining construction. Upon the sale of a home, plaintiff would receive 50% of the net profit with defendants taking the other 50%. The net profit was the amount remaining after the actual cost of construction was subtracted from the sale price.

The parties built and sold fifteen homes in both Iredell and Mecklenburg counties during the existence of the purported partnership. Manus himself purchased one of them.

Plaintiff filed suit in 1997, claiming breach of the partnership agreement by defendants and requesting an accounting and dissolution of the partnership. Manus denied individual liability in the answer while MHI's counterclaim requested an accounting and one-half of plaintiff's framing profits. Defendants, while denying the existence of a partnership in their answer, presented no evidence at trial. The jury found a partnership between the plaintiff and defendants did exist and the agreement included the sharing of profits on fifteen projects. The jury specifically found that MHI breached its contract with plaintiff as to the property purchased by Manus and owed plaintiff $15,000 for his share of the profits. The court denied defendants' motions for directed verdict and judgment notwithstanding the verdict and dismissed MHI's counterclaim. In addition, the trial court ordered both a financial accounting to determine the total amount

due and the dissolution of the partnership. Defendants appeal from the judgment.

[1] By defendants' first and second assignments of error, they contend the trial court committed reversible error by denying defendants' motion for a directed verdict. We disagree.

A motion for a directed verdict is properly denied when, in considering the evidence in the light most favorable to the movant, the claim is legally sufficient. *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 365 S.E.2d 621 (1988). Defendants claim plaintiff has not made out a *prima facie* case that a partnership existed because he did not show that he was a co-owner of the business.

A partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit." N.C. Gen. Stat. § 59-36 (1999). A partnership can be formed orally or implied by the parties' conduct. *Peed v. Peed*, 72 N.C. App. 549, 325 S.E.2d 275, *cert. denied*, 313 N.C. 604, 330 S.E.2d 612 (1985). Here, there is evidence of both. Manus testified that there was never a written agreement between himself and plaintiff. However, Manus also testified concerning a letter dated 10 April 1997, which discussed plaintiff's duties under their agreement, including a statement that "[plaintiff] and [Manus] agreed to [plaintiff] supervising a number of jobs that Manus Homes had under contract in which [plaintiff] claimed he could complete in no longer than four months." The letter confirms in part what was contained in the oral agreement by stating "[i]f [plaintiff] completed these jobs in four months then we would split the profit." Sending letters detailing someone's duties and splitting profits evidences conduct that implies a partnership. A share of the profits is *prima facie* evidence a partnership exists. N.C. Gen. Stat. § 59-37(4) (1999); *Wilder v. Hobson*, 101 N.C. App. 199, 398 S.E.2d 625 (1990). Plaintiff testified to an agreement to split profits with defendants, illustrating *prima facie* evidence of a partnership. Defendants, in turn, have not shown that plaintiff's claim was legally deficient. It should also be noted that while denying the existence of a partnership, MHI requested in its counterclaim an accounting and payment of one-half of plaintiff's framing labor profits. MHI, accordingly, was seeking a partnership remedy.

[2] By defendants' third, fourth, fifth and sixth assignments of error, they contend the trial court erred in, respectively, allowing plaintiff to amend his pleading, granting plaintiff's motion to dismiss the counterclaim, and denying motions to set aside the verdict as being

against the greater weight of the evidence and inconsistent. However, because defendants did not cite legal authority in the text of their argument, these assignments of error are deemed waived. N.C.R. App. P. 28(b)(5) (1999); *Joyner v. Adams*, 97 N.C. App. 65, 387 S.E.2d 235 (1990).

[3] By defendants' assignments of error seven through fourteen, they contend the findings of facts were not supported by competent evidence. We disagree.

The trial court found that the plaintiff and defendants formed a partnership to share profits on fifteen homes with those profits to be divided 50% to plaintiff and 50% to defendants. The court also found plaintiff had demanded an accounting to which the defendants refused and that defendants maintained control of all relevant records. The trial court further found that plaintiff had been wrongfully excluded from possession of partnership property, it would be just and reasonable for plaintiff to have an accounting, and that 25 November 1997 was the date of breach. There was sufficient evidence of the existence of a partnership from the testimony of both plaintiff and Manus, as both testified to the existence of an agreement to split profits.

Defendants incorporate arguments one, two and five to support these assignments of error. We did not find them compelling as to one, two and five and do not find them compelling as to seven through fourteen. Accordingly, defendants' assignments of error seven through fourteen are rejected.

[4] By defendants' assignments of error fifteen and sixteen, they argue the trial court's conclusions of law were not supported by competent evidence. We disagree.

The trial court's conclusions of law will not be overturned if supported by competent evidence. *State v. Pugh*, 138 N.C. App. 60, 530 S.E.2d 328 (2000). The trial court concluded first that the partnership between plaintiff and defendants was dissolved when the claim was filed and that plaintiff was entitled to an accounting pursuant to section 59-52. That section provides "[a]ny partner shall have the right to a formal account as to partnership affairs: (1) If he is wrongfully excluded from the partnership business or possession of its property by his copartners[.]" N.C. Gen. Stat. § 59-52(1) (1999). As aforementioned, there is ample evidence of the parties' agreement to split profits, implying a partnership. Plaintiff presented evidence of written

and verbal demands for an accounting of partnership profits. By filing a claim against defendants, plaintiff expressed his intent to dissolve the partnership. Moreover, Manus admitted that he had not paid a partnership profit share to plaintiff for several homes subject to the partnership agreement. Yet again, defendants incorporate arguments one, two and five to support these assignments of error. Again, we find these arguments unpersuasive and that the trial court's conclusions of law were sufficiently supported by competent evidence. Defendants' assignments of error fifteen and sixteen are, accordingly, rejected as well.

[5] By defendants' seventeenth and last assignment of error, they argue the trial court committed reversible error by ordering an accounting. We disagree.

This judgment was based on the fact that a partnership existed, plaintiff made demands for an accounting, defendants refused to provide an accounting, Manus maintained control of all partnership records and that plaintiff was wrongfully excluded from partnership property, i.e., profits from the sale of homes under the agreement. In *Casey v. Grantham*, our Supreme Court held that a cause of action for an accounting existed where one partner had usurped complete control and exclusive possession of the assets of the partnership, including the books and records, which were in the hands of the defendant and his wife. 239 N.C. 121, 79 S.E.2d 735 (1954). The defendant in *Casey* also refused to give an accounting even though a demand had been made. We find the instant case to be similar to *Casey*, and hold that the accounting, under these circumstances, is proper pursuant to section 59-52. Accordingly, the trial court did not err.

For the aforementioned reasons, we reject defendants' assignments of error and find no error with the trial court's ruling.

NO ERROR.

Judges MARTIN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. SY LOBOHE

No. COA00-492

(Filed 15 May 2001)

1. **Motor Vehicles— impaired driving—indictment—misdemeanor and habitual**

The trial court properly denied defendant's motion to dismiss an indictment for impaired driving and habitual impaired driving where Count I contained all of the elements of driving while impaired but did not allege defendant's three previous convictions, while Count II contained the allegation of three previous convictions and the dates of those convictions. The indictment follows precisely the required format of N.C.G.S. § 15A-928 and complies with N.C.G.S. § 15A-924(a)(5).

2. **Motor Vehicles— impaired driving—misdemeanor and felony counts—superior court jurisdiction**

The trial court properly denied an impaired driving defendant's motion to dismiss a misdemeanor offense for lack of superior court jurisdiction where the second count of the indictment alleged felony habitual impaired driving, an element of which was the misdemeanor impaired driving.

Appeal by defendant from judgment dated 23 February 2000 by Judge Catherine C. Eagles in Randolph County Superior Court. Heard in the Court of Appeals 17 April 2001.

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

Richard G. Roose for defendant-appellant.

GREENE, Judge.

Sy Lobohe (Defendant) appeals a judgment dated 23 February 2000 entered after a jury rendered a verdict finding him guilty of driving while impaired and after he pled guilty to habitual impaired driving.

On 6 December 1999, Defendant was indicted for one count of impaired driving pursuant to N.C. Gen. Stat. § 20-138.1 (Count I) and one count of habitual impaired driving pursuant to N.C. Gen. Stat. § 20-138.5 (Count II). Count I of the indictment states:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did drive a vehicle on High Point Street in Randleman, North Carolina, a highway, while subject to an impairing substance.

Count II of the indictment states:

> And the jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above within seven years of the date of this offense, has been convicted of three or more offenses involving impaired driving. The defendant has been previously convicted on (1) April 13, 1995, of impaired driving in Davidson County District Court; (2) January 21, 1998 (offense date 7-12-97), of impaired driving in Guilford County Superior Court; and (3) January 21, 1998[1] (offense date 7-1-95), of impaired driving in Guilford County Superior Court.

Defendant's case was tried in the Superior Court of Randolph County. Prior to trial, Defendant made a motion to dismiss Count I of the indictment on the ground the superior court did not have jurisdiction over the misdemeanor charged in Count I. Defendant also made a motion to dismiss Count II of the indictment on the ground Count II did not charge all of the elements of a criminal offense as required by N.C. Gen. Stat. § 15A-924(a)(5). The trial court denied Defendant's motions. Defendant then stipulated to the prior convictions contained in Count II of the indictment "without waiving [his] objections to the form of [the] indictment."

The State presented evidence at trial that on 21 August 1999, Don Taylor (Taylor), a patrolman with the Randleman Police Department, was patrolling on High Point Street when he saw an overturned vehicle blocking both lanes of traffic. The vehicle "was sitting on its hood, completely upside down with all four wheels facing upward" and there was one person in the vehicle, who was later identified as Defendant. After notifying a 911 operator of the accident, Taylor approached the vehicle to determine whether Defendant was injured and he "notice[d] an odor of alcohol about [Defendant's] person." When medical assistance arrived at the scene of the accident, Defendant was transported by ambulance to the hospital. Taylor also went to the hospital, where he read Defendant his rights regarding

1. Prior to Defendant's trial, the State moved to amend "January 21, 1998" to state "May 14, 1996," and the trial court granted this motion.

the taking of blood "to Determine Alcohol Concentration or Presence of an Impairing Substance." Defendant consented to undergo a blood test to determine the alcohol concentration of his blood, and a sample of his blood was taken. The sample was sent for analysis to the North Carolina State Bureau of Investigation, where it was determined that Defendant's "blood alcohol concentration was 0.177 grams of ethanol per 100 millimeters of blood."

Defendant did not present any evidence at trial. At the close of the evidence, Defendant renewed his motion to dismiss both counts of the indictment and the trial court denied this motion. Subsequent to its deliberations, the jury returned a verdict finding Defendant guilty of driving while impaired. The trial court then entered judgment against Defendant for habitual impaired driving. The judgment states Defendant pled guilty to this charge.

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[1] The dispositive issue is whether an indictment which alleges in one count the elements of impaired driving under N.C. Gen. Stat. § 20-138.1 and alleges in a second count previous convictions which would elevate the impaired driving offense to habitual impaired driving under N.C. Gen. Stat. § 20-138.5 is a valid indictment under N.C. Gen. Stat. §§ 15A-924 and 15A-928.

Defendant argues the indictment in this case "is fatally defective because neither count alleges all of the elements of the felony of Habitual Impaired Driving" as required by N.C. Gen. Stat. § 15A-924. We disagree.

"A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: . . . (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." N.C.G.S. § 20-138.1 (1999). "A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense." N.C.G.S. § 20-138.5 (1999).

N.C. Gen. Stat. § 15A-924, which sets forth the requirements for a valid criminal indictment, provides that a criminal indictment must contain

> [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(a)(5) (1999). Additionally, section 15A-924 provides that "[i]n trials in superior court, allegations of previous convictions are subject to the provisions of G.S. 15A-928." N.C.G.S. § 15A-924(c) (1999). Section 15A-928, which sets forth the proper format for an indictment that contains allegations of a previous conviction, states:

> (a) When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction. . . .
>
> (b) An indictment or information for the offense must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the prosecutor's option, the special indictment or information may be incorporated in the principal indictment as a separate count.

N.C.G.S. § 15A-928(a), (b) (1999).

In this case, Count I of the indictment contains all of the elements of driving while impaired and, in compliance with section 15A-928(a), Count I does not allege Defendant's three previous impaired driving convictions. Count II of the indictment, which is contained as a separate count in the principal indictment as permitted by section 15A-928(b), contains an allegation that Defendant was convicted of impaired driving on three previous occasions and contains the dates of those alleged convictions. Count II, therefore, complies with the requirement of section 15A-928(b) that the principal indictment "be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense." Thus, the indictment follows precisely the required format set forth in section 15A-928. Further, as section 15A-924(c) specifically states that "allegations of previous convictions are subject to the provisions of [section]

15A-928," we reject Defendant's argument that an indictment which complies with section 15A-928 is in violation of section 15A-924 because it does not contain in one count the elements of impaired driving as well as the elements which elevate the offense of impaired driving to that of habitual impaired driving. *See State v. Sullivan*, 111 N.C. App. 441, 443-44, 432 S.E.2d 376, 378 (1993) (trial court properly granted the defendant's motion to strike from the principal indictment the allegations of the defendant's prior convictions, pursuant to section 15A-928, when the prior convictions were alleged for the purpose of elevating the offense contained in the principal indictment to a higher grade offense). Accordingly, the trial court properly denied Defendant's motion to dismiss the indictment on the ground it does not comply with section 15A-924(a)(5).

[2] Additionally, Defendant argues the superior court did not have jurisdiction over the misdemeanor alleged in Count I of the indictment. *See* N.C.G.S. § 7A-272 (1999) (jurisdiction of district court over criminal actions below the grade of felony). This Court has previously held "the offense of habitual impaired driving as defined by G.S. § 20-138.5 constitutes a separate substantive felony offense which is properly within the original exclusive jurisdiction of the superior court." *State v. Priddy*, 115 N.C. App. 547, 548, 445 S.E.2d 610, 612, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994). Because the indictment alleges the substantive felony of habitual impaired driving, an element of which is the misdemeanor offense of impaired driving, the trial court properly denied Defendant's motion to dismiss Count I of the indictment based on lack of jurisdiction. *See State v. Baldwin*, 117 N.C. App. 713, 716, 453 S.E.2d 193, 194 (rejecting the defendant's argument that the superior court did not have jurisdiction to try a misdemeanor driving while impaired charge when, because of previous impaired driving convictions, the misdemeanor charge was enhanced to habitual impaired driving), *cert. denied*, 341 N.C. 653, 462 S.E.2d 518 (1995). Accordingly, the trial court's 23 February 2000 judgment is affirmed.

Affirmed.

Judges McGEE and CAMPBELL concur.

JIMMY L. HEARNE AND WIFE, TAMMY K. HEARNE, PLAINTIFFS v. STATESVILLE LODGE NO. 687, LOYAL ORDER OF MOOSE, INC. AND GARY SMITH D/B/A GARY SMITH REALTY, DEFENDANTS

No. COA00-681

(Filed 15 May 2001)

Fraud— fraudulent or negligent misrepresentation—conveyance of property—septic tank problems

The trial court did not err by granting summary judgment in favor of defendant realtor regarding defendant's alleged fraudulent or negligent misrepresentation of a septic system on plaintiff purchasers' property, because: (1) the right to rely on representations is connected with the duty of a representee to use diligence with respect to the representations made to him; (2) defendant realtor did not resort to any artifice which was reasonably calculated to induce the purchasers to forego investigation; (3) the purchase contract specifically addressed and upheld plaintiffs' right to inspect the septic system before acquiring the property; and (4) plaintiffs had full opportunity to inspect the property and determine its suitability for plaintiff's envisioned purposes, including the septic system's capacity to effectively absorb the increased demand a restaurant would entail.

Appeal by plaintiffs from judgment entered 10 April 2000 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 16 April 2001.

Eisele, Ashburn, Greene & Chapman, P.A., by Douglas G. Eisele, for plaintiff appellants.

Homesley, Jones, Gaines, Homesley & Dudley, by L. Ragan Dudley, for Gary Smith Realty defendant appellee.

McCULLOUGH, Judge.

On 2 September 1999, plaintiff Jimmy Hearne and his wife, Tammy Hearne, filed suit against the Statesville Lodge No. 687, Loyal Order of Moose, Inc. (Statesville), and realtor Gary Smith, alleging that defendants willfully and wantonly misrepresented to plaintiffs that the septic system located on property owned by Statesville and sold to plaintiffs was adequate for plaintiffs' envisioned development purposes. The trial court subsequently granted defendant Smith's motion for summary judgment, from which plaintiffs now appeal.

Summary judgment is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999); *Johnson v. Insurance Co.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980). Plaintiffs contend that the trial court erred when it granted defendant Smith's motion for summary judgment, in that there remain genuine issues of material fact regarding defendant Smith's fraudulent or negligent misrepresentation of the property's septic system. Relying upon *Johnson v. Beverly-Hanks & Assoc.*, 328 N.C. 202, 400 S.E.2d 38 (1991), plaintiffs argue that defendant Smith breached his duty not to conceal from the purchasers any material facts affecting the property and to make full and open disclosure of all such information to plaintiffs.

In *Johnson*, our Supreme Court reversed the grant of summary judgment in favor of defendant-realtor where issues of material fact existed regarding allegations of fraud. *Johnson*, 328 N.C. at 211, 400 S.E.2d at 43. There, out-of-state plaintiff-buyers relied upon the local defendant-realtor's representations that the house plaintiffs were interested in purchasing had been thoroughly inspected and approved by an independent investigator. After closing on the house, plaintiffs discovered extensive structural defects. Because there was conflicting evidence regarding whether defendant-realtor knew that the housing inspection conducted was not a neutral, independent investigation, summary judgment was inappropriate. *Id.*

It is true that "[a] broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information." *Id.* at 210, 400 S.E.2d at 43. It is equally true, however, that claims based upon misrepresentations are groundless where a purchaser of real property "deal[s] at arm[']s length and the purchaser has full opportunity to make inquiry but neglects to do so and the seller resorted to no artifice which was reasonably calculated to induce the purchaser to forego investigation . . . ." *Calloway v. Wyatt*, 246 N.C. 129, 134, 97 S.E.2d 881, 885-86 (1957). In *Goff v. Realty and Insurance Co.*, 21 N.C. App. 25, 203 S.E.2d 65, *cert. denied*, 285 N.C. 373, 205 S.E.2d 97 (1974), this Court applied the above-stated principle to facts remarkably similar to the instant case. *Goff* involved the sale and purchase of residential property that the defendant-realtor allegedly represented to be free of any septic tank or drainage problems. *Goff*, 21 N.C. App. at 27, 203 S.E.2d at 67. Relying upon the realtor's specific representation that no sewage problems existed, plaintiffs purchased the property. When plaintiffs

moved into the home, however, they discovered that the property had a long history of sewer and septic tank problems, resulting in such an accumulation of raw sewage in plaintiffs' back yard that it "constituted a serious health problem." *Id.* at 26, 203 S.E.2d at 66. Because plaintiffs had neglected to inspect the property, however, the Court ruled that plaintiffs could not maintain an action for fraudulent concealment and misrepresentation against defendant-realtor. "Plaintiffs had full opportunity to inquire of other residents of the area as to any septic tank problems . . . but they neglected to do so. Defendants resorted to no artifice which was calculated to induce plaintiffs to forego investigation." *Id.* at 30, 203 S.E.2d at 68.

In the case *sub judice*, plaintiffs allege that defendant Smith knew that plaintiffs were specifically interested in the property in question because they intended to open a private club and restaurant on the premises. Defendant Smith allegedly informed plaintiffs that the septic system on site was adequate for such purposes. Relying upon this information, plaintiffs failed to make any independent investigation of the property. After acquiring the property, plaintiffs could not secure the necessary license from the Iredell County Health Department to open a restaurant, because the property's septic system was inadequate to treat the waste that would be generated at the restaurant.

We determine that plaintiffs' reliance upon *Johnson* is misplaced, and that *Goff* controls the instant case. "The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him. The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest." *Calloway*, 246 N.C. at 134-35, 97 S.E.2d at 886. Before purchasing property, it is incumbent upon buyers to take reasonable steps to protect their own interest. *Clouse v. Gordon*, 115 N.C. App. 500, 509, 445 S.E.2d 428, 433 (1994). Unlike present plaintiffs, the plaintiffs in *Johnson* specifically requested an independent investigation of the property before the purchase. Because defendant-realtor allegedly misrepresented to plaintiffs that such an inspection had been performed, the Court held that plaintiffs could pursue their claim against defendant for fraudulent misrepresentation. *See Johnson*, 328 N.C. at 211, 400 S.E.2d at 43. Unlike *Johnson*, defendant-realtor in the instant case "resorted to no artifice which was reasonably calculated to induce the purchaser to forego investigation . . . ." *Calloway*, 246 N.C. at 134, 97 S.E.2d at 885-86. In

fact, the purchase contract entered into by plaintiffs specifically addressed and upheld plaintiffs' right to inspect the septic system before acquiring the property:

> The water and sewer systems shall be adequate and not in need of immediate repair. The purchaser shall have the option to have the above-listed systems, items and conditions inspected by a reputable inspector or contractor at purchasers['] expense prior to the time this Contract is executed. Execution of this Contract by the seller and purchasers signifies acceptance of premises in its current condition.

In the negotiation of the sale and purchase of the subject property, the parties were dealing at arm's length. Plaintiffs had full opportunity to inspect the property and determine its suitability for plaintiffs' envisioned purposes, including the septic system's capacity to effectively absorb the increased demand a restaurant would entail. Plaintiff completely failed to forecast any evidence that defendant Smith resorted to any artifice calculated to induce plaintiffs to forego investigation. *See Goff*, 21 N.C. App. at 30, 203 S.E.2d at 68. As there is no evidence that defendant Smith prevented plaintiffs from making such reasonable inspections of the property as was their responsibility, we hold that the trial court properly granted defendant Smith's motion for summary judgment.

Affirmed.

Chief Judge EAGLES and Judge BRYANT concur.

GERARD R. NAZZIOLA, SR., RICHARD L. POWERS, SR., STEVE LACIVITA, ROBERT A. BOLANDER, ANNE B. MARTIN AND SEDGEFIELD LAKES COMMUNITY ORGANIZATION, INC., PLAINTIFFS V. LANDCRAFT PROPERTIES, INC., JONES BROS., INC., AND CITY OF GREENSBORO, NORTH CAROLINA, DEFENDANTS V. WILLARD MICHAEL COFFIN, INDIVIDUALLY; WILLARD MICHAEL COFFIN AS EXECUTOR OF THE ESTATE OF ANNIE C. COFFIN; WILLARD MICHAEL COFFIN, AS TRUSTEE OF TRUST ESTABLISHED UNDER THE WILL OF ANNIE C. COFFIN; AND WILLARD MICHAEL COFFIN AS SUCCESSOR TRUSTEE OF ANNIE C. COFFIN INTER VIVOS TRUST, AND THE CITY OF GREENSBORO, THIRD-PARTY DEFENDANTS

No. COA00-64

(Filed 15 May 2001)

1. **Cities and Towns— residential subdivision—permits—minimum requirements of development ordinance met**

The whole record test reveals that defendant city did not act arbitrarily and capriciously in granting permits for the development of a residential subdivision because: (1) when zoning restrictions are met and subdivision regulations as set out in the ordinance are in compliance, permits must be issued; and (2) the city met the minimum requirements of its development ordinance.

2. **Cities and Towns— residential subdivision—no entitlement to hearing or notice to nearby property owners**

Plaintiffs were not entitled to a hearing on their opposition to development of a residential subdivision, because: (1) N.C.G.S. § 160A-373 requires neither a hearing nor notice to nearby property owners for the granting or denying of a permit for a subdivision plot; (2) the pertinent subdivision ordinance contemplates that the approval of site plans is ministerial; and (3) plaintiffs cannot now seek a hearing on zoning issues by challenging the administrative and ministerial issuance of permits for a site plot, N.C.G.S. §§ 1-54.1 and 160A-364.1.

Appeal by plaintiffs from judgment entered 23 November 1999 by Judge Russell G. Walker in Guilford County Superior Court. Heard in the Court of Appeals 14 February 2001.

Smith, James, Rowlett & Cohen, LLP by Norman B. Smith, for plaintiffs-appellants.

Smith Helms Mulliss & Moore, LLP by Thomas E. Terrell, Jr., for defendant-appellee, Landcraft Properties, Inc.

A. Terry Wood, Chief Deputy City Attorney, for defendant-appellee, City of Greensboro.

Adams, Kleemeier, Hagan, Hannah, & Fouts, by David S. Pokela and David A. Senter, for defendant-appellee, Jones Brothers, Inc.

WYNN, Judge.

The individual plaintiffs in this action are homeowners in the Sedgefield Lakes area of Greensboro who are organized under the nonprofit corporation of Sedgefield Community Organization, Inc.

After two public hearings in 1994, Greensboro City Council annexed the Sedgefield Lakes-Pilot Ridge area and zoned the property under a general classification that permitted single family homes. In 1999, defendant Landcraft Properties, Inc. purchased the 37-acre tract called Pilot Ridge for residential development. Thereafter, Landcraft submitted to the City of Greensboro's Planning Department a preliminary subdivision plat, watershed development plan, and erosion and sedimentation control plans. The Planning Department approved all of the plans in June 1999 under the City of Greensboro Development Ordinance, Section 30-6-7. The plaintiffs challenged that approval by bringing this action. Following a grant of partial summary judgment in favor of Landcraft and the City of Greensboro, the plaintiffs appealed to this Court.

[1] Plaintiffs first argue that the City acted arbitrarily and capriciously in granting the permits for the residential development. We disagree.

"[A] decision may be reversed as arbitrary and capricious only where the petitioner establishes that the decision was whimsical, made patently in bad faith, indicates a lack of fair and careful consideration, or 'fail[s] to indicate any course of reasoning and the exercise of judgment. . . .' " *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999) (quoting *Adams v. N.C. State Bd. of Registration for Prof'l Engineers and Land Surveyors*, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663 (1998)). When the reviewing court is determining whether the decision by the City was arbitrary, capricious, or unsupported by substantial evidence, as we are in the instant case, it must apply the "whole record" test. *See Amanini v. N.C. Dep't of Hum. Res., N.C. Special Care Ctr.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). The whole record

test requires that the reviewing court examine all competent evidence to determine whether the agency decision is supported by substantial evidence. *See Rector v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991).

When issuing permits, a city's agent is merely an administrative official and must be governed by the literal provisions of the zoning regulations. *Lee v. Bd. of Adj. of Rocky Mount*, 226 N.C. 107, 37 S.E.2d 128 (1946). Indeed, such administrative decisions are "made without a hearing at all, with the staff member reviewing an application to determine if it is complete and whether it complies with the objective standards set forth in the zoning ordinance." *County of Lancaster, S.C. v. Mecklenburg County, N.C.*, 334 N.C. 496, 508, 434 S.E.2d 604, 612 (1993). An applicant who meets all the requirements of the ordinance is entitled to the issuance of a permit as a matter of right; and, it may not lawfully be withheld. *See In re Rea Const. Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 889-90 (1968).

In this dispute, the plaintiffs acknowledged in their complaint that the City of Greensboro met the technical requirements of its Development Ordinance, "by treating the minimum requirements for subdivision platting, as entitlements or mandates for applicants to carry out development activities for which application was made." When zoning restrictions are met, and subdivision regulations as set out in the ordinance are complied with, permits must be issued. *Quadrant Corp. v. City of Kinston*, 22 N.C. App. 31, 205 S.E.2d 324 (1974). Thus, because the City of Greensboro met the minimum requirements of its Development Ordinance, we must conclude that the evidence fails to show that the City of Greensboro acted in an arbitrary and capricious manner.

[2] The plaintiffs also argue that they were entitled to a hearing on their opposition to the Pilot Ridge Subdivision. We disagree.

Under N.C. Gen. Stat. § 160A-373 (1999), a subdivision ordinance must set forth the procedures for granting or denying approval of a subdivision plat prior to registration. However, that statute requires neither a hearing nor notice to nearby property owners for the granting or denying of a permit for a subdivision plot. N.C. Gen. Stat. § 160A-373. Moreover, the subdivision ordinance at issue, Section 30-3.11.4, contemplates that the approval of site plans is ministerial: "The Site Plan or Plot Plan shall be approved when it meets all requirements of this ordinance." Thus, as to zoned tracts, the

Planning Department's role is administrative as it may not consider the zoning issues that the plaintiffs seek to have addressed such as the density and character of the neighborhood and streets.

Indeed, the essence of the issues presented by the plaintiffs challenge the original zoning decision of 1994. Since the statute of limitations has long run on such a challenge, the plaintiffs cannot now seek a hearing on zoning issues by challenging the administrative and ministerial issuance of permits for a site plot. N.C. Gen. Stat. §§ 1-54.1 (1999) and 160A-364.1 (1981).

Affirmed.

Judges McGEE and THOMAS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 MAY 2001

BENKE v. DANIEL No. 00-988	Chatham (99CVS784)	Dismissed
EL-HADDAD v. JERRY SMITH BUILDERS, INC. No. 00-290	Wake (98CVS11422)	Affirmed
FULLWOOD v. FULLWOOD No. 00-184	New Hanover (99CVD2712) (99CVD2815)	Affirmed in part, reversed in part and remanded
HONEA v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 00-525	Burke (99CVS511)	Affirmed
IN RE BATCHELOR No. 00-402	Nash (98J15) (98J16)	Affirmed
McMURTRAY v. McMURTRAY No. 00-358	Wake (96CVD4428)	Affirmed
MEDLIN v. JOHNSON No. 00-573	Halifax (96CVS1371)	Affirmed
NEWTON v. B.F. GOODRICH CO. No. 00-847	Mecklenburg (00CVS4653)	Affirmed
REDMAN v. CUMBERLAND & ASSOCS. No. 00-26	Cumberland (98CVS8935)	Affirmed
RENFRO v. YANCEY NURSING CTR. No. 99-1515	Ind. Comm. (640967)	Affirmed
SCHLESSELMAN v. SCHLESSELMAN No. 00-25	Guilford (99CVD7187)	Affirmed
SIDDEN v. EQIPICIAO No. 00-568	Lee (98CVD824)	Reversed and remanded
STATE v. ALLEN No. 00-956	Forsyth (99CRS14118)	Affirmed
STATE v. ALLEN No. 00-1073	Gaston (98CRS4582)	Affirmed
STATE v. BALDWIN No. 00-790	Lee (99CRS50187)	No error

STATE v. BOWDEN No. 00-1285	Wayne (99CRS55536)	No error
STATE v. CHAPMAN No. 00-467	Lenoir (98CRS8753)	No error
STATE v. DESIMONE No. 00-413	Wake (96CRS90617)	No error
STATE v. HOOPER No. 00-1181	Gaston (99CRS36087)	No error
STATE v. HOWARD No. 00-1098	Alamance (99CRS54638)	No error
STATE v. HUSKETH No. 00-1156	Wake (99CRS060344)	Remanded for resentencing
STATE v. JELINEK No. 99-1479	Guilford (99CRS030395)	No error
STATE v. KING No. 00-481	Greene (99CRS1141) (99CRS1643)	No prejudicial error in defemdant's trial; sentence vacated and remanded for resentencing
STATE v. KING No. 00-962	Davidson (99CRS2113) (99CRS3324)	No error
STATE v. LEAK No. 00-974	Guilford (99CRS39667) (99CRS39669)	No error
STATE v. MOHWISH No. 00-1056	Granville (98CRS3659)	Affirmed
STATE v. MOORE No. 00-808	Cumberland (95CRS13396) (97CRS2242)	Affirmed
STATE v. RICE No. 00-821	Davidson (97CRS11458)	No error
STATE v. SMALL No. 00-1018	Pasquotank (99CRS2354)	No error
STATE v. SURMIAK No. 00-1221	Buncombe (97CRS12466) (97CRS12467) (97CRS12468) (97CRS12469) (97CRS12470) (97CRS12471)	No error

	(97CRS63560) (97CRS63561) (97CRS63562) (97CRS63563) (97CRS63564) (97CRS63681)	
STATE v. TRIPP No. 00-1002	Brunswick (98CRS9092) (00CRS336) (00CRS337) (00CRS338)	Remanded for entry of corrected judgment in 98CRS9092; in all other respects, affirmed
STATE v. VALLADARES No. 00-241	New Hanover (99CRS1720) (99CRS1721) (99CRS1722) (99CRS1723)	No error in 99CRS1720; no error in 99CRS1722; and no error in 99CRS1723. 99CRS1721 is vacated
STATE v. WILLIAMS No. 00-350	Cabarrus (97CRS9849) (97CRS9850) (97CRS10872)	No error
THOMAS v. BOST No. 00-237	Mecklenburg (97CVS5384)	No error
TOWN OF HILLSBOROUGH v. GOVERNORS GROVE, LLC No. 99-1621	Orange (99CVS861)	Appeal dismissed
TUCKER v. TRANTHAM No. 00-1062	Haywood (98CVS1367)	No error

CHAPEL HILL CINEMAS, INC., A NORTH CAROLINA CORPORATION, PLAINTIFF v. CECIL W. ROBBINS AND FAYE ELOISE ROBBINS, DEFENDANTS

No. COA00-253

(Filed 5 June 2001)

1. Landlord and Tenant— lease agreement—failure to give notice of sale of property—lost opportunity to purchase property

The trial court erred by granting plaintiff tenant's motion for directed verdict under N.C.G.S. § 1A-1, Rule 50 as to the damages occasioned by the breach of Article XVII of the pertinent lease regarding defendants' failure to give notice to plaintiff of the sale of the property to a third party based on the damages sustained by plaintiff as a result of its lost opportunity to purchase the property, because this issue was a question for the jury since the credibility of the expert's testimony with respect to the methodology used to value the property was at issue.

2. Landlord and Tenant— lease agreement—failure to give notice of sale of property—increased rental costs

The trial court did not err by granting plaintiff tenant's motion for directed verdict under N.C.G.S. § 1A-1, Rule 50 as to the damages occasioned by the breach of Article XVII of the pertinent lease regarding defendants' failure to give notice to plaintiff of the sale of the property to a third party based on the damages sustained by plaintiff as a result of its increased rental costs, because: (1) the increased rental costs had no relation to plaintiff's failure to record the lease; and (2) defendants failed to preserve the issues of plaintiff's duty to mitigate damages or that the increased rent should have been submitted to the jury for determination.

3. Landlord and Tenant— lease agreement—failure to make repairs

The trial court did not err by granting plaintiff tenant's motion for directed verdict under N.C.G.S. § 1A-1, Rule 50 as to the damages occasioned by the breach of Article V of the pertinent lease regarding defendants' failure to make repairs, because: (1) defendants did not deny the authenticity or correctness of the tenant manager's log of refunds and canceled shows due to the leaking roof; (2) defendants have failed to point to specific areas

of impeachment and contradictions in the manager's testimony; and (3) defendants essentially admitted the existence of the damages ultimately awarded by the trial court for this breach.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendants from an order and judgment entered on 26 July 1999 by Judge F. Fetzer Millsin Orange County Superior Court. Heard in the Court of Appeals 22 February 2001.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips and Jennifer T. Harrod, for plaintiff-appellee.

Levine & Stewart, by John T. Stewart, and Eisele, Ashburn, Greene & Chapman, P.A., by Douglas G. Eisele, for defendant-appellants.

MARTIN, Judge.

Plaintiff corporation brought this action alleging claims for breach of a lease and for unfair and deceptive practices. Plaintiff, which operates the Varsity Theater in Chapel Hill, alleged that it entered into a written lease agreement with defendant Cecil W. Robbins and his wife, Eloise S. Robbins, on 24 November 1982, pursuant to which plaintiff leased the Varsity Theater and certain common areas located at the Sorrell Building, 123 East Franklin Street, Chapel Hill, for an initial term of two years, with options for extensions of the lease through 30 September 2002. The lease was not recorded in the office of the Orange County Register of Deeds.

Plaintiffs alleged that defendants breached two provisions of the lease; Article V and Article XVII. Article V provides that the lessors are responsible for "keep[ing] the outer walls, roof and structural portions of the building on the demised premises in proper and substantial repair." Article XVII provides:

> [I]n the event the Lessors at any time during the term of this Lease, or any extension thereof, decide voluntarily to sell and convey the said property, the Lessor shall give the Lessee written notice to this effect and the price at which said Lessors have received a bona fide offer for the purchase of said property. Within twenty (20) days after the date of the receipt of said notice the Lessee may give the Lessors written notice that it elects to purchase the said property in which the demised premises are located at said price.

Plaintiff contends that defendants breached both provisions by failing to repair the roof of the building and by failing to give plaintiff notice of the sale of the property to a third party. Eloise S. Robbins died in 1991, and defendant Faye Eloise Robbins, the granddaughter of Cecil W. Robbins and Eloise S. Robbins, acquired an undivided interest in the property through a deed of gift from Cecil Robbins. She acquired additional interests in the property through gifts from her grandfather and, on 24 September 1997, she became the sole owner of the property. On the same date, Faye Eloise Robbins transferred her entire interest in the Sorrell Building to James M. Rumfelt. Plaintiffs alleged that neither Cecil Robbins nor Faye Eloise Robbins gave them the notice required by Article XVII before selling the building to Rumfelt. Defendants answered admitting the existence of the lease, but denying their breach of its provisions. Plaintiff moved for summary judgment in its favor on all claims. The court granted summary judgment in favor of plaintiff on the issue of defendants' breach of Article XVII, but denied summary judgment on the issue of damages arising from that breach, and also denied plaintiff's motion for summary judgment on the claims for breach of Article V and for unfair and deceptive practices. Those issues were set for trial before a jury.

At trial, plaintiff's evidence tended to show that Jim Steele, the general manager of the Varsity Theater, reported periodic roof leakage to the lessors and received prompt repair until approximately 1991 when Cecil Robbins' health began to decline. Since 1991, however, the leaks increased in frequency and severity. Defendants were slow in responding to requests for repair; and, when made, the repairs were inadequate. Steele estimated, based on a record which he kept, that between December 1996 and March 1997 plaintiff lost $10,800 in refunds and canceled shows due to damage occasioned by the leaking roof.

Plaintiff's evidence further tended to show that Faye Eloise Robbins sold the property to Rumfelt for $550,000 on 24 September 1997, without giving plaintiff any prior notice of the sale. Rumfelt subsequently notified plaintiff of his purchase of the building and that it would be necessary for plaintiff to negotiate a new lease if it desired to continue to occupy the theater. Plaintiff had been paying $3,200 per month as rent under its lease with defendants; after negotiations with Rumfelt, plaintiff signed a new lease on 16 December 1997 that provided for an initial monthly rent of $6,000 and annual increases based on adjustments in the Consumer Price Index. Dr. Hammond

Bennett, a shareholder of plaintiff, testified that plaintiff will pay an additional $159,600 in rent for the remainder of the lease term under the Rumfelt lease.

Steve Williams, a real estate appraiser, testified that he appraised the property as of September 1997 and valued the building at $925,000. He estimated that plaintiff would have paid $555,000 if given the opportunity to exercise its right of first refusal, and concluded therefore that the damages suffered by plaintiff from the lost opportunity to purchase the property was $370,000.

At the close of plaintiff's evidence, it withdrew its claim for unfair and deceptive practices. Defendants presented evidence through the testimony of Faye Eloise Robbins, who testified that the roof was patched and repaired prior to Hurricane Fran in September 1996. After the hurricane, she hired roofing contractors from California to replace the roof but there was a delay in signing the contract. She also testified that defendants had agreed to extend plaintiff's lease beyond 2002, although she had not sent plaintiff a new lease as she had promised. She testified that she sent Dr. Bennett a letter dated 21 September 1997 notifying him of the sale to Rumfelt.

At the close of all the evidence, the trial court granted a directed verdict in favor of plaintiff on both the issue of damages occasioned by defendants' breach of Article XVII and the issue of defendants' breach of Article V and resulting damages. With respect to the latter, the trial court ruled as a matter of law that defendants had breached the lease by failing to keep the roof in proper repair and that the damages from this breach amounted to $10,800. With respect to the damages resulting from defendants' breach of Article XVII, the trial court found that plaintiff was entitled to recover damages in the amount of $529,600 as a matter of law. The trial court entered judgment in favor of plaintiff in the amount of $540,400. Defendants appeal.

Initially, we note that defendants have failed to observe the requirements of Rule 28(b)(5) of the Rules of Appellate Procedure, which requires: "Immediately following each question 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." N.C.R. App. P. 28(b)(5). Instead, following each of the questions presented in their brief, defendants have referenced an "Objection No." and an "Exception No." which do not correspond to the seven assignments of error set out in the record on

appeal. The Rules of Appellate Procedure are designed to facilitate appellate review and a failure to observe the rules subjects an appeal to dismissal. *May v. City of Durham*, 136 N.C. App. 578, 525 S.E.2d 223 (2000). Notwithstanding defendants' failure to observe the rules, we elect to exercise the discretion allowed us by N.C.R. App. P. 2 and consider defendants' arguments on their merits.

Defendants have not assigned error to the grant of partial summary judgment establishing their breach of Article XVII nor have they brought forward any assignment of error to the grant of directed verdict establishing their breach of Article V. They argue, however, that the trial court erred by granting plaintiff's motion for directed verdict as to the damages occasioned by those breaches because there were issues of fact for the jury with respect to the amount of those damages.

A motion for a directed verdict pursuant to G.S. § 1A-1, Rule 50 tests the legal sufficiency of the evidence to take the case to the jury. *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971). In ruling upon a motion for a directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, and any conflicts in the evidence and every reasonable inference which may be drawn from it are resolved in favor of the non-movant. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E.2d 452 (1979). A directed verdict may not be granted when there is conflicting evidence on contested issues of fact. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

Any party may move for a directed verdict at the close of all the evidence. *Snipes v. Snipes*, 55 N.C. App. 498, 286 S.E.2d 591, *affirmed*, 306 N.C. 373, 293 S.E.2d 187 (1982). But a directed verdict may not be granted in favor of the party with the burden of proof when his right to recover depends on the credibility of his evidence. *Murray v. Murray*, 296 N.C. 405, 250 S.E.2d 276 (1979). Thus, it is rarely appropriate to grant a directed verdict in favor of the party with the burden of proof "because, even though [a] proponent succeeds in the difficult task of establishing a clear and uncontradicted prima facie case, there will ordinarily remain in issue the credibility of the evidence adduced by the proponent." *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979) (citations omitted).

In *Burnette*, the Court recognized the following instances where "credibility is manifest as a matter of law:" (1) "[w]here non-movant establishes proponent's case by admitting the truth of the basic facts

upon which the claim of proponent rests;" (2) "[w]here the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents;" and (3) "[w]here there are only latent doubts as to credibility of oral testimony and the opposing party has 'failed to point to specific areas of impeachment and contradictions.' " *Id.* at 537-38, 256 S.E.2d at 396 (citations omitted).

> In summary, while credibility is generally for the jury, courts set the outer limits of it by preliminarily determining whether the jury is at liberty to disbelieve the evidence presented by movant. Needless to say, the instances where credibility is manifest will be rare, and courts should exercise restraint in removing the issue of credibility from the jury.

Id. at 538, 256 S.E.2d at 396 (citations omitted).

Moreover, we note that although the trial court in this case made findings of fact and conclusions of law, these are neither necessary nor appropriate in granting a motion for directed verdict. *Kelly v. Int'l Harvester Co.*, *supra.* Accordingly, we will disregard the findings and conclusions of the trial court as they have no legal significance. *Id.*

I.

Defendants argue first that the trial court erred in directing a verdict in plaintiff's favor with respect to damages for their breach of Article XVII of the lease. The trial court awarded damages for the breach of that article in the amount of (1) $370,000, the difference in the fair market value of the building on the date of sale and the price for which defendants sold the building to Rumfelt; and (2) $159,600, the increased rent which plaintiff was required to pay due to Rumfelt's acquiring the property and requiring plaintiff to enter into a new lease.

A. Damages from Plaintiff's Lost Opportunity to Purchase the Property

[1] Defendants argue that the damages, if any, sustained by plaintiff as a result of its lost opportunity to purchase the property was a question for the jury. We agree.

Steve Williams, who was qualified as an expert real estate appraiser, testified for plaintiff regarding damages suffered as a result of losing the opportunity to purchase the Sorrell Building. Williams

stated that he reached his $925,000 valuation of the property by reconciling two methods, the income approach and the sales comparison approach. The income approach is based on the amount of commercial income the property can generate. Williams testified that he looked at the income under the lease signed with Rumfelt in 1997 and determined that they were "approximately reflective of market rentals." Using this approach, he valued the property at $928,350. The sales comparison approach looks at recent sales of similar property. Williams testified that he looked at sales of comparable buildings on or in the vicinity of Franklin Street and valued the property at $918,540. Plaintiff contends that Williams' credibility is manifest as a matter of law; therefore, it contends, the trial court properly directed a verdict for plaintiff.

However, Williams was cross-examined as to his methodology as follows:

> Q. Mr. Williams, in your testimony, uh, of course you're doing this appraisal now based on numbers that you gathered from various places to try to come up with a value from September of '97; is that correct?
>
> A. That's correct.
>
> Q. Okay. And in [sic] one of your approaches that you just explained is the income approach. And you use the income after Mr. Rumfelt purchased the property and renegotiated all the leases; is that correct?
>
> A. That's correct, yes.
>
> Q. To come up with the value at a possible sale in September, you wouldn't have had those numbers if you'd done that the first day of September; isn't that correct?
>
> A. That's correct.
>
> Q. Why didn't you use the, uh, rental income that was there September 1, instead of now looking back after Rumfelt had redone all the leases to come up with a value of the property.
>
> A. The income in September 1997, uh, would have reflected a lease fee estate. Uh, I was asked to look at the value of the fee simple. I don't want to complicate the issue, but the fee simple value of the property looks at market rates, the rates that an

owner could achieve if the property is leased on the market at that time.

Q. Okay. But you said you'd used the leases that Rumfelt did for '97?

A. Yes.

Q. Okay. If you had used the leases in existence September 1, would that have been different?

A. Yes. That would have been a leased fee estate as of September 1, 1997 as encumbered by the leases in place. The fact that the leases were not recorded, uh, indicated that a buyer of the property was not necessarily bound by the contract rents passing at that time.

The foregoing cross-examination arguably brought into question a specific area of Williams' testimony with respect to the methodology used to value the property and therefore arguably brought this evidence into question. Viewing the evidence in the light most favorable to the defendants and giving them the benefit of every reasonable inference which may be drawn from it, as is required in ruling on a motion for directed verdict, we must conclude that the credibility of Williams' testimony adduced by plaintiff was at issue and the court erred in granting a directed verdict awarding plaintiff damages based thereon. As the Court noted in *Burnette*, "the instances where credibility is manifest will be rare, and courts should exercise restraint in removing the issue of credibility from the jury." 297 N.C. at 538, 256 S.E.2d at 396. In this instance, the court erred by not exercising such restraint; the issue was for the jury to determine.

B. Damages from Plaintiff's Increased Rental Cost

[2] Defendants also argue that the trial court erred in directing a verdict for plaintiff and awarding damages for plaintiff's increased rental costs. They contend their breach of the notification of sale and right of first refusal provisions of Article XVII was not a proximate cause of plaintiff's damages because, had plaintiff recorded the lease, Rumfelt would have been bound by the original lease terms and plaintiff's rent would not have increased. Therefore, defendants argue that the court should not have awarded plaintiff damages for its increased rental cost.

Plaintiff's failure to record the lease has no effect on the legal relationship between it, as lessor, and defendants, as lessees. In

Patterson v. Bryant, 216 N.C. 550, 5 S.E.2d 849 (1939), our Supreme Court held that the recordation statutes are for the protection of subsequent purchasers, not for the protection of the parties to the contract. In *Patterson*, the defendant-grantor conveyed two timber deeds on the same piece of land. *Id.* at 551, 5 S.E.2d at 849-50. The plaintiff was the first grantee; however, the subsequent grantee was the first to record his deed. *Id.* The plaintiff sued the defendant for breach of the agreement. *Id.* The defendant argued that the plaintiff was negligent or guilty of laches in failing to record the deed and that any damages were a result of this failure. *Id.* at 552, 5 S.E.2d at 850. The Court disagreed:

> Whether it is registered at all is of no consequence to the grantor, and the statute requiring conveyances to be registered is not for his protection, but, as stated, for protection of a subsequent purchaser with whom he has seen fit to deal; therefore, laches on the part of his first grantee in recording his deed is not available to defendant [grantor] as an equitable defense.

Id. at 553, 5 S.E.2d at 851. Here, defendants are making essentially the same argument as the defendant in *Patterson*, and for similar reasons, we reject it.

In their brief, defendants present three additional grounds for their argument that plaintiff was not entitled to damages for the increased rental cost. One of these grounds, the duty to mitigate damages, is the basis for the dissent in this case. However, defendants have failed to preserve these arguments for appellate review. Initially, we note that none of these three additional grounds was presented to the trial court for a ruling. *See State v. Hensley*, 77 N.C. App. 192, 334 S.E.2d 783 (1985), *disc. review denied*, 315 N.C. 393, 338 S.E.2d 882 (1986); N.C.R. App. P. 10(b). While a liberal construction of the pleadings might support a conclusion that they raised an issue as to mitigation of damages, defendants presented *no* evidence to require submission of the issue to the jury. Indeed, defendants did not even cross-examine Dr. Bennett, plaintiff's witness who testified regarding the difference in rental cost, with respect to plaintiff's alleged failure to mitigate damages.

In addition, defendants did not assert plaintiff's breach of its duty to mitigate as a ground in opposition to plaintiff's motion for directed verdict. In opposing the motion for directed verdict, defendants argued "if plaintiff wanted to be protected under the lease, he (sic) should have had that lease recorded." An appellate court will not con-

sider arguments other than those called to the attention of the trial court in reviewing the trial court's ruling on a motion for directed verdict. *Stacy v. Jedco Construction Co.*, 119 N.C. App. 115, 457 S.E.2d 875, *disc. review denied*, 341 N.C. 421, 461 S.E.2d 761 (1995) (reviewing order denying motion for directed verdict). "[T]he law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934).

Finally, N.C.R. App. P. 10(c) requires that each assignment of error "state plainly, concisely, and without argumentation the legal basis upon which error is assigned." Nowhere in the assignments of error, including those cited by the dissent, does plaintiff's alleged failure to mitigate damages appear as a legal basis for error. Thus, we hold defendants have failed to properly present the issue of plaintiff's duty to mitigate its damages for appellate review.

Alternatively, defendants argue that the amount of damages to which plaintiff was entitled for increased rent should have been submitted to the jury for determination. As to this element of damages, plaintiff presented evidence that the rent under the lease with defendants at the time the property was sold was $3,200 per month, and that the new lease required by Rumfelt after his purchase of the property called for monthly rent in the amount of $6,000. Dr. Bennett testified that plaintiff's lease with defendants had fifty-seven months remaining on its term at the time of Rumfelt's purchase of the property, and that plaintiff would be required to pay $159,600 in increased rent during that term. Neither defendants' evidence, nor their cross-examination of plaintiff's witnesses, served to impeach the authenticity or correctness of the documents offered by plaintiff or the credibility of plaintiff's evidence as to the amount of increased rent occasioned by defendants' breach of Article XVII. Thus, pursuant to *Burnette*, the credibility of plaintiff's evidence as to this element of damages was manifest and the trial court did not err in directing the verdict in plaintiff's favor.

II.

[3] Defendants also contend the trial court erred in granting a directed verdict establishing the damages to which plaintiff was entitled by reason of defendants' failure to make repairs in breach of Article V. They contend the amount of such damages was an issue for the jury. We disagree.

Plaintiff's manager, Mr. Steele, testified, based on a log which he kept during the pertinent time period, that plaintiff lost $10,800 as a result of refunds and canceled shows due to the leaking roof. Defendants made no attempt to discredit or refute his testimony. In fact, while arguing in opposition to plaintiff's motion for directed verdict, defendant's counsel acknowledged those damages:

> And . . . the only possible damages I can see are the $10,800 for roof leaks which didn't seem to get fixed in a timely manner.

All three of the instances recognized by the *Burnette* Court where credibility is manifest as a matter of law are present in this case. Defendants did not deny the authenticity or correctness of Mr. Steele's log; they have failed to point to specific areas of impeachment and contradictions in his testimony; and defendants, through the statement of their counsel, essentially admitted the existence of the damages ultimately awarded by the trial court for this breach. Accordingly, we hold that the credibility of plaintiff's evidence as to such damages is manifest as a matter of law and the court did not err in directing the verdict as to damages from this breach.

For the foregoing reasons, we find no error in the trial court's granting of a directed verdict in favor of plaintiff establishing plaintiff's damages at $10,800 for defendants' breach of Article V of the lease, and establishing damages for increased rent in the amount of $159,600 as a portion of plaintiff's damages for defendants' breach of Article XVII of the lease. However, because a factual issue existed for the jury with respect to the amount of the damages sustained by plaintiff due to its having lost the opportunity to purchase the building as a proximate result of defendants' breach of Article XVII, the directed verdict fixing such amount was error, and defendants are entitled to a new trial on the issue. The case must be remanded for such a trial and the entry of judgment reflecting the jury's finding.

No error in part; new trial in part.

Judge TIMMONS-GOODSON concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge, concurring in part, dissenting in part.

I concur with the majority's opinion that the trial court properly granted directed verdict in favor of plaintiff for $10,800.00 for defend-

ants' breach of Article V of the lease. I also concur with the majority's opinion that the trial court erred in granting a directed verdict in favor of plaintiff in the amount of $370,000.00 for plaintiff's lost opportunity to purchase the building. However, I respectfully dissent from the majority's opinion that the trial court properly granted a directed verdict in favor of plaintiff for $159,600.00 in damages for increased rents. I would hold that the jury was entitled to determine whether plaintiff exercised reasonable diligence to mitigate its damages for increased rental payments.

"With respect to the question of mitigation of damages, the law in North Carolina is that the nonbreaching party to a lease contract has a duty to mitigate his damages upon breach of such contract." *Isbey v. Crews*, 55 N.C. App. 47, 51, 284 S.E.2d 534, 537 (1981) (citing *Weinstein v. Griffin*, 241 N.C. 161, 84 S.E.2d 549 (1954); *see also, e.g., Harris & Harris Constr. Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 121, 123 S.E.2d 590, 598 (1962) (quotation omitted) (" 'A party injured by the breach of contract by the other party thereto is required to protect himself from loss if he can do so with reasonable exertion or trifling expense, and ordinarily will be allowed to recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided.' "); *Monger v. Lutterloh*, 195 N.C. 274, 142 S.E. 12, 16 (1928) (quotation omitted) (" 'The general principle is fully recognized with us that, in case of contract broken or tort committed, the injured party should do what reasonable care and business prudence requires to minimize the loss.' ").

"Imposing such a duty assures that an award of damages will put the injured party in as good a position as if the contract had not been breached while affording the least amount of cost to the defaulting party." *New Towne Limited Partnership v. Pier 1 Imports, Inc.*, 113 Ohio App.3d 104, 108, 680 N.E.2d 644, 646 (1996).

"Since it is a basic principle of contract law that damages are compensatory and not punitive, North Carolina holds that the nonbreaching party to a lease cannot recover damages which he could have averted by reasonable mitigation activity." 2 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 12-28, at 524 (Patrick K. Hetrick & James B. McLaughlin, Jr., eds., 5th ed. 1999). Where the nonbreaching party to a contract fails to use reasonable diligence to mitigate damages, its recovery will be limited to "the difference between what [it] would have received had the lease agreement been performed, and the fair market value of what he could

have received had [it] used reasonable diligence to mitigate." *Isbey* at 51, 284 S.E.2d at 537.

"Generally, the reasonableness of mitigation efforts depends upon the facts and circumstances of the particular case and is a jury question except in the clearest of cases." *Smith v. Martin*, 124 N.C. App. 592, 600, 478 S.E.2d 228, 233 (1996) (citing *Radford v. Norris*, 63 N.C. App. 501, 503, 305 S.E.2d 64, 65 (1983)) (emphasis supplied).

The evidence presented at trial established that, prior to the sale of the building to Rumfelt, plaintiff's rent was $3,200.00 per month. After purchasing the building, Rumfelt wrote a letter to plaintiff's stockholders advising them of his purchase, stating "[i]f you are interested in negotiating a new lease, I look forward to developing a business relationship that will be beneficial to all of us." Upon receiving the letter, plaintiff offered to buy the building from Rumfelt, who refused. The parties entered into a new lease requiring rental payments of $6,000.00 per month, nearly double the original monthly rental amount.

I would hold plaintiff's evidence as to this element of damages was not manifest, and that the jury was entitled to determine whether plaintiff exercised the reasonable diligence required by law to mitigate its damages resulting from defendants' breach. The only "manifest" evidence was that plaintiff agreed to a virtual doubling of its rent less than 3 months after defendants' sale of the property to Rumfelt. The trial court's grant of a directed verdict on this issue was error. Accordingly, I respectfully dissent from this portion of the majority's opinion.

I also disagree with the majority's opinion that the issue of plaintiff's mitigation of its increased rental damages is not an issue properly before this Court. In its complaint, plaintiff alleged that Rumfelt informed plaintiff that he had purchased the building, and that Rumfelt stated that "unless Plaintiff signed a new lease with him at a higher rental, he would pursue negotiations with other prospective tenants for the premises leased by Plaintiff." Plaintiff did not separate its allegations of damages incurred for lost opportunity and for increased rentals in its complaint. Plaintiff merely alleged that it suffered damages as a result of defendants' breach of the lease. Defendants' answer denied both that Rumfelt required plaintiff to pay higher rent in order to stay in the building, and that plaintiff suffered damages, including increased rental damages, as a result of defendants' breach.

Contrary to the majority's colorful assertion that the "law does not permit parties to swap horses between courts in order to get a better mount" on appeal, the record as a whole reflects that defendants continue to ride the same horses they mounted when they filed their answer. Plaintiff did not segregate its claims for damages for lost opportunity and damages for increased rentals. Defendants' denial of those allegations squarely put those claims in dispute, including the question of fact of whether plaintiff did "what reasonable care and business prudence requires to minimize the loss." *Monger*, *supra*.

A plaintiff's duty to mitigate damages following a defendant's breach is a duty that arises as a matter of law. *See, e.g., Tillis v. Calvine Cotton Mills, Inc.*, 251 N.C. 359, 367-68, 111 S.E.2d 606, 613 (1959) (citation omitted) (a party is "required by law to exercise reasonable diligence to minimize damages."); *Gibbs v. Western Union Telegraph Co.*, 196 N.C. 516, 146 S.E. 209, 213 (1929) (citations omitted) ("it is a well-settled rule of law that the party who is wronged is required to use due care to minimize the loss."). The duty to mitigate "stems from the implied covenant of good faith and fair dealing" inherent in all contracts. *See New Towne Limited Partnership*, 113 Ohio App.3d at 108, 680 N.E.2d at 646; Barker, Commercial Landlords' Duty Upon Tenants' Abandonment—To Mitigate?, 20 J. Corp. L. 627, 644 (1995). *See also*, *Rubin v. Dondysh*, 146 Misc.2d 37, 43, 549 N.Y.S.2d 579, 582 (1989), *reversed on other grounds*, 153 Misc.2d 657, 588 N.Y.S.2d 504 (1991) (duty to mitigate "flows logically from the implied covenant, which exists in any contract, of fair dealing and good faith.").

Thus, where plaintiff raised the issue of defendants' liability for plaintiff's increased rental damages following defendants' breach, the issue of plaintiff's duty to mitigate such damages arose as a matter of law. The issue was properly presented to the trial court, and the jury was entitled to review it.

Furthermore, defendants preserved this argument for appeal in their assignments of error to this Court. Defendants' assignments of error, as enumerated in the record on appeal, include the following: (1) that the trial court's entry of a directed verdict was inappropriate where, "it appearing from the evidence adduced at trial that there existed an issue of fact as to the amount of damages, if any, which Plaintiff was entitled to recover"; (2) that the trial court's conclusion that plaintiff was entitled to recover damages for increased rents was

inappropriate where plaintiff had no obligation to pay the increased rent; and (3) that the trial court's conclusion that defendants were liable for $159,600.00 in increased rental damages was error where plaintiff's failure to record its lease "was the proximate cause of Plaintiff's inability to avoid paying a higher lease cost, and that in any event Plaintiff was under no obligation to accept a higher lease cost."

Defendants also argued in their brief that plaintiff's duty to mitigate its damages was an issue requiring the jury's review. Defendants' arguments were supported by authority. I would hold that because the trial court made no findings of fact or conclusions of law that plaintiff made any efforts to mitigate its damages, the entry of a directed verdict in favor of plaintiff was error on this question of fact.

I concur with the majority's opinion that the trial court erred in granting a directed verdict for plaintiff for lost opportunity damages in the amount of $370,000.00. The jury did not pass judgment on whether defendants must be accountable for the entire amount of increased rental damages. Evidence of damages for plaintiff's lost opportunity were based upon Williams' testimony of the value of the building. Williams' valuation of the property was based, in part, upon the increased rental amounts that were agreed to after the date of sale. I concur with the majority's opinion that the credibility of this evidence was not so manifest for the trial court to remove this issue from the jury and grant a directed verdict.

Plaintiff did not separate the allegations of damages for lost opportunity and for increased rentals for breach of Article XVII of the lease in the complaint. The issues of plaintiff's damages for increased rentals and for lost opportunity are intertwined. It is difficult to separate these elements of damages, where the evidence is manifest in one area of damages, but not manifest in the other. We all agree that lost opportunity damages must be considered by the jury. I believe the issue of damages for increased rentals and plaintiff's mitigation efforts should also be submitted to the jury.

IN RE ALLISON

[143 N.C. App. 586 (2001)]

IN THE MATTER OF: LINDSAY ALLISON

No. COA00-705

(Filed 5 June 2001)

1. Juveniles— delinquency—longer sentence than adult committing same offense—no equal protection violation—rational basis

The trial court did not err by entering a new dispositional order that committed a juvenile to training school for a minimum of six months and N.C.G.S. § 7B-2513(a) was not unconstitutionally applied to the juvenile in violation of her equal protection rights even though an adult committing the same offense of unauthorized use of a motor vehicle in violation of N.C.G.S. § 14-72.2 would have received at most 120 days active punishment, because: (1) the differences are reasonably related to the purposes of the juvenile act to provide children with the needed supervision and control; and (2) the desire of the state to exercise its authority as parens patriae and to provide for the care and protection of its children supplies a compelling rational justification for the classification.

2. Appeal and Error— preservation of issues—failure to argue in brief

Although a juvenile contends the trial court's new disposition order setting her period of commitment violated her constitutional rights under the ex post facto clause as well as the Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 18, 23, 24, 27, and 35 of the North Carolina Constitution, the juvenile has abandoned this assignment of error by failing to argue these contentions in her brief. N.C. R. App. P. 28.

3. Juveniles— delinquency—disposition level—training school

The trial court did not err by relying on N.C.G.S. § 7B-2508(d) to raise a juvenile's Level 2 dispositional limit under N.C.G.S. § 7B-2508(f) to Level 3 in order to commit the juvenile to training school for her unauthorized use of a motor vehicle, because the juvenile's prior commitment to training school under the old juvenile code is equivalent to a Level 3 disposition under the new code.

4. Juveniles— delinquency—credit for time served in detention pending hearing

The trial court did not violate a juvenile's right to be free from double jeopardy or her rights to due process and equal protection by allegedly failing to give her credit for time served in detention prior to the 16 February 2000 disposition, because: (1) the juvenile was given credit for time served in detention pending the 16 February 2000 disposition hearing, which was applied toward her commitment term for violation of her conditional release; and (2) the juvenile was not entitled to receive similar credit toward her new commitment term under the new dispositional order when she was already credited for time served in conjunction with the violation of her conditional release.

Appeal by juvenile from orders entered 28 April 2000 by Judge Louis A. Trosch, Jr. in District Court, Mecklenburg County. Heard in the Court of Appeals 25 April 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Jane L. Oliver, for the State.

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

WYNN, Judge.

This appeal arises from trial court orders committing the delinquent juvenile-appellant, L.M.A., for placement in a residential facility. The orders also provided that L.M.A. "is to be released to an appropriate placement in a secure residential inpatient treatment facility if and when one becomes available."

The record reveals that on 10 June 1998, L.M.A. was adjudicated delinquent for assault with a deadly weapon in violation of N.C. Gen. Stat. § 14-33(c)(1) (Supp. 1997); she was placed on juvenile probation on 6 October 1998. L.M.A. was again adjudicated delinquent on 11 December 1998 for unauthorized use of a motor vehicle in violation of N.C. Gen. Stat. § 14-72.2 (1993). A motion to review L.M.A.'s probation was apparently filed on 17 December 1998, although a copy of this motion does not appear in the record. On 29 January 1999, L.M.A. was once again adjudicated delinquent for (1) first-degree trespass in violation of N.C. Gen. Stat. § 14-159.12 (1993), and (2) damage to real property in violation of N.C. Gen. Stat. § 14-127 (1993).

The district court conducted a dispositional hearing on 2 February 1999, at which L.M.A. admitted the allegations in the 17 December 1998 motion for review. Following that hearing, the court extended the termination date of L.M.A.'s probation for an additional six months from 6 April 1999 until 6 October 1999. On 2 June 1999, the court conducted a hearing on another motion for review, filed 25 May 1999, alleging further probation violations by L.M.A. Based on L.M.A.'s admitted allegations in that motion for review, the district court found her in violation of her probation, and continued the disposition until 29 June 1999. That disposition hearing resulted in a court order committing L.M.A. to the Division of Youth Services for placement in a residential "training school" facility for an indefinite term not to exceed 450 days.

L.M.A. was conditionally released from training school on 22 September 1999. The conditions of her release required, among other things, that she (1) not violate any local, state, or federal law or otherwise commit any legal infraction, and (2) meet with a court counselor, notify said counselor of any home, school or community difficulties, and enroll in and attend a Charlotte Mecklenburg school.

A juvenile petition to declare L.M.A. a delinquent juvenile was filed on 15 November 1999, alleging that L.M.A. committed additional delinquent acts, including (1) obstructing and delaying a police officer in the discharge of his duties in violation of N.C. Gen. Stat. § 14-223 (1993), and (2) unauthorized use of a motor vehicle in violation of N.C. Gen. Stat. § 14-72.2; a motion for review was apparently filed alleging these same delinquent acts. A separate motion for review was filed alleging L.M.A.'s violation of her conditional release by her absence from school, tardiness, and cutting classes. At a hearing on both of these motions conducted on 24 November 1999, L.M.A. admitted her unauthorized use of a motor vehicle, and admitted being absent from school, cutting classes, and being tardy. The trial court adjudicated L.M.A. delinquent under the 15 November 1999 juvenile petition, ordered her detention pending a further disposition hearing, and scheduled a detention review hearing for 2 December 1999.

The trial court held several additional detention review hearings in December 1999. During such hearings, L.M.A. was given the choice of waiting in detention for an available placement in an inpatient treatment facility, or returning to training school to complete her commitment sentence; L.M.A. repeatedly indicated her desire to remain in detention until a treatment facility placement became avail-

able. Following the 2 and 13 December 1999 hearings, the trial court ordered that L.M.A. remain in detention pending disposition; however, the court further ordered that, if L.M.A. was accepted at The Willows, a residential treatment facility, prior to the disposition date, she was to be released to that placement.

The Willows announced that it would be closing, and alternative treatment plans were discussed at a 28 December 1999 disposition hearing; a detention hearing was set for 30 December to discuss a possible alternative placement at another facility. After the 30 December 1999 hearing, the trial court scheduled a further detention review hearing for 20 January 2000, but ordered that L.M.A. be released to placement in the Charter Pines Asheville treatment facility if such placement became available. As of the 20 January 2000 hearing, it appears from the record that no placement had become available, although it was believed that placement was forthcoming, and L.M.A. was retained in detention pending appropriate placement.

On 16 February 2000, the trial court once again held a detention hearing, and a dispositional hearing on the November 1999 motions for review alleging L.M.A.'s violation of her conditional release and the juvenile order adjudicating L.M.A. delinquent following the hearing on 24 November 1999. At the 16 February 2000 hearing, it was learned that the Charter Pines Asheville facility was also closing. Although other treatment options were discussed, the only other appropriate treatment facility possible was located in South Carolina, and no residential placement was available at that time. The trial court determined that keeping L.M.A. in detention pending placement in an inpatient treatment facility would be detrimental to her.

On 28 April 2000, the trial court entered two separate disposition and commitment orders, explaining:

> Given the modifications of the [applicable] law since July 1, 1999, separate orders are drawn for the violation of the conditional release under the old law and dispositional hearing for the charges of unauthorized use and resisting arrest under the new law.

The first order ("Old Disposition Order") concerned L.M.A.'s violation of her conditional release by her absence from school, tardiness and cutting classes, as alleged in the motion for review filed in November 1999. The second order ("New Disposition Order") concerned

L.M.A.'s adjudication of delinquency under the new law, pursuant to the 15 November 1999 juvenile petition and accompanying motion for review.

In the Old Disposition Order, the trial court found that L.M.A.'s behavior "constitutes a threat to persons or property in the community," and found that all treatment alternatives to commitment as prescribed in N.C. Gen. Stat. §§ 7A-647 through 7A-649 (repealed effective 1 July 1999) had been attempted unsuccessfully, or were considered but found to be inappropriate. The trial court concluded that committing L.M.A.:

> to the Division of Youth Services (now Office of Juvenile Justice) is the least restrictive dispositional alternative that is available and that is appropriate to meet the needs of the juvenile and the objectives of the State in exercising jurisdiction in this case.

Accordingly, the trial court ordered that:

> 1. [L.M.A.] be recommitted to the Division of Youth Services (now Office of Juvenile Justice), for placement in one of the residential facilities operated by the Division to finish the commitment term of an indefinite term not to exceed 450 days that was entered June 29, 1999.
>
> 2. She is to be released to an appropriate placement in a secure residential inpatient treatment facility if and when one becomes available. If a placement becomes available for her, she may be released to it from the residential facility in which she is housed.
>
> 3. While in the residential facility of DYS, intensive psychological services are to be provided to her as are available and as is consistent with the assessments hereto attached.
>
> 4. The Mecklenburg County Area Mental Health is to continue to provide [L.M.A.] with services.

In the New Disposition Order, the trial court found:

> 8. [L.M.A.] has been adjudicated delinquent for a violation of probation and unauthorized use of a motor vehicle. The maximum for a class 1 misdemeanor is 120 days. However, pursuant to [N.C. Gen. Stat. §] 7B-2513(a), a term of commitment to training school must be for at least six months.

> 9. The court also finds that [L.M.A.] needs intensive, long term and secure psychological/psychiatric treatment to modify her behavior. This treatment should be consistent with the attached psychological assessments. The juvenile should receive a substance abuse assessment and intensive substance abuse assessment. The Court notes that, pursuant to [N.C. Gen. Stat. §] 7B-2515, if [L.M.A.] is in a program of treatment, her stay can be, with proper notice, extended beyond that [] term of the original commitment.

The court thus concluded that L.M.A.'s commitment to the Office of Juvenile Justice is in her best interest, "while reflecting the needs of the community and its available resources." Therefore, the trial court ordered that:

> 1. [L.M.A.] be committed to the Office of Juvenile Justice, for placement in one of the residential facilities operated by the Office of Juvenile Justice to finish the commitment term of an indefinite term of at least six months and not to exceed [L.M.A.'s] 18th birthday unless otherwise maintained by N.C.G.S. 7B-2515.
>
> 2. [L.M.A.] is to be released to an appropriate placement in a secure residential inpatient treatment facility if and when one becomes available. If a placement becomes available for her, she may be released to it from the residential facility in which she is housed.
>
> 3. While in the residential facility of [the] Office of Juvenile Justice, intensive psychological services are to be provided to her as are available and as is consistent with the assessments hereto attached.
>
> 4. The Mecklenburg County Area Mental Health is to continue to provide [L.M.A.] with services.

L.M.A. appeals from both disposition orders, bringing forth eleven assignments of error for our consideration. We note preliminarily that she has abandoned assignments of error 1-5, 7 and 10 by failing to argue them in her brief. *See* N.C.R. App. P. 28 (2001); *see also State v. Rhyne*, 124 N.C. App. 84, 478 S.E.2d 789 (1996); *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

We note further that L.M.A.'s remaining assignments of error concern alleged errors that were not preserved by a timely request, objection or motion presented to the trial court. *See* N.C.R. App. P. 10(b)(1)

(2001). Nonetheless, certain errors may be reviewed on appeal despite the absence of an objection, exception or motion made in the trial court, including where it is alleged that:

> The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

N.C. Gen. Stat. § 15A-1446(d)(18) (1997). Therefore, to the extent L.M.A.'s remaining assignments of error concern the alleged illegality of her sentence, we consider those assignments herein. *See id.*

[1] In assignment of error 6, L.M.A. contends that the trial court erred in entering the New Disposition Order, ordering her commitment to training school for a minimum of six months,

> on the ground this commitment is longer than the sentence an adult would receive for the same crime, and on the ground that the Court's action violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, Article I, §§ 18, 19, 23, 24, 27, and 35 of the North Carolina Constitution, and North Carolina common and statutory law.

Similarly, in assignment of error 9, L.M.A. contends that the order imposing a mandatory six-month commitment to training school was error,

> on the ground the mandatory six month period for training school required by G.S. §§ 7B-2506(24), 7B-2508(e), and 7B-2513(a) is unconstitutional, and on the ground that the Court's action violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, Article I, §§ 18, 19, 23, 24, 27, and 35 of the North Carolina Constitution, and North Carolina common and statutory law.

In support of these assignments of error in her brief, L.M.A. argues that her equal protection and due process rights were violated as her period of commitment to training school exceeded the sentence an adult could receive for committing the same offense. *See* U.S. Const. amends. V, XIV; N.C. Const. art. I, § 19. Specifically, L.M.A. argues,

> *In the instant case*, G.S. § 7B-2513(a), which provides that a juvenile who is committed to training school must be committed for at least six months, is unconstitutional.

(Emphasis added.)

L.M.A. does not contend, either in her assignments of error or in her brief, that N.C. Gen. Stat. §§ 7B-2506(24) (1999), 7B-2508(e) (1999) and 7B-2513(a) (1999) are facially unconstitutional. *See State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 281-82 (1998) (holding that a party challenging the facial constitutionality of a legislative act must show there are no circumstances under which the act would be valid); *see also United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed.2d 697, 707 (1987). Furthermore, she has abandoned these assignments of error insofar as she contends that (1) the trial court's action violated her due process rights, as well as the Sixth and Eighth Amendments to the United States Constitution, and Article I, §§ 18, 23, 24, 27 and 35 of the North Carolina Constitution, and (2) N.C. Gen. Stat. §§ 7B-2506(24) and 7B-2508(e) are unconstitutional as applied to her in the case at bar, by failing to argue these contentions in her brief. *See* N.C.R. App. P. 28; *Rhyne*, 124 N.C. App. 84, 478 S.E.2d 789; *Kirby*, 276 N.C. 123, 171 S.E.2d 416. We therefore limit our discussion of this assignment of error to a consideration of whether N.C. Gen. Stat. § 7B-2513(a) was unconstitutionally applied to L.M.A. in the instant case, in violation of her equal protection rights. *See* U.S. Const. amends. V, XIV; N.C. Const. art. I, § 19. For the reasons that follow, we find that it was not.

1998 N.C. Sess. Laws ch. 202 repealed the former North Carolina Juvenile Code, Articles 41 through 59 of Chapter 7A of the General Statutes, N.C. Gen. Stat. §§ 7A-516 *et seq.* (1995), effective 1 July 1999. The new Juvenile Code enacted by 1998 Sess. Laws ch. 202, codified in Chapter 7B of the General Statutes, N.C. Gen. Stat. § 7B-100 *et seq.* (1999), became effective 1 July 1999, and applies to petitions filed and reviews commenced on or after that date. *See* 1998 Sess. Laws ch. 202. As the New Disposition Order concerns L.M.A.'s adjudication of delinquency based upon a juvenile petition filed on 15 November 1999, that order is governed by the new Juvenile Code, N.C. Gen. Stat. § 7B-100 *et seq.*

As noted above, at the hearing on 24 November 1999, L.M.A. admitted to the unauthorized use of a motor vehicle as alleged in the 15 November 1999 juvenile petition, and the trial court subsequently adjudicated her delinquent. In accordance therewith, the trial court committed L.M.A. to the Office of Juvenile Justice for the completion of an indefinite term of at least six months, pursuant to N.C. Gen. Stat. § 7B-2513(a), which provides in relevant part:

> Pursuant to G.S. 7B-2506 [concerning disposition alternatives] and G.S. 7B-2508 [concerning dispositional limits], the court may

> commit a delinquent juvenile who is at least 10 years of age to the Office for placement in a training school. Commitment shall be for an indefinite term of at least six months. In no event shall the term exceed:
>
> . . .
>
> (3) The eighteenth birthday of the juvenile if the juvenile has been committed to the Office for an offense other than an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

N.C. Gen. Stat. § 7B-2513(a).

L.M.A. argues that this statute, as applied to her, is unconstitutional insofar as it results in a harsher sentence being imposed upon her than would be imposed upon an adult having committed the same offense, to-wit, unauthorized use of a motor vehicle in violation of N.C. Gen. Stat. § 14-72.2, which constitutes a Class 1 misdemeanor. *See* N.C. Gen. Stat. § 14-72.2. Pursuant to N.C. Gen. Stat. § 15A-1340.23 (1997), the most severe sentence possible for an adult convicted of this crime is 120 days active punishment. *See* N.C. Gen. Stat. § 15A-1340.23(c). Because of the disparity in sentencing between similarly-situated adults and juveniles, L.M.A. contends that N.C. Gen. Stat. § 7B-2513 was unconstitutionally applied to her. *See State v. Benton*, 276 N.C. 641, 660, 174 S.E.2d 793, 805 (1970) (stating that a statute denies equal protection where it prescribes disparate punishment for the same offense committed under the same circumstances by similarly-situated persons).

This Court has noted previously that:

> The equal protection clauses of the United States Constitution and the Constitution of North Carolina require that in making classifications . . . there be no discrimination, that is, there must be some reasonable relation between the class created and the legislative end to be obtained.

Ledwell v. Berry, 39 N.C. App. 224, 225, 249 S.E.2d 862, 863 (1978), *disc. review denied*, 296 N.C. 585, 254 S.E.2d 35 (1979). The test to be applied to a statute challenged on the basis of equal protection "is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation." *Guthrie v. Taylor*, 279 N.C. 703, 714, 185 S.E.2d 193, 201 (1971), *cert. denied*, 406 U.S. 920, 32 L. Ed. 2d 119 (1972).

In *In re: Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969), *aff'd sub nom. McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L. Ed. 2d 647 (1971), our Supreme Court considered a challenge to the constitutionality of the then-existing North Carolina Juvenile Court Act (Article 2 of Chapter 110 of the General Statutes). *See* N.C. Gen. Stat. § 110-21 *et seq.* In upholding the constitutionality of the Act, our Supreme Court stated:

> Appellants seek to equate the protective custody of children under the juvenile laws of the State with the trial and punishment of adults under the criminal statutes. By so doing, they conclude that since a juvenile may be committed "during minority" (unless sooner released by the proper authorities) he is required "to serve a longer period of confinement" than the criminal law visits upon an adult for violation of the same statute. Therefore, they argue, the juvenile statutes are constitutionally unsound. The equation is a *non sequitur*; its rationale fallacious. Nothing in [*In re Gault*, 387 U.S. 1, 18 L. Ed. 2d 527 ((1967)] or other recent federal decisions supports it. There are still many valid distinctions between a criminal trial and a juvenile proceeding.

Burrus, 275 N.C. at 533, 169 S.E.2d at 889. *See In re Whichard*, 8 N.C. App. 154, 157-58, 174 S.E.2d 281, 283 (1970), *cert. denied*, 403 U.S. 940, 29 L. Ed. 2d 719 (1971) (rejecting the appellant's claim that the Juvenile Court Act is unconstitutional because it "authorizes a longer period of confinement for a juvenile who violates a criminal statute than for an adult who violates the same statute").

Nearly thirty years ago, in *In re Walker*, 282 N.C. 28, 191 S.E.2d 702 (1972), our Supreme Court rejected an equal protection challenge to certain juvenile code provisions, stating:

> The purpose of the Juvenile Court Act "is not for the punishment of offenders but for the salvation of children." *Commonwealth v. Fisher*, 213 Pa. 48, 62 A. 198 (1905). The Act treats "delinquent children not as criminals, but as wards and undertakes . . . to give them the control and environment that may lead to their reformation and enable them to become law-abiding and useful citizens, a support and not a hindrance to the commonwealth." *State v. Burnett*, 179 N.C. 735, 102 S.E. 711 (1920). The State must exercise its power as "*parens patriae* to protect and provide for the comfort and well-being of such of its citizens as by reason of infancy . . . are unable to take care of themselves." [*County of*] *McLean v. Humphreys*, 104 Ill. 378 (1882). Thus, juveniles are in

> need of supervision and control due to their inability to protect themselves. In contrast, adults are regarded as self-sufficient.
>
> Therefore, the classification here challenged is based on differences between adults and children; and there are so many valid distinctions that the basis for challenge seems shallow. These differences are "reasonably related to the purposes of the Act"—that is, to provide children the needed supervision and control. Consequently, the classification does not offend the Equal Protection Clause under the test laid down in *Morey v. Doud*, [354 U.S. 457, 1 L. Ed. 2d 1485 (1957)]; and even if it be said that the classification here challenged affects "fundamental interests" or is "inherently suspect," it is our view that the desire of the State to exercise its authority as *parens patriae* and provide for the care and protection of its children supplies a "compellingly rational" justification for the classification.

Walker, 282 N.C. at 39, 191 S.E.2d at 709-10. Our Supreme Court concluded that the challenged statutes "do not violate the Equal Protection Clause by classifying and treating children differently from adults." *Id.* at 39, 191 S.E.2d at 710. In this, our first opportunity to consider the constitutionality of N.C. Gen. Stat. § 7B-2513(a), we similarly conclude that there exists a rational basis for the legislature's disparate treatment of adults and children, and that G.S. § 7B-2513(a) was not unconstitutionally applied to L.M.A. in the instant case in derogation of her equal protection rights. *See Burrus; Walker.*

[2],[3] Next, in connection with the New Disposition Order, L.M.A. assigns as error:

> The Juvenile Court's disposition committing [L.M.A.] to training school for at least six months, on the ground the period of commitment was not authorized under G.S. § 7B-2507, on the ground the period of commitment violated the ex post facto clause, and on the ground that the Court's action violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, Article I, §§ 18, 19, 23, 24, 27, and 35 of the North Carolina Constitution, and North Carolina common and statutory law.

L.M.A. has abandoned this assignment of error insofar as she contends that the period of commitment imposed violated her constitutional rights under the *ex post facto* clause, as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution, and Article I, §§ 18, 23, 24, 27 and 35 of the North Carolina Constitution, by failing to argue these contentions in her brief. *See* N.C.R. App. P. 28; *Rhyne*, 124 N.C. App. 84, 478 S.E.2d 789; *Kirby*, 276 N.C. 123, 171 S.E.2d 416. Instead, L.M.A. argues in her brief that the trial court "erred in committing L.M.A. to training school because she was not eligible for such a commitment" under the dispositional limits imposed by N.C. Gen. Stat. § 7B-2508 (1999). We disagree.

Under the Juvenile Code, the trial court must consider the juvenile's delinquency history level as well as the classification of the current offense in determining the appropriate disposition limit in a juvenile proceeding. *See* N.C. Gen. Stat. § 7B-2508. N.C. Gen. Stat. § 7B-2507 (1999) provides the manner for determining the juvenile's delinquency history level, stating:

> The delinquency history level for a delinquent juvenile is determined by calculating the sum of the points assigned to each of the juvenile's prior adjudications and to the juvenile's probation status, if any, that the court finds to have been proved in accordance with this section.

N.C. Gen. Stat. § 7B-2507(a). Based upon the delinquency history level determined pursuant to G.S. § 7B-2507, and the offense classification for the current offense, N.C. Gen. Stat. § 7B-2508 then dictates the dispositional limits available.

In conjunction with L.M.A.'s adjudication of delinquency on 24 November 1999 for her unauthorized use of a motor vehicle, the trial court completed a dispositional level worksheet pursuant to N.C. Gen. Stat. §§ 7B-2507 and 7B-2508. Therein, the court found that the offense committed was a Class 1 misdemeanor, a minor offense. *See* N.C. Gen. Stat. § 14-72.2(b). The trial court found further that L.M.A. had a "high" prior delinquency history level, pursuant to G.S. § 7B-2507. Neither L.M.A. nor the State dispute these determinations.

According to the dispositional chart in G.S. § 7B-2508(f), a high delinquency history combined with a minor offense, as in the instant case, results in a Level 2 dispositional limit. *See* N.C. Gen. Stat. § 7B-2508(f) (1999). A Level 2 dispositional limit—or intermediate disposition—does not provide for commitment of the juvenile to training school as one of the "intermediate" dispositional alternatives. *See* N.C. Gen. Stat. §§ 7B-2506(1)-(23) (1999); 7B-2508(d) (1999). However, N.C. Gen. Stat. § 7B-2508(d) provides that,

> [N]otwithstanding any other provision of this section, a court may impose a Level 3 disposition if the juvenile has previously received a Level 3 disposition in a prior juvenile action. In determining which dispositional alternative is appropriate, the court shall consider the needs of the juvenile as indicated by the risk and needs assessment contained in the predisposition report, the appropriate community resources available to meet those needs, and the protection of the public.

N.C. Gen. Stat. § 7B-2508(d). The trial court apparently relied upon this language to raise L.M.A.'s dispositional limit to Level 3, which requires the court to "commit the juvenile to the Office for placement in a training school in accordance with G.S. 7B-2506(24)."

L.M.A. contends that the trial court erred in elevating her disposition level to Level 3, arguing that she was only eligible for a Level 2 disposition. She argues that her "prior commitment to training school under the old code did not involve any of [the] specific circumstances [warranting a Level 3 disposition] and is not equivalent [to] a prior Level 3 disposition." That is, had her previous disposition under the old juvenile code instead been carried out under the new juvenile code, L.M.A. argues that she would not have been eligible for a Level 3 disposition in that instance. In essence, L.M.A. argues that her prior commitment to training school does not constitute a "Level 3 disposition in a prior juvenile action" sufficient to warrant elevating her current disposition level to Level 3, since no "Level 3" dispositions existed under the old juvenile code. Regardless of how it is stated, we find this argument to be without merit.

In addition to providing for treatment and evaluation under N.C. Gen. Stat. § 7B-2502 (1999), the new Juvenile Code provides for twenty-four dispositional alternatives. *See* N.C. Gen. Stat. § 7B-2506 (1999). Only one of the alternatives provides for commitment of the juvenile to training school. *See* N.C. Gen. Stat. § 7B-2506(24). N.C. Gen. Stat. § 7B-2508 establishes three dispositional levels, only one of which, Level 3, provides for commitment of a juvenile for placement in a training school. Thus, it is apparent that a commitment of a juvenile to training school under the old juvenile code is equivalent to a Level 3 disposition under the new code. *See* N.C. Gen. Stat. § 7B-2508(f). We, therefore, conclude that the trial court committed no error in using L.M.A.'s previous commitment to training school as a basis for imposing a Level 3 disposition in the instant case. *See* N.C. Gen. Stat. § 7B-2508(d).

[4] Lastly, with respect to both the Old Disposition Order and the New Disposition Order, L.M.A. assigns as error:

> The failure of the Trial Court to give [L.M.A.] credit for "time served" when committing [her] to training school on the ground the Court's action constituted double jeopardy, on the ground the juvenile commitment statutes are unconstitutional on their face, and on the ground that the Court's action violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, Article I, §§ 18, 19, 23, 24, 27, and 35 of the North Carolina Constitution, and North Carolina common and statutory law.

In her brief, L.M.A. argues that the trial court failed to give her credit for "time served" in detention prior to disposition, in violation of her right to be free from double jeopardy, and in violation of her rights to due process and equal protection of the laws. *See* U.S. Const. amends. V, XIV; N.C. Const. art. I, § 19. She contends that:

> *In the instant case*, N.C. Gen. Stat. § 7A-652 (repealed July 31, 1999) and G.S. § 7B-2508, which provide that a juvenile may be committed to training school without credit for time served in detention, are unconstitutional.

(Emphasis added.)

This amounts to an argument that N.C. Gen. Stat. § 7A-652 and N.C. Gen. Stat. § 7B-2508 were applied unconstitutionally to L.M.A. As such, she has abandoned this assignment of error to the extent it contends that the juvenile commitment statutes are facially unconstitutional; additionally, L.M.A. has abandoned this assignment of error insofar as she contends that the trial court's action violated the Sixth and Eighth Amendments to the United States Constitution, and Article I, §§ 18, 23, 24, 27 and 35 of the North Carolina Constitution, by failing to argue these contentions in her brief. *See* N.C.R. App. P. 28; *Rhyne*, 124 N.C. App. 84, 478 S.E.2d 789; *Kirby*, 276 N.C. 123, 171 S.E.2d 416. We therefore limit our discussion to a consideration of her argument that the trial court unconstitutionally failed to give her credit for time served in detention prior to her disposition hearing. We find this argument to be without merit.

It appears from the record that L.M.A. was committed on 29 June 1999 to the Division of Youth Services for placement in a training school. She was conditionally released from training school on 22 September 1999, after being detained for 86 days, and was not detained again until the completion of the 24 November 1999 hearing,

at which she was adjudicated delinquent. Thereafter, L.M.A. was detained until the dispositional hearing on 16 February 2000, for a total of 85 days. The transcript from the disposition hearing indicates that L.M.A. was given credit for this time served while in detention pending the 16 February 2000 hearing. As of the 16 February 2000 hearing, L.M.A. had therefore been detained for 171 days, for which she was given credit toward her commitment for violating her conditional release. Furthermore, the trial court's order (Old Disposition Order) *recommits* L.M.A. to the Division of Youth Services "to *finish the commitment term* . . . that was entered June 29, 1999." (Emphasis added.) L.M.A. was clearly given credit for time served in detention pending the 16 February 2000 disposition hearing, which was applied toward her commitment term for violation of her conditional release.

In addition, N.C. Gen. Stat. § 15-196.1 (Supp. 1998) provides:

> The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: *Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.*

N.C. Gen. Stat. § 15-196.1 (emphasis added). Accordingly, as L.M.A. was credited for time served in conjunction with the violation of her conditional release, she was not also entitled to receive similar credit toward her new commitment term under the New Disposition Order. Therefore, L.M.A.'s argument that she was not given credit for time served in detention pending the 16 February 2000 disposition hearing is without merit.

As the defendant's assignments of error are without merit, we affirm the trial court's handling of her case.

Affirmed.

Judges TIMMONS-GOODSON and HUDSON concur.

IN THE MATTER OF THE INVESTIGATION INTO THE INJURY OF SWANTEE BROOKS

No. COA00-334

(Filed 5 June 2001)

1. Appeal and Error— mootness—disclosure of officers' personnel files—public interest exception

Although the State has moved to dismiss an action by two law enforcement officers seeking to limit the use and dissemination of their confidential personnel files based on alleged mootness, this case is not dismissed because the public interest exception reveals a duty to consider this question when this appeal could have implications reaching beyond the law enforcement community given the fact that N.C.G.S. § 160A-168, which allows for the disclosure of confidential information, is applicable to all current and former city employees.

2. Police Officers— personnel files—trial court's jurisdiction to authorize disclosure

The superior court had jurisdiction and the authority to enter its 13 April 1999 orders authorizing the disclosure of information in two law enforcement officers' personnel files, because: (1) N.C.G.S. § 160A-168(c)(4) authorizes a court of competent jurisdiction to allow inspection of the officers' personnel files; and (2) this case is an extraordinary proceeding under N.C.G.S. § 1-2 in which the superior court was required to exercise its inherent or implied power for the proper administration of justice to fashion an order allowing for the disclosure of the records under N.C.G.S. § 160A-168(c)(4).

3. Police Officers— personnel files—ex parte order requiring disclosure improper—unsworn petitions

The superior court could not make an independent determination as to whether the interests of justice required the issuance of an ex parte order under N.C.G.S. § 160A-168(c)(4) for the disclosure of information in two law enforcement officers' personnel files and the superior court erred in failing to vacate and set aside the order in its entirety, because: (1) the district attorney's petitions were unsworn, not accompanied by any affidavits or other similar evidence, and amounted to nothing more than the district attorney's own opinion that the disclosure of the officers'

files was in the best interest of the administration of justice; (2) the petitions failed to list the statutory provision authorizing the court to issue the order; and (3) there is no indication that the case was docketed as a special proceeding or any other type of proceeding in the superior court until the failure to assign a file number to the matter was brought to the superior court's attention by the officers.

Appeal by Timothy Mark Brewer and Dexter Dean Davis from orders entered 13 April and 10 August 1999 by Judge A. Leon Stanback, Jr. in Superior Court, Orange County. Heard in the Court of Appeals 25 January 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Mary D. Winstead, for the State.

J. Michael McGuinness for appellants.

TIMMONS-GOODSON, Judge.

Hillsborough Police Officers Timothy Mark Brewer ("Officer Brewer") and Dexter Dean Davis ("Officer Davis") (collectively "the officers"), appeal the Superior Court's 13 April 1999 orders granting the Orange County District Attorney's petitions for release of their internal affairs and personnel files and its 10 August 1999 order vacating and modifying its original order in part. Upon review of the materials submitted on appeal and arguments of counsel, we reverse and remand.

The procedure and factual background of the present appeal is as follows: Orange County District Attorney, Carl R. Fox ("Fox"), filed *ex parte* petitions in Superior Court, seeking the release of internal affairs and personnel files for Officers Brewer and Davis. Fox's "PETITION[S] FOR RELEASE OF INTERNAL AFFAIRS AND PERSONNEL FILES" contained factual allegations concerning an alleged assault of Swantee Brooks and a statement by Fox that the files requested were "necessary to a full and complete investigation into the injury of **Swantee Brooks**, and would be in the best interest of the administration of justice." The petitions, although signed by Fox, were not supported by affidavits, nor did they reference any legal authority allowing Fox to seek the release.

On 13 April 1999, the Superior Court granted Fox's request and ordered "the Hillsborough Police Department make available to

Special Agents of the North Carolina State Bureau of Investigation for examination and/or photocopying, the complete Internal Affairs Files and Personnel Files of [Officers Brewer and Davis]." Neither Fox's petitions nor the court's 13 April orders were initially assigned a case number.

Officers Brewer and Davis noticed an appeal to this Court on 11 May 1999; however, their notice of appeal does not appear in the record. The officers further moved the Superior Court to vacate, set aside, and stay enforcement of its 13 April 1999 orders.

Rather than setting the orders aside, the court modified them as follows:

> 1. The information disclosed to the State Bureau of Investigation (SBI) by the Town of Hillsborough and/or the Hillsborough Police Department pursuant to the Petition[s] shall be limited to that related to the scope of the investigation . . . . Otherwise, the SBI shall immediately return all documents, including copies, containing any matters unrelated to these issues to the Town of Hillsborough and/or the Hillsborough Police Department.
>
> 2. The SBI shall not disclose any information contained in any documents received pursuant to the Petition[s] which are unrelated to the scope of the investigation to anyone. The SBI shall not disclose any information contained in any documents related to the scope of the investigation to anyone other than the prosecutor(s) assigned to the investigation.
>
> 3. The SBI shall not disclose any information contained in any documents received pursuant to the Petition[s] which are related to the scope of the investigation to any Grand Jury unless and until (1) the State has petitioned the Court to present such information to the Grand Jury, (2) the Court has had an opportunity to conduct an "in camera" review of the information the State intends to present to the Grand Jury and (3) the Court has determined that the interests of justice outweigh the protected interests of [Officers Brewer and Davis].

On 16 August 1999, Officers Brewer and Davis again noticed an appeal from the 13 April 1999 orders, as well as the court's modified order entered 10 August 1999. Both officers moved the Superior Court to stay enforcement of the court's orders. Their motions were denied. The officers sought a writ of supersedeas and motion for stay

with this Court. This Court dismissed the petition for the writ but granted a temporary stay.

The State moved to dismiss the officers' appeal in Superior Court, arguing that the appeal was moot. Following a hearing, the Superior Court concluded that it lacked jurisdiction to dismiss the action as moot and therefore, denied the State's motion.

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[1] On appeal, the State has again moved to dismiss the present action, asserting that the issues presented are moot. In support of its motion, the State cites the trial court's 10 August 1999 order limiting the use and dissemination of the officers' files. The State further presents affidavits from individuals possessing information in relation to the officers' personnel files.

In his affidavit, SBI Special Agent P.A. Emerson ("Agent Emerson") stated that he reviewed the officers' files and summarized them in a SBI report. According to Agent Emerson, the report was transmitted to three other SBI agents, Fox, and the Office of the Attorney General. Agent Emerson noted that the Attorney General's Office concluded that no criminal charges were to be brought. As such, Agent Emerson returned the officers' records to the Hillsborough Police Department and destroyed the SBI files relating to the matter in question.

Fox stated that a copy of the report was transmitted to him, that he requested that the Attorney General's Office review the investigation, and that he was never actually in possession of the report. All others in possession of the SBI report affirmed that they received a copy of the report, did not disseminate it, and destroyed all references to the officers' files.

Mootness arises when the relief sought has been granted or the original controversy between the parties is no longer at issue. *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994). It is axiomatic that if, during the course of litigation, an action becomes moot, it should usually be dismissed. *In re Peoples*, 296 N.C. 109, 148, 250 S.E.2d 890, 912 (1978). However, our appellate courts recognize at least five exceptions to the general rule that moot cases should be dismissed. *Thomas v. N.C. Dept. of Human Resources*, 124 N.C. App. 698, 705-06, 478 S.E.2d 816, 820-21 (1996), *aff'd per curiam*, 346 N.C. 268, 486 S.E.2d 295 (1997); *see e.g.*, *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 286, 293, 517 S.E.2d 401, 405 (1999) (stating that court must review moot case where defendant voluntarily

ceases challenged act); *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (per curiam) (concerning the public duty exception); *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989) (discussing "capable of repetition, yet evading review" exception); *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977) (recognizing exception where there exists "collateral legal consequences of an adverse nature"); *Simeon*, 339 N.C. at 371, 451 S.E.2d at 867 (noting appeal was reviewable where the claims of unnamed class members are not mooted by the termination of the class representative's claim).

Officers Brewer and Davis argue that at least three of the five exceptions to the mootness doctrine apply, thus mandating our review of the appeal *sub judice.* We have thoroughly reviewed the officers' arguments and find that at least one of the exceptions applies, the public interest exception.

It is well established that even if an appeal is moot, we have a duty to "consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar*, 325 N.C. at 701, 386 S.E.2d at 186 (citations omitted); *Leak v. High Point City Council*, 25 N.C. App. 394, 397, 213 S.E.2d 386, 388 (1975). Evidence submitted before the trial court revealed that the SBI utilizes an established practice in the disclosure of officers' personnel files. The agency first requests that the officers waive any right to confidentiality in their personnel files. If the SBI is unsuccessful in obtaining a waiver, it then seeks, through the district attorney, an *ex parte* court order authorizing disclosure.

Members of the law enforcement community assert that the procedure employed by the SBI is troublesome in that the information contained in personnel and internal affairs files "is typically highly personal information, which if disclosed, may jeopardize the financial, health and general welfare of the officer[s]." We share these concerns. This case involves the disclosure of confidential personnel files of law enforcement officers to those ultimately charged with the prosecution of crimes in this State. Also, the State claims that section 160A-168(c)(4) of our General Statutes allowed the disclosure of confidential information in the case *sub judice. See* N.C. Gen. Stat. § 160A-168(c)(4) (1999). Thus, given that section 160A-168 is applicable to all current and former city employees, *see* N.C. Gen. Stat. § 160A-168(a), the issues presented by this appeal could have implications reaching far beyond the law enforcement community.

Because this is the first case of its kind to reach our Court, and given the gravity of the issues presented and the far reaching implications of section 160A-168, we find that our review of the present case is in the public interest.

[2] We first address the officers' argument that the Superior Court did not have jurisdiction or the authority to enter its 13 April 1999 orders authorizing the disclosure of information in their personnel files. The State contends that the Superior Court retained the authority to grant Fox's request pursuant to North Carolina General Statutes section 160A-168. However, the officers argue that section 160A-168(c)(4) does not authorize the release of their personnel files because it provides no statutory basis "to initiate such a release of documents on an *ex parte* basis." (Emphasis added). With the officers' argument, we disagree.

Section 160A-168(c) of our General Statutes provides: "All information contained in a city employee's personnel file, other than the information made public . . . , is confidential." N.C. Gen. Stat. § 160A-168(c). "[P]ersonnel files of employees, former employees, or applicants for employment maintained by a city are subject to inspection and may be disclosed only as provided by [section 160A-168 of the North Carolina General Statutes]." N.C. Gen. Stat. § 160A-168(a). Section 160A-168(c)(4) provides: "By order of a court of competent jurisdiction, any person may examine such portion of an employee's personnel file as may be ordered by the court." N.C. Gen. Stat. § 160A-168(c)(4).

The plain language of section 160A-168(c)(4) indicates that the Superior Court, Orange County, being a court of competent jurisdiction, was indeed authorized to allow inspection of the officers' personnel files. *See State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998) (finding that where statute is "clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning"), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999). Yet, as noted by the officers, the applicable statutory provision does not provide for procedures allowing or directing the court to do so. Our appellate courts have never addressed the application of section 160A-168(c)(4). However, in *In re Mental Health Center*, 42 N.C. App. 292, 256 S.E.2d 818 (1979), our Court previously held that the Superior Court had the authority to order the disclosure of privileged communications under a similar statute, North Carolina General Statutes section 8-53.3. A summary of the issues presented by *Mental Health Center* is particularly instructive to the disposition of the present case.

In *Mental Health Center,* a district attorney ("DA") filed a verified motion with the Superior Court seeking disclosure of information concerning an alleged homicide. In his motion, the DA noted that although a mental health care facility director informed him that facility employees had obtained information relating to the alleged homicide, the director refused to provide the information because it was privileged. The DA requested that the director submit the information to an SBI agent, but the director again refused.

The DA further specified:

> "[I]t is in the best interest of society and necessary to a proper administration of justice to quickly and thoroughly investigate all alleged acts of homicide to the end of apprehending any and all persons responsible for such acts and bring such persons to public trial in order to determine their guilt or innocence. . . ."

Id. at 293, 256 S.E.2d at 819 (alteration in original). The DA requested an *in camera* examination of the facility employees to determine (1) whether the information was privileged, (2) whether it was relevant to the alleged homicide, (3) "whether disclosure of such information to law enforcement officers was necessary to a proper administration of justice." *Id.* The DA also requested that the court compel disclosure of the information, if the court found the information necessary to the administration of justice and relevant to the alleged homicide.

The Superior Court did not conduct the requested examination but ordered facility employees to appear in court. Following a hearing, the trial court concluded that it did not have jurisdiction to order disclosure of the requested information. The State appealed, and this Court reversed the Superior Court's order.

The *Mental Health Center* Court began by concluding that the proceeding before the Superior Court was a "special proceeding." *Id.* at 295, 256 S.E.2d at 820-21 (citing N.C. Gen. Stat. § 1-3). The Court recognized that " '[s]pecial proceedings against adverse parties shall be commenced as is prescribed for civil actions.' " *Id.* at 295, 256 S.E.2d at 821 (quoting N.C. Gen. Stat. § 1-394). The Court noted that although the DA failed to follow the Rules of Civil Procedure, it was not fatal to his motion requesting disclosure. *Id.* Rather, the Court concluded that "our law is [not] so inflexible as to prescribe the superior court's jurisdiction in a matter of such moment as presented by the facts before [it]." *Id.*

The Court went on to discuss the statute which authorized the disclosure of the information requested, section 8-53.3 of the North Carolina General Statutes. *Id.* at 296-97, 256 S.E.2d at 821-22. Section 8-53.3 provided: " 'the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.' " *Id.* at 297, 256 S.E.2d at 822 (quoting N.C. Gen. Stat. § 8-53.3). In examining the language of section 8-53.3, the Court found that nothing in the statute prohibited the Superior Court "in the proper administration of justice[,] from requiring disclosure prior to the initiation of criminal charges or the commencement of a civil action." *Id.* at 297-98, 256 S.E.2d at 822.

The Court duly noted:

> [T]he legislature is charged with the responsibility of providing the necessary procedures for the proper commencement of a matter before the courts. Occasionally, however, the proscribed procedures of a statutory scheme fail to embrace the unanticipated and extraordinary proceeding such as that disclosed by the record before us. In similar situations, it has been long held that courts have the inherent power to assume jurisdiction and issue necessary process in order to fulfill their assigned mission of administering justice efficiently and promptly. . . . [T]his is one of those extraordinary proceedings . . . .

Id. at 296, 256 S.E.2d at 821; *see also State v. Buckner*, 351 N.C. 401, 411, 527 S.E.2d 307, 313 (2000) (citation omitted) (courts employ "their inherent power when constitutional provisions, statutes, or court rules fail to supply answers to problems"). Accordingly, the Court held that "it becomes the responsibility of the judiciary, *in the absence of some express prohibition*, to effectuate the intent of our law by the exercise of its inherent or implied powers." *Mental Health Center*, 43 N.C. App. at 298, 256 S.E.2d at 822.

In the case *sub judice*, the legislature provided for the disclosure of city employees' personnel files "[b]y order of a court of competent jurisdiction." N.C. Gen. Stat. § 160A-168(c)(4). However, the legislature failed to specify the exact procedure required to obtain such an order, or whether such an order could be sought without first filing a civil or criminal action. As in the case of *Mental Health Center*, the legislature's failure to provide for the proper procedure did not negate the Superior Court's authority, granted by section 160A-168(c)(4), to order the disclosure of the confidential information. For, there is "nothing inherent in the wording of [section

160A-168] that would *prohibit* the court in the proper administration of justice from requiring disclosure prior to the initiation of criminal charges or the commencement of a civil action." *Mental Health Center*, 42 N.C. App. at 297, 256 S.E.2d at 822. As such, this is one of those "extraordinary proceedings" in which the Superior Court was required to exercise "its inherent or implied power for the proper administration of justice" and fashion an order allowing for the disclosure of the records pursuant to section 160A-168(c)(4). *Id.* at 296, 256 S.E.2d at 821.

Like the proceeding in *Mental Health Center*, the proceeding in the present case was a "special proceeding," in that it was not "[a]n action [] in an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." N.C. Gen. Stat. § 1-2 (1999); *see also* N.C. Gen. Stat. § 1-3 (1999) (stating that actions not defined in section 1-2 are "special proceedings"). Unlike the statute discussed in *Mental Health Center*, the statute at issue in the present appeal does not specify which division of court is authorized to issue the order allowing disclosure. However, our General Statutes mandate that the Superior Court "is the proper division, without regard to amount in controversy, for the hearing and trial of all special proceedings." N.C. Gen. Stat. § 7A-246 (1999). Although Fox did not comply with the Rules of Civil Procedure, *see* N.C. Gen. Stat. § 1-393 (1999) (stating that Rules of Civil Procedure apply to special proceedings), like the DA's actions in *Mental Health Center*, such failure was not fatal to Fox's petitions. In accordance with *Mental Health Center*, we agree with the State that section 160A-168(c)(4) authorized the trial court to issue the order authorizing the disclosure in the "special proceeding" below.

[3] We cannot agree, however, that the method utilized by Fox in obtaining the 13 April 1999 *ex parte* orders was adequate under North Carolina General Statutes section 160A-168(c)(4). Concerning the procedures utilized in *Mental Health Center*, our Court stated it could "think of no more effective or practical way to effectuate the intent of the proviso in question than through the employed procedures." *Mental Health Center*, 42 N.C. App. at 298, 256 S.E.2d at 822. The Court further found that the DA in that case "diligently employed a practicable and workable procedure to bring the matter before the trial court." *Id.*

Certainly, the methods employed by Fox in obtaining the officers' confidential information did not approach the level of procedure invoked by the DA in *Mental Health Center.* While the *Mental Health Center* Court deemed the procedures employed in that case more than "effective" and "practical," *id.* at 298, 256 S.E.2d at 822, it gave no guidance in establishing the minimum procedures required for obtaining an order pursuant to section 8-53.3 and other like statutes, such as the one at issue in the present case. However, we find that the Supreme Court's decision in *In re Superior Court Order*, 315 N.C. 378, 338 S.E.2d 307 (1986), provides some guidance in determining the proper procedures under section 160A-168(c)(4).

In *Superior Court Order*, the DA filed a petition in Superior Court seeking an order directing a bank to make a customer's bank records available to a detective. In his petition, the DA swore, under oath, that disclosure of the records " 'would be in the best interest of justice, ...' " *Superior Court Order*, 315 N.C. at 379, 338 S.E.2d at 309 (alteration in original). The Superior Court issued the order, as requested by the DA. Our Supreme Court reversed.

In its opinion, the Supreme Court first recognized that although no statutory authority existed authorizing or prohibiting the Superior Court's order, "such authority exist[ed] in the inherent power of the court to act when the interests of justice so require." *Id.* at 380, 338 S.E.2d at 309 (citations omitted). The Court then considered "what the State must show in order to provide a basis for the trial court to make the requisite finding to support the issuance of such an order." *Id.* The Court found:

> At a minimum the State must present to the trial judge an affidavit or similar evidence setting forth facts or circumstances sufficient to show reasonable grounds to suspect that a crime has been committed, and that the records sought are likely to bear upon the investigation of that crime. With this evidence before it, the trial court can make *an independent decision as to whether the interests of justice require the issuance of an order rather than relying solely upon the opinion of the prosecuting attorney.*

Id. at 381, 338 S.E.2d at 310 (emphasis added) (footnote omitted). The Supreme Court concluded that the petition presented to the Superior Court was insufficient for the trial court to make its independent determination. *Id. Compare In re Computer Technology Corp.*, 80 N.C. App. 709, 343 S.E.2d 264 (1986) (concluding that evidence presented in affidavit submitted with verified petition was sufficient

for trial court to make its independent decision that issuing *ex parte* order allowing disclosure of records was in interests of justice).

In accordance with *Mental Health Center* and *Superior Court Order*, the Superior Court must utilize its inherent power and implement and follow procedures which "effective[ly] and practical[ly] . . . effectuate the intent of [section 160A-168]," that an officer's files remain confidential. *Mental Health Center*, 42 N.C. App. at 298, 256 S.E.2d at 822. At a minimum, an *ex parte* petition submitted pursuant to section 160A-168(c)(4) should be accompanied by sworn affidavit(s) or similar evidence, including specific factual allegations detailing reasons justifying disclosure. The petition should further state the statutory grounds which allow disclosure. *See* N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (1999) ("An application to the court for an order shall be by motion which, . . . shall state the grounds therefor").

Furthermore, the Superior Court should docket petitions submitted and orders entered pursuant to section 160A-168(c)(4) per its rules for docketing "special proceedings." The Superior Court should make an independent determination that the interests of justice require disclosure of the confidential employment information. It is further within the Superior Court's inherent power and discretion to implement other procedures as may be required to effectuate the legislature's intent that the information remain somewhat confidential. The court could, for example, limit that dissemination and use of disclosed materials to certain individuals, order an *in camera* inspection, or redact certain information. *See* N.C. Gen. Stat. § 160A-168(c)(4) ("By order of a court of competent jurisdiction, any person may examine *such portion* of an employee's personnel file as may be ordered by the court").

The petitions presented to the Superior Court in the present case were simply inadequate to justify the issuance of an *ex parte* order under section 160A-168(c)(4). The petitions were unsworn, not accompanied by any affidavits or other similar evidence, and amounted to nothing more than Fox's own opinion—that the disclosure of the officers' files was "in the best interest of the administration of justice." *See Superior Court Order*, 315 N.C. at 381, 338 S.E.2d at 310 (advising that courts should not rely "solely upon the opinion of the prosecuting attorney"). The petitions further failed to list the statutory provision authorizing the court to issue the order. We also note that there is no indication that the case was docketed as a "special proceeding" or any other type of proceeding in the Superior

Court until the failure to assign a file number to the matter was brought to the Superior Court's attention by the officers. The State was questioned at oral argument concerning this oversight, but failed to assert any viable explanation.

We therefore find that the Superior Court could not make an independent determination as to whether the interests of justice require the issuance of an order under section 160A-168(c)(4). Thus, the Superior Court erred in issuing its 13 April 1999 order and failing to vacate and set aside those orders in their entirety.

Given our resolution of the aforementioned issue, our review of the officers' remaining arguments is unnecessary.

For the foregoing reasons, we reverse the Superior Court's 13 April 1999 orders and its 10 August 1999 order, modifying, but failing to set aside its original orders in their entirety, and remand for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges MARTIN and THOMAS concur.

HAROLD F. PRIOR AND PAULETTE M. PRIOR, CO-ADMINISTRATORS OF THE ESTATE OF SHAWN KELLY PRIOR, DECEASED, AS ADMINISTRATORS, AND ON THEIR OWN BEHALF PLAINTIFFS v. JAMES EARL PRUETT, INDIVIDUALLY IN HIS OFFICIAL CAPACITY AS DEPUTY OF THE BURKE COUNTY SHERIFF'S DEPARTMENT; STEVEN SCOTT ROGERS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A DEPUTY OF THE BURKE COUNTY SHERIFF'S DEPARTMENT; LYLE DEAN GARLAND, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A DEPUTY OF BURKE COUNTY SHERIFF'S DEPARTMENT; RALPH JOHNSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF BURKE COUNTY; AND BURKE COUNTY, A BODY POLITIC AND CORPORATE, DEFENDANTS

No. COA00-415

(Filed 5 June 2001)

1. **Wrongful Death— negligence—assault and battery—state tort claims—summary judgment improperly based on qualified immunity in Section 1983 suit**

The trial court erred by granting summary judgment in favor of defendants on plaintiffs' state law tort claim for wrongful death based on the trial court's erroneous use of the federal dis-

trict court's finding of qualified immunity in plaintiffs' action for relief under 42 U.S.C. § 1983, because: (1) the prior unpublished decision of the Court of Appeals in this case held that the federal court's determination that defendants were entitled to qualified immunity under federal law does not collaterally estop plaintiffs from proceeding in their state law tort actions when the threshold of liability in a Section 1983 claim is higher than the threshold in a state law tort claim; and (2) the prior panel's decision is the law of the case and is thus binding.

2. Appeal and Error— appealability—wrongful death—suit against officers in individual capacity—issue already decided

Although defendants contend that the trial court's grant of summary judgment in a wrongful death action should be affirmed based on the fact that plaintiff's complaint allegedly does not relate to actions in defendant officers' individual capacities, it is unnecessary to revisit this issue on appeal given the Court of Appeals' conclusion to the contrary in a prior unpublished opinion.

3. Wrongful death— negligence—officers—summary judgment improper

The trial court erred in a wrongful death action by granting summary judgment in favor of defendant officers on the issue of negligence, because there was a genuine issue of material fact regarding the reasonableness of defendant officers' conduct in shooting the decedent.

4. Wrongful Death— negligence—county and sheriff's department—summary judgment improper

The trial court erred in a wrongful death action by granting summary judgment in favor of defendant county and defendant sheriff's department on the issue of negligence, because the forecast of evidence reveals that a jury could find that the sheriff's department was negligent in the training and supervision of defendant officers and that negligence, in turn, proximately caused the death of the victim.

5. Wrongful Death— contributory negligence—summary judgment improper

The trial court erred in a wrongful death action by granting defendants' motion for summary judgment on the issue of con-

tributory negligence, because the forecast of evidence creates a question of material fact as to whether the victim had the capacity to control his own actions in order to actually or constructively appreciate the danger of injury which his conduct involved.

6. Wrongful Death— officers sued in individual capacity— summary judgment improper

The trial court erred in a wrongful death action by granting summary judgment in favor of defendant officers in an action against the officers in their individual capacity based on the defense of public officer immunity, because the evidence viewed in the light most favorable to plaintiffs creates a genuine issue of material fact as to whether the officers acted with malice, corruption, or beyond the scope of authority.

Appeal by and through co-administrators of the decedent's estate from judgment entered 10 January 2000 by Judge Jesse B. Caldwell in Burke County Superior Court. Heard in the Court of Appeals 8 February 2001.

Goldsmith, Goldsmith & Dews, P.A., by C. Frank Goldsmith, Jr., for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, by G. Michael Barnhill and W. Clark Goodman, for defendants-appellees.

BIGGS, Judge.

This appeal arises from a wrongful death action filed by the Estate of Shawn Kelly Prior, in which the trial court granted the defendants' motion for summary judgment. Plaintiffs, Harold and Paulette Prior assert that the trial court's entry of summary judgment was error because there were genuine issues of material fact regarding the reasonableness of the defendants' conduct and therefore defendants were not entitled to judgment as a matter of law. For the reasons stated herein, we reverse the decision of the trial court.

On 15 August 1994, Harold and Paulette Prior (hereinafter plaintiffs), the parents and co-administrators of the estate of Shawn Prior, commenced this action in Burke County Superior Court. The action consisted of a claim for relief under 42 U.S.C. § 1983 for a violation of the plaintiff decedent's civil rights and a claim for relief under North Carolina common law based on the wrongful death of the decedent

upon theories of negligence and assault and battery. Plaintiffs subsequently removed the case to the United States District Court for the Western District of North Carolina based on the federal civil rights claim.

Following extensive discovery, defendants moved for summary judgment as to all claims. On 16 May 1996, the Honorable Lacy H. Thornburg granted the defendants' motion for summary judgment as to the causes of action pursuant to 42 U.S.C. § 1983 based on a determination that the officers were entitled to qualified immunity.[1] Judge Thornburg declined to exercise supplemental jurisdiction over the state claims and remanded the claims to state court, noting that the "threshold for determining whether the limits of privileged force have been exceeded for purposes of liability under Section 1983 is higher than that for a normal tort action," and "[t]hus, the above ruling is not sufficient for dismissal of these claims."

On remand, before the superior court of Burke County, the defendants' filed a motion for judgment on the pleadings. On 23 March 1997, the Honorable Claude S. Sitton denied the defendants' motion, after which the defendants' appealed. On appeal to this Court, the defendants' argued that the trial court erred by (1) denying the defendants' motion for judgment on the pleadings on the basis of collateral estoppel and (2) denying defendants' motion for judgment on the pleadings as to all claims against the defendants in their individual capacities on the basis of public officer immunity. In an unpublished opinion, this Court affirmed the trial court's decision.

On 5 October 1999, pursuant to Rule 56, the defendants filed a motion for summary judgment relying on the findings of fact contained in the Memorandum and Order by Judge Thornburg and the materials included in the Appendix to defendants' motion for summary judgment in the United States District Court. After hearing the arguments of the parties and considering the evidence presented, the trial court granted the motion for summary judgment as to all defendants and dismissed all remaining charges with prejudice. From this order, the plaintiffs now appeal.

Pertinent facts and procedural history include the following: Shawn Prior (Shawn) was the twenty-four year old son of plaintiffs

1. Under federal law, officers are entitled to qualified immunity if a reasonable officer possessing the same particularized information as the officers, *could* have believed his conduct was lawful. *See McLenagan v. Karnes*, 27 F.3d 1002, 1006-08 (4th Cir.) *cert. denied*, 513 U.S. 1018, 130 L. Ed. 2d 496 (1994) (emphasis added).

Harold and Paulette Prior. Shawn had a history of alcohol and drug abuse, and had been hospitalized in 1992 for attempted suicide. In August 1993, Shawn was released from Swain Recovery Center in Black Mountain, North Carolina after forty-two days of in-patient treatment for substance abuse. By the end of September 1993, Shawn had begun drinking again.

On 2 October 1993, Shawn was heavily intoxicated and called 911 threatening suicide. The 911 operator notified emergency medical services and the Burke County Sheriff's Department. Neighbors Joe and Mark Cooper heard the 911 call over the police scanner and went to the Prior residence to investigate. Both Mark and Joe observed that Shawn was intoxicated and was in possession of a fifteen to sixteen inch knife.

When the EMS technicians arrived, Mark Cooper told the sheriff's deputy, "[h]ey you need to get your ass up here, you know, just to get between us and him." Defendant Lyle Garland (Garland), the first deputy on the scene, found Shawn standing at the door leading from the garage to the kitchen holding a knife in his right hand. With his gun drawn, but out of Shawn's view, the deputy attempted to talk Shawn into dropping the knife. Shawn refused; instead responding with threats and obscenities. Soon, Lieutenant James Pruett (Pruett) arrived. With his gun drawn, Pruett yelled at Shawn to drop the knife, to which Shawn responded by drawing up the knife as if he would use it. After Pruett arrived, Garland advanced to the screen door to attempt to disarm Shawn, but was unsuccessful. At this point, Shawn yelled at the officers saying that he had a gun and was going to get it.

While the officers were trying to convince Shawn to drop the knife, Shawn's brother, Todd Prior (Todd), arrived on the scene and asked to speak to his brother, but the officers refused. At some point, a third officer, defendant Steven Rogers (Rogers) arrived and positioned himself between Garland and Pruett. His arrival prompted Shawn to point the knife at each officer, yelling, "[s]peak English or die." The officers commented that they were concerned that if Shawn left the door to get the gun, he would harm anyone in his path, including the EMS personnel and his parents in the event that they came home.

The officer-defendants continuously warned Shawn not to step out of the door and urged him to put the knife down. While doing so, Sergeant Leon Foss, a friend of Shawn's mother, arrived and tried to

talk Shawn into dropping the knife. Although Shawn calmed momentarily, he soon became agitated again and slammed the knife through the glass panes in the door. He began cursing at the officers, and switching the knife from hand to hand. As Sergeant Foss attempted to reason with him, Shawn closed his eyes, began to breathe deeply, and began rocking back and forth while holding the knife up near his chest. With their guns drawn, the officers warned Shawn not to come out of the door, or they would have to take action. When Shawn began to move forward, with his left foot, all three officers discharged their weapons, fatally wounding the decedent. Although Garland and Rogers each shot Shawn once, Pruett shot three times.

On appeal, the plaintiffs argue that the trial court erred in granting defendants' motion for summary judgment because there were genuine issues of material fact regarding the reasonableness of the defendants' conduct. We agree and reverse the decision of the trial court.

A defendant is entitled to summary judgment if there is no genuine issue as to any material fact, and defendant is entitled to a judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (1999). If findings of fact are necessary to resolve an issue of material fact, summary judgment is improper. *Moore v. Galloway*, 35 N.C. App. 394, 396, 241 S.E.2d 386, 387 (1978). A material fact for summary judgment purposes is one that "would constitute or would irrevocably establish any material element of a claim or defense." *Bernick v. Jurden*, 306 N.C. 435, 440, 293 S.E.2d 405, 409 (1982) (quoting *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980)). Evidence properly considered on a motion for summary judgment includes "admissions in pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken." *Epps v. Duke University, Inc.* 122 N.C. App. 198, 202, 468 S.E.2d 846, 849-50, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). Any evidence presented should be "viewed in the light most favorable to the non-movant, giving it the benefit of all inferences which reasonably arise therefrom." *Id.* To overcome a motion for summary judgment, the nonmoving party must "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). Generally, summary judgment is inappro-

priate in cases alleging negligence because the standard of reasonable care should ordinarily be applied by the jury under appropriate instruction from the court. *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980) (citation omitted).

[1] At the outset, we address the defendants' argument that the trial court's grant of summary judgment was proper because the federal district court's finding of qualified immunity precludes the plaintiffs' state law tort claim for wrongful death as a matter of law. As primary support for this argument, the defendants cite *Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 528 S.E.2d 911 (2000). In *Fennell*, plaintiffs brought a wrongful death action in state court after the dismissal of their federal claims brought pursuant to 42 U.S.C. § 1983 based on a finding of qualified immunity. The court in *Fennell* stated that the federal court conclusively addressed the issue of reasonableness as to an officer's questionable conduct under the circumstances in determining whether defendants were entitled to qualified immunity. In the state tort claim, the determinative issue was once again the reasonableness of the officer's actions. The court in *Fennell* held that since "[t]he federal district court determined that issue in the Defendant's favor and, because the determination was necessary to the federal court's judgment, [they were] bound by [the federal court's] finding under the doctrine of collateral estoppel[2]." *Fennell* at 439-40, 528 S.E.2d at 917. We find however that their reliance on *Fennell* is misplaced.

It has long been recognized that "once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *Southern Furniture Co. v. Dep't of Transp.*, 133 N.C. App. 400, 408, 516 S.E.2d 383, 388 (1999); *N.C.N.B. v. Virginia Home Builders*, 307 N.C. 563, 299 S.E.2d 629 (1983); *Wrenn v. Maria Parham Hosp., Inc.*, 135 N.C. App. 672, 522 S.E.2d. 789, *cert. denied*, 351 N.C. 372, 543 S.E.2d 149 (2000). Even unpublished opinions, which are normally without precedential value, or an erroneous decision by the Court of Appeals becomes the law of the case for that case only. *Wrenn v. Maria Parham Hosp., Inc.*, 135 N.C.

2. "The doctrine of collateral estoppel provides 'a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies'." *Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 438, 528 S.E.2d 911, 916 (2000) (quoting *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986)).

App. 672, 522 S.E.2d 789 (1999); *King v. Grindstaff*, 284 N.C. 348, 360, 200 S.E.2d 799, 808 (1973).

In *Prior v. Pruett* (*Prior I*), Slip Opinion COA97-787 (1998), an unpublished opinion filed 29 December 1998, the defendant presented the very issues that are presently before this Court. On appeal, the defendant contended that the trial court erred by (1) denying defendants' motion for judgment on the pleadings on the basis of collateral estoppel and (2) denying defendants' motion for judgment on the pleadings as to all claims against defendants in their individual capacities on the basis of public officer immunity. *Id.* The Court in *Prior I* held that "the federal court's determination that defendants were entitled to qualified immunity under federal law does not collaterally estop plaintiffs from proceeding in their state law tort actions," because "the threshold of liability in a Section 1983 claim is higher than the threshold in a state law tort claim," and "[a]s a result, the instant federal and state actions do not present the same issues for determination." *Id.*; *see also*, *Fowler v. Valencourt*, 108 N.C. App. 106, 115, 423 S.E.2d 785, 790 (1992); *Myrick v. Cooley*, 91 N.C. App. 209, 215, 371 S.E.2d 492, 496, *disc. review denied*, 323 N.C. 477, 373 S.E.2d 865 (1988).

The decision of the panel in *Prior I* is the law of the case and is thus binding. Accordingly, we find that plaintiffs are not collaterally estopped from proceeding with their tort action in state court. We next address the plaintiffs' assignment of error regarding the trial court's grant of summary judgment.

[2] As a preliminary issue, we note that plaintiffs sued defendants in both their official and individual capacities. While we recognize that generally, claims of negligence can not be maintained against public officials in their individual capacity, these actions may be maintained, if plaintiffs bring forth evidence sufficient to "pierce the cloak of official immunity." *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (citation omitted). In so doing, plaintiffs are allowed to sue officials in their individual capacities, as if the suit had been brought against "any private individual." *Id.*

In *Prior I*, this Court determined that the allegations in plaintiffs' complaint were sufficient to overcome defendants' claims of official immunity and therefore, sufficient to maintain an action against defendants in their individual capacities. Defendants contend on appeal that the grant of summary judgment should be affirmed because the allegations in plaintiff's complaint do not relate to

actions in defendants' individual capacities. Given this Court's conclusion to the contrary in *Prior I*, we find it unnecessary to revisit the issue of whether plaintiffs presented sufficient allegations to maintain this action against defendants in either their official or individual capacities. Consequently, defendants' argument is without merit. We now address plaintiffs' contentions regarding the propriety of summary judgment.

A. Negligence (Defendants Pruett, Garland, and Rogers)

[3] Plaintiffs first contend that the trial court erred in granting defendants' motion for summary judgment as to the claims of negligence.

Plaintiffs assert that the officer-defendants were negligent[3] in their use of deadly force against Shawn Prior and that their gross negligence proximately caused his death. Plaintiffs argue that the evidence before the trial court was sufficient to create a genuine issue of material fact regarding the reasonableness of defendants' conduct and therefore summary judgment was improper. We agree.

"In a negligence action, a law enforcement officer is held to the standard of care that a reasonably prudent person would exercise in the discharge of official duties of like nature under like circumstances." *Best v. Duke University*, 337 N.C. 742, 752, 448 S.E.2d 506, 511-12 (1994) (quoting *Bullins v. Schmidt*, 322 N.C. 580, 582, 369 S.E.2d 601, 603 (1988)). Under certain circumstances, law enforcement officers may use deadly force without fear of incurring criminal or civil liability. *State v. Irick*, 291 N.C. 480, 501, 231 S.E.2d. 833, 846 (1977). N.C.G.S. § 15A-401(d)(2)(a) (1999) provides that "[a] law-enforcement officer is justified in using deadly physical force upon another person . . . only when it appears reasonably necessary thereby to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force." However, an officer may be held liable for use of "unreasonable or excessive force." N.C.G.S. § 15A-401(d)(2) (1999).

In the instant case, plaintiffs' complaint alleged that defendants Pruett, Rogers, and Garland were grossly negligent in their use of

3. Alternatively, plaintiffs' assert a claim for assault and battery. "[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." *Thomas v. Sellers* 142 N.C. App. —, —, 542 S.E.2d 283, 287 (2001) (quoting *Myrick v. Cooley*, 91 N.C. App. 209, 215, 371 S.E.2d 492, 496 (1988)).

deadly force and that their conduct was unreasonable under the circumstances. Evidence before the court in support of plaintiffs' contention included testimony from two expert witnesses stating that the actions of the officers under the circumstances were excessive, inappropriate in response to a suicide threat, and in reckless disregard for the life and safety of Shawn Prior. Also present in the record are conflicting accounts regarding Shawn Prior's final movements. The defendants assert that they shot Shawn because he "lunged" toward them. However, in a deposition, an eyewitness to the events stated that Shawn's movement was less than a lunge, but more of a "leaning forward with your body and arms," not inconsistent with movement back and forth that Shawn had previously made without consequence. These differing accounts of the incident create a genuine question of material fact as to whether the officer's reasonably perceived Shawn as an imminent threat, especially in light of officer testimony that they had predetermined orders from Lieutenant Pruett to shoot if Shawn moved forward.

"[W]hen there is substantial evidence of unusual force, it is for the jury to decide whether the officer acted as a reasonable and prudent person . . . ." *Todd v. Creech*, 23 N.C. App. 537, 539, 209 S.E.2d 293, 295, *cert. denied*, 286 N.C. 341, 211 S.E.2d 216 (1974). Viewing this evidence in the light most favorable to the plaintiff, a jury could find that the circumstances did not warrant deadly force, and therefore the officers did not act reasonably. We find that the evidence before the trial court regarding the reasonableness of the officers' actions presented a genuine question of material fact for the jury and therefore the trial court erred in granting the defendants' motion for summary judgment.

B. Liability of Burke County Sheriff's Department and Burke County

[4] "A sheriff is liable for the acts or omissions of his deputy as he is for his own." *Cain v. Corbett*, 235 N.C. 33, 38, 69 S.E.2d 20, 23 (1952). Accordingly, plaintiffs maintain that the negligent acts of defendants Pruett, Rogers, and Garland occurred in the course and scope of their employment and therefore their negligence is imputed to their employer, Ralph Johnson, (Burke County Sheriff) under the principle of *respondeat* superior. Additionally, plaintiffs allege that defendant Ralph Johnson, as the Burke County Sheriff, and Burke County were negligent in failing to establish reasonable procedures, including the training of subordinates in methods designed to prevent

the excessive use of force and procedures for responding to suicide threats and situations involving emotionally disturbed persons. *See Johnson v. Lamb*, 273 N.C. 701, 707, 161 S.E.2d 131, 137 (1968) (employer has duty to exercise due care in the supervising and directing of employees).

Both of the above mentioned claims against the County and the Sheriff's Department are derivative and dependant on the resolution of the negligence claims against the defendant-officers. Without an underlying negligence charge against the deputies, a claim of negligence against the Sheriff and County can not be supported. *Id.*; *Wrenn v. Maria Parham Hosp., Inc.*, 135 N.C. App. 672, 681, 522 S.E.2d 789, 794 (1999). In holding that the underlying negligence charge presents a genuine issue of material fact, it would be improper to grant summary judgment as to the issue of liability on the part of the County and Sheriff's department.

Furthermore, as support for their contention, plaintiffs presented testimony of an expert in police policies who stated that "both the violations of generally accepted law enforcement custom and practice in this situation and the death of Shawn Prior were direct and predictable results of grossly inadequate supervisory and training policies and practices on the part of the Burke County Sheriff's Department." From this forecast of evidence, a jury could find that the Sheriff's Department was negligent in training and supervision and that negligence in turn, proximately caused the death of Shawn Prior.

C. Contributory Negligence

[5] In response to plaintiffs' complaint, defendants denied claims of negligence and asserted that in refusing to cooperate and threatening the police officers with a deadly weapon, Shawn was contributorily negligent. 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 the proximate cause of his or her injury. *Champs Convenience Stores v. United Chemical Co.*, 329 N.C. 446, 455, 406 S.E.2d 856, 861 (1991). Contributory negligence acts as a complete bar to a plaintiff's recovery.[4] *Id.* "Issues of contributory neg-

4. In a wrongful death action, plaintiffs can only bring actions that decedent would have been entitled to bring if he had survived. If the decedent is barred from recovery by a finding of contributory negligence, then plaintiff's in a wrongful death action are likewise barred. *See e.g., Hinton v. City of Raleigh*, 46 N.C. App. 305, 264 S.E.2d 777, *disc. review denied*, 300 N.C. 556, 270 S.E.2d 107 (1980).

ligence, like those of ordinary negligence, are ordinarily questions for the jury and are rarely appropriate for summary judgment." *Nicholson v. American Safety Utility Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997). "Only where the evidence establishes the plaintiff's own negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted." *Id.* However, if evidence of plaintiff's contributory negligence is uncontroverted, the defendant is entitled to summary judgment as a matter of law. *Meadows v. Lawrence*, 75 N.C. App. 86, 88-89, 330 S.E.2d 47, 49 (1985).

"[A] plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves." *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965) (citation omitted). In the present case, plaintiffs presented expert testimony in an affidavit stating that Shawn was emotionally disturbed, and at the time of the fatal shooting, he lacked capacity to control his own actions. This forecast of evidence creates a question of material fact and therefore the issue of contributory negligence should be resolved by the trier of fact. We find that the trial court erred in granting defendants' motion for summary judgment as to the issue of contributory negligence.

D. Public Officer Immunity

[6] As a defense to plaintiffs' charge of negligence in their individual capacity, defendants asserted the public officers' immunity doctrine. "Under the public officers' immunity doctrine, 'a public official is [generally] immune from personal liability for mere negligence in the performance of his duties, but he is not shielded from liability if his alleged actions were corrupt or malicious or if he acted outside and beyond the scope of his duties'." *Schlossberg v. Goines*, 141 N.C. App. 436, 445, 540 S.E.2d 49, 56 (2000) (quoting *Slade v. Vernon*, 110 N.C. App. 422, 428, 429 S.E.2d 744, 747 (1993)); *see Shuping v. Barber*, 89 N.C. App. 242, 248, 365 S.E.2d 712, 716 (1988) (police are public officials). To withstand a law enforcement officer's motion for summary judgment on the issue of individual capacity, plaintiffs must allege and forecast evidence demonstrating that the officers acted maliciously, corruptly, or beyond the scope of duty. In their complaint, the plaintiffs alleged that defendants' actions were "willful, wanton, malicious, intentional, or grossly negligent." In support of this claim, the plaintiffs once again presented testimony from an expert who stated that "defendants committed gross violations of generally accepted

police practice and custom" and that they acted "with reckless and wanton disregard for the life and safety of Shawn Prior." Additionally, plaintiffs' allegations that defendants used excessive force could support a finding that defendants' actions were beyond the scope of authority to use deadly force. We conclude that this evidence, when viewed in the light most favorable to the plaintiffs creates a genuine issue of material fact as to whether the officers acted with malice, corruption, or beyond the scope of authority.

For the reasons stated above, we hold that there exist genuine issues of material fact and therefore, the trial court erred in granting summary judgment.

Reversed.

Judges WYNN and TIMMONS-GOODSON concur.

ELEANOR COFFEY AND KRISTEN COFFEY WEST, PLAINTIFFS v. TOWN OF WAYNESVILLE, DEFENDANT

No. COA00-545

(Filed 5 June 2001)

1. Cities and Towns— demolition—quasi-judicial decision—standard of review

The standard of review applied in reviewing a town board of alderman's quasi-judicial decision whether to issue a demolition order under N.C.G.S. § 160A-429 is based on a de novo review if petitioner contends the legislative body's decision was based on an error of law, or is based on the whole record test if petitioner contends the legislative body's decision was not supported by the evidence or is arbitrary and capricious.

2. Cities and Towns— demolition—compliance with statutory procedures—decision not arbitrary or capricious

A town board of aldermen did not act arbitrarily or capriciously by condemning and then requiring demolition of a building owned by plaintiffs, because: (1) defendant complied with the procedures set forth under N.C.G.S. §§ 160A-424 to 160A-429; (2) the code enforcement official conducted an inspection of the

property on 25 March 1998, satisfying the requirements of N.C.G.S. § 160A-426 for condemnation of plaintiffs' building; and (3) after nearly a full month passed and no corrective action was taken, the official sent plaintiffs a notice of hearing and a hearing was held determining the property should be demolished based on the length of time the property had been in unsafe condition and the unlikelihood that plaintiffs would actually take sufficient steps to improve the property.

3. Cities and Towns— demolition—reasonable time to repair property

The trial court did not err by affirming the town board of alderman's order requiring demolition of a building owned by plaintiffs even though plaintiffs contend defendant town failed to provide plaintiffs with a reasonable amount of time to repair the property in order to bring it up to standard and avoid demolition, because: (1) plaintiffs were given forty days from the posting of the notice of unsafe structure to the hearing before the code enforcement official to take steps toward repairing the building in an attempt to influence the code enforcement official's decision to either repair, close, vacate, or demolish the building; and (2) there is no evidence plaintiffs contacted anyone for the formulation of plans to restore the building, nor sought the required permits to undertake repairs to the building during this forty-day period.

Appeal by plaintiffs from order entered 6 January 2000 by Judge Zoro J. Guice, Jr. in Haywood County Superior Court. Heard in the Court of Appeals 5 February 2001.

Patrick U. Smathers, for plaintiffs-appellants.

Russell & King, P.A., by Sandra M. King, for defendant-appellee.

CAMPBELL, Judge.

Plaintiffs Eleanor Coffey and Kristen Coffey West appeal the trial court's order affirming the Town of Waynesville Board of Alderman's ("Board") order requiring demolition of a building owned by plaintiffs. We affirm the trial court's order.

Plaintiffs are the record owners of real property and an attached building located at 250 Westwood Circle, Waynesville ("Town"), North

Carolina. Based on its deteriorating and eventually dangerous condition, the building has been a subject of concern to local government for over twenty years, during which time it has not been occupied. In fact, the possibility of condemning the building was discussed by local government officials as far back as 1984.

On 25 March 1998, the Town's Code Enforcement Official, Jack Morgan ("Morgan"), inspected the property pursuant to N.C. Gen. Stat. § 160A-424 to determine its condition. Morgan photographed the building from various angles. However, he did not enter all parts of the building, as some areas were deemed too dangerous to enter. Upon inspection, he found the building to be in a "serious state of decay due to neglect, possible vandalism and exposure to weather conditions." He determined the building to be unsafe pursuant to N.C. Gen. Stat. § 160A-426, and that unsafe structure proceedings should be started as soon as possible. Morgan posted two "Notices of Unsafe Structure" in conspicuous places on the exterior of the building, as required by G.S. § 160A-426. Morgan also asked Alex Corbin, a fellow employee of the Town's Inspection Department, to inspect the building, and Corbin concurred with Morgan's assessment that the building was unsafe.

On 5 April 1998 and 22 April 1998, Morgan returned to the property and re-posted "Notices of Unsafe Structure" to replace his previous notices which had been removed. On 22 April 1998, Morgan mailed a "Notice of Hearing" to plaintiffs pursuant to N.C. Gen. Stat. § 160A-428 informing them of the unsafe condition of the property, certain corrective actions that needed to be taken, and that a public hearing would be held in his office to determine the future of the building on 4 May 1998. Morgan also informed plaintiffs that he would issue an order to either repair, close, vacate, or demolish the building, as determined to be appropriate following the hearing.

At the 4 May 1998 hearing, Lyle Coffey ("Mr. Coffey"), husband of plaintiff Eleanor Coffey, appeared on plaintiffs' behalf, and indicated that he and plaintiffs had not been aware of the condition of the property prior to receiving the "Notice of Hearing," but that they were now aware of the property's unsafe condition and wished to try to make the building safe. Morgan discussed with Mr. Coffey that the building was listed with the Haywood County Tax Office as having no value, and that, in Morgan's opinion, repairing it would be a waste of money. The two men also discussed the Coffey family's past record of not making promised repairs to other dilapidated structures they owned

in the Town, as well as a letter from the Town's police department outlining numerous complaints that had been lodged over the past twenty years regarding the building and its condition. Based on the Coffey family's past indifference to making their properties safe, the length of time 250 Westwood Circle had been in unsafe condition, and the fact that the cost of repairing the building would be substantially greater than its value, Morgan determined that the building should be demolished pursuant to N.C. Gen. Stat. § 160A-429. Plaintiffs were served with notice of this decision by "Finding in Fact and Order" dated 5 May 1998, ordering the demolition of the building and removal of debris from the property by 6 July 1998. The order further informed plaintiffs of their right to appeal the demolition order to the Board within 10 days.

Plaintiffs timely appealed the order to the Board and a hearing was held on 26 May 1998. The minutes of this hearing indicate that some exterior improvements and some minor interior structural repairs had been made to the building since Morgan's last inspection. According to Morgan, the deteriorated stairs had been removed from the back of the building, repair work had been done to a window that had collapsed, some floor joists had been replaced, and the area under the carport had been cleaned out. In response to a question from a member of the Board, Morgan stated that the property was still in no condition to be rented. Plaintiff Eleanor Coffey stated her desire to repair the property so it would no longer be a fire hazard or an eyesore to the area. The Board heard from Jack Smith ("Smith"), who lives across the street from the subject property. Smith stated that the property had been in the same state of deterioration for twenty years and that the Coffey family cared nothing about the condition of their properties located in the Town. The Board voted unanimously to affirm the demolition order, and the date of demolition and removal of debris was moved back to 17 July 1998.

Plaintiffs subsequently filed an appeal with the North Carolina Commissioner of Insurance ("Commissioner") pursuant to N.C. Gen. Stat. § 160A-434. They were informed by the Commissioner that he lacked jurisdiction over the matter.

On 16 June 1998, Morgan visited the property to discuss it with Mr. Coffey. Mr. Coffey showed Morgan some repairs and painting that had been done, and that some of the decayed material had been removed from the property. Morgan again took pictures of the property, was denied entry into the building by Mr. Coffey, and informed

Mr. Coffey he was likely wasting his time in making the improvements. Mr. Coffey informed Morgan that he and plaintiffs still intended to improve the property and were not going to have the building demolished. Morgan returned to inspect the property on 6 July 1998, only to find that the yellow warning ribbon had been removed, debris and combustible material remained, and that the building remained in an unsafe condition in violation of the Board's order.

Plaintiffs filed a notice of appeal, petition for writ of certiorari, complaint for declaratory judgment, complaint for damages, and motion for injunctive relief in Haywood County Superior Court on 30 June 1998. Having received an extension of time to plead, defendant filed an answer, motion to dismiss, and motion to sever on 28 August 1998. On 14 October 1998, Judge Marcus Johnson entered an order severing plaintiffs' "Notice of Appeal [and] Petition for Writ of Certiorari" from plaintiffs' "Complaint for Declaratory [Judgment], Complaint for Damages, [and] Motion for Injunctive Relief." Plaintiffs filed a motion for partial summary judgment on 5 April 1999, which motion was denied by Judge Dennis J. Winner by order dated 10 May 1999. On 7 June 1999, Judge Winner dismissed plaintiffs' notice of appeal but issued a writ of certiorari, and scheduled a hearing for the next available session of Superior Court.

Upon stipulation of the parties in order to prepare a written record for Superior Court, the Board held a second evidentiary hearing on 29 June 1999 to consider plaintiffs' appeal of the demolition order. Following this hearing, the Board entered a new order with extensive findings of fact and conclusions of law affirming the demolition. The written record of this hearing was certified to Superior Court on 27 July 1999. On 31 August 1999, a hearing was conducted by the trial court, which entered an order affirming the Board's decision, concluding defendant: (1) correctly followed the procedures specified in N.C. Gen. Stat. §§ 160A-424 to 160A-431; (2) made no errors of law in its review of the decision of the Code Enforcement Official; (3) protected the due process rights of plaintiffs; (4) based its decisions on competent, material, and substantial evidence; and (5) did not act in an arbitrary and capricious manner. Plaintiffs appeal.

On appeal, plaintiffs assert two bases on which the trial court erred in upholding defendant's demolition order: (1) defendant acted in an arbitrary and capricious manner in not following the procedures

specified in N.C. Gen. Stat. §§ 160A-424 to 160A-429 for condemning unsafe property and ordering its demolition, and (2) defendant acted in an arbitrary and capricious manner in not allowing plaintiffs a reasonable period of time to bring the property into compliance with applicable standards.

[1] We begin by noting that the role of the superior court in reviewing a municipality's decision ordering demolition of a building pursuant to G.S. § 160A-429 is not statutorily mandated, nor has it been defined by the appellate courts of this State. Likewise, the standard to be applied by this Court in reviewing a superior court order in such a case has not been addressed. When determining whether to issue a demolition order pursuant to G.S. § 160A-429, a municipal board which ordinarily sits as a legislative body, such as the Board in the instant case, sits as a quasi-judicial body. Its role is similar to that of a municipal board deciding whether to grant or deny a conditional use permit under N.C. Gen. Stat. § 160A-381(a), *See Sun Suites Holdings, LLC v. Board of Alderman of Town of Garner*, 139 N.C. App. 269, 533 S.E.2d 525, *disc. review denied*, 353 N.C. 280, —— S.E.2d —— (2000) (citations omitted), or a municipal board determining whether a local ordinance has been violated. *See In re Appeal of Willis*, 129 N.C. App. 499, 500 S.E.2d 723 (1998). In these situations, the municipal board sits as a quasi-judicial body to hear evidence, to determine the existence of facts and conditions, and to draw legal conclusions therefrom as a basis of official action. *See Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 625, 265 S.E.2d 379, 382, *rehearing denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). The standard to be applied in reviewing such quasi-judicial decisions of these boards which ordinarily act as legislative bodies is well established. We believe this standard is instructive in determining the standard to be applied in the instant case.

When reviewing the decision of a legislative body acting in its quasi-judicial capacity, the trial court sits as an appellate court, and not as a trier of facts. *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 217, 488 S.E.2d 845, 848, *disc. review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997). Thus, the trial court's task includes:

(1) Reviewing the record for errors in law,

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

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

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

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

Concrete Co., 299 N.C. at 626, 265 S.E.2d at 383. If the petitioner contends the legislative body's decision was based on an error of law, "de novo" review is the proper standard of review. *JWL Invs., Inc. v. Guilford County Bd. of Adjust.*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717, *disc. review denied*, 351 N.C. 357, 540 S.E.2d 349 (1999). However, if the petitioner contends the legislative body's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the "whole record" test. *Id.* Moreover, "[t]he trial court, when sitting as an appellate court to review [a decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 342 (1999). The role of appellate courts in such cases is to review the trial court's order for errors of law, just as with any other civil case. *Act-Up Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 483 S.E.2d 388 (1997). This process of review by appellate courts has been described as a two-fold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. *Id.* at 706, 483 S.E.2d at 392.

Based on the similarities between the role of a board of alderman in deciding whether to issue a demolition order under G.S. § 160A-429, and the role of legislative bodies in performing other quasi-judicial functions, we hold that the foregoing standard should apply to our review of the instant case.

[2] In their appeal, plaintiffs make two arguments in support of their contention that the trial court erred in affirming the Board's demolition order. First, plaintiffs argue that defendant was arbitrary and capricious in failing to follow the procedures specified in G.S. §§ 160A-424 to 160A-429 for ordering the demolition of property. Plaintiffs also argue that defendant acted arbitrarily and capriciously in failing to provide plaintiffs with a reasonable period of time to

bring their property into compliance with the law, as required by *Horton v. Gulledge*, 277 N.C. 353, 177 S.E.2d 885 (1970), *overruled on other grounds*, *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982). Although plaintiffs use the phrase "arbitrary and capricious" in describing the decision of the Board, their arguments are in fact based on their belief that defendant's decision contained errors of law, in that: (1) defendant did not follow the proper statutory procedure for ordering demolition of property; and (2) defendant failed to provide a reasonable amount of time to repair the property, as required by law.

When a party contends that a legislative body's decision, made while acting in its quasi-judicial capacity, was based on an error of law, "de novo" review is proper. *JWL Invs., Inc.*, 133 N.C. App. at 429, 515 S.E.2d at 717. Plaintiffs do not allege that the trial court exercised the wrong standard in reviewing the Board's demolition order; thus, we proceed to determine whether the trial court exercised "de novo" review properly. *See SBA, Inc., v. City of Asheville*, 141 N.C. App. 19, —— S.E.2d —— (2000) (citations omitted).

N.C. Gen. Stat. §§ 160A-424 to 160A-429 establish a procedure by which cities and towns may condemn buildings found to be unsafe and dangerous, and ultimately order that they be demolished for the protection of the public. Under G.S. § 160A-424, a local inspection department "shall make periodic inspections, subject to the [town] council's directions, for unsafe, unsanitary, or otherwise hazardous and unlawful conditions in structures within its territorial jurisdiction," and "shall make inspections when it has reason to believe that such conditions may exist in a particular structure." N.C. Gen. Stat. § 160A-424 (1999). The inspector is required to notify the owner or occupant of any building in which the inspector finds defects, failures to comply with the law, or other dangerous or fire hazardous conditions. N.C. Gen. Stat. § 160A-425 (1999). In especially dangerous situations, the local inspector is guided by G.S. § 160A-426, which reads:

> **§ 160A-426 Unsafe buildings condemned.** Every building which shall appear to the inspector to be especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes, *shall* be held to be unsafe, and the inspector *shall* affix a notice of the dangerous character of the structure to a conspicuous place on the exterior wall of said building.

N.C. Gen. Stat. § 160A-426 (1999) (emphases added). Once a building has been condemned as unsafe under G.S. § 160A-426, and the owner has failed to take prompt corrective action, the local inspector is required to send written notice to the owner informing the owner that the building is in dangerous or hazardous condition, that a hearing will be held to determine the future of the building, and that following the hearing an order to either repair, close, vacate, or demolish the building will be entered as deemed appropriate. N.C. Gen. Stat. § 160A-428 (1999). G.S. § 160A-429 further provides:

> If, upon a hearing held pursuant to the notice prescribed in G.S. 160A-428, the inspector shall find that the building or structure is in a condition that constitutes a fire or safety hazard or renders it dangerous to life, health, or other property, he *shall* make an order in writing, directed to the owner of such building or structure, requiring the owner to remedy the defective conditions by repairing, closing, vacating, or *demolishing* the building or structure or taking other necessary steps, within such period, not less than 60 days, as the inspector may prescribe;
>
> . . .

N.C. Gen. Stat. § 160A-429 (1999) (emphases added). Any order entered pursuant to G.S. § 160-429 may be appealed to the town council within 10 days, and must be heard in a reasonable time, with the town council having the power to affirm, modify and affirm, or revoke the order. N.C. Gen. Stat. § 160A-430 (1999).

This Court's review of the record indicates defendant complied with the procedures set forth in G.S. §§ 160A-424 to 160A-429. Morgan, the Town's Code Enforcement Official, conducted an inspection of the property on 25 March 1998 based on reason to believe the property was in dangerous condition. Upon inspection, Morgan found the property to be unsafe and posted notice of the dangerous character of the property pursuant to G.S. § 160A-426. Contrary to plaintiffs' argument on appeal, Morgan's actions on 25 March 1998 complied with the requirements of G.S. § 160A-426, thus, constituting condemnation of plaintiffs' building. After nearly a full month passed and no corrective action was taken, Morgan sent plaintiffs the "Notice of Hearing." Morgan held a hearing and determined the property should be demolished, based on the length of time the property had been in unsafe condition and the unlikelihood that the plaintiffs would actually take sufficient steps to improve the property. This order was appealed to the Board and affirmed after two separate hearings.

Therefore, we find no merit in plaintiffs' argument that defendant failed to properly follow the statutory procedure. Accordingly, this assignment of error is overruled.

[3] Plaintiffs also argue defendant failed to provide plaintiffs a reasonable amount of time to repair the property in order to bring it up to standard and avoid demolition, as required by *Horton*. The trial court found that plaintiffs' reliance on *Horton* was misplaced because its facts were distinguishable from the facts in the instant case. We agree with the trial court and likewise overrule this assignment of error.

In *Horton*, the defendant City of Greensboro ("City") had adopted a Housing Code pursuant to N.C. Gen. Stat. §§ 160-182 *et seq.* (currently N.C. Gen. Stat. §§ 160A-441, *et seq.*). The Housing Code provided that if, after notice and hearing, the Inspector of Buildings of the City ("Inspector") determined that a building was unfit for human habitation, he was required to state such determination in writing and issue an order. If the building could be brought up to Housing Code standards by repairs costing less than 60% of the present value of the building, the Inspector was required to order the owner to repair the building, or vacate and close the building as a human habitation. If repairs to bring the building up to Housing Code standards could not be made at a cost of less than 60% of the building's present value, the Inspector was required to order demolition of the building. If the owner failed to comply with an order of demolition, the Housing Commission could direct the Inspector to have the building demolished and impose a lien on the land for the cost of demolition.

Pursuant to the Housing Code, an inspection was made of a dwelling house owned by the plaintiff. After notice and hearing, the Inspector entered an order directing the plaintiff to demolish the building and finding as fact: (1) that the building was unfit for human habitation, and (2) that repair of the building would cost more than 60% of the building's present value. The plaintiff appealed to the defendant's Housing Commission, which thereupon affirmed the decision and order of the Inspector. On certiorari, the decision of the Housing Commission was affirmed by Superior Court.

On appeal, the Supreme Court held that the defendant could not, under the circumstances present, demolish the building without paying compensation to the plaintiff, and impose upon the lot a lien for the cost of the demolition, without giving the owner a reasonable opportunity to bring the building into conformity with the Housing

Code. The Supreme Court reasoned that requiring destruction of the building in such a case, without giving the owner a reasonable opportunity to remove the existing threat to the public health, safety and welfare, was arbitrary and unreasonable. However, the Court specifically did not address the question of the authority of the defendant to destroy the plaintiff's property, without paying compensation therefor, in the event the plaintiff did not, within a reasonable amount of time allowed him by the defendant, repair the house so as to make it comply with the requirements of the Housing Code.

The facts in the case *sub judice* are distinguishable from the facts in *Horton*. In *Horton*, demolition was ordered pursuant to an ordinance which was mandatory in its terms. The Inspector and Housing Commission had no alternative to demolition once the building had been found to be unfit for human habitation and the cost of repair had been found to exceed 60% of the present value of the building. However, in the instant case, the demolition order was entered pursuant to a statutory procedure in which the enforcement official's discretion had not been restricted. Plaintiffs' building was found to be unsafe and was condemned pursuant to G.S. § 160A-426 by posting of two "Notices of Unsafe Structure" on 25 March 1998. At that point, demolition of the building was not required by the statute. Plaintiffs were given an opportunity under the statute to take corrective action to remove the threat to the public health, safety and welfare. Having failed to take any corrective action for 27 days, the plaintiffs received written notice of a hearing to be held to determine the future of the building. This hearing was held on 4 May 1998, forty days after plaintiffs received constructive notice of the unsafe and dangerous condition of the property. Upon finding that the building was in dangerous condition, Morgan (the Town's Code Enforcement Official) was required to issue an order to either repair, close, vacate, or demolish the building. Unlike the Inspector in *Horton*, here Morgan had discretion whether to order demolition of the building. Plaintiffs in the instant case were given forty days—from the posting of notice on 25 March 1998, to the hearing before the Code Enforcement Official on 4 May 1998—to take steps toward repairing the building, in an attempt to influence the decision of the Code Enforcement Official. There is no evidence plaintiffs contacted any contractors, electricians, restoration experts, or other persons for the formulation of plans to restore the building, nor sought the required permits to undertake repairs to the building during this forty-day period. Having failed to take any action for forty days in an attempt to influence the

discretionary decision of the Town's Code Enforcement Official, plaintiffs cannot now claim that they were not given a reasonable amount of time to bring the building up to standard. Thus, we hold that plaintiffs were given a reasonable opportunity to remove the threat to the public health, safety and welfare that was created by their building. Consequently, plaintiffs' final assignment of error is overruled.

In light of the foregoing, we conclude that the trial court properly exercised *de novo* review in upholding the Board of Alderman's demolition order. The trial court's order is affirmed.

Affirmed.

Judges WALKER and HUNTER concur.

KIMBERLY WHITE HAMBY, PLAINTIFF v. WILLIAM RICHARD HAMBY, DEFENDANT

No. COA00-151

(Filed 5 June 2001)

1. Divorce— equitable distribution—valuation—insurance agency

The trial court did not abuse its discretion in an equitable distribution case by its valuation of defendant husband's insurance agency, because: (1) plaintiff's expert testified that even though defendant cannot sell his agency, the agency still has value to defendant above and beyond a salary or the net worth of the agency's fixed assets which could be sold; and (2) plaintiff's expert was in a position to assist the court as fact-finder based on his specialized knowledge.

2. Divorce— equitable distribution—extended earnings plan—deferred compensation benefit—pretrial agreement—marital property

The trial court did err in an equitable distribution case by its finding of fact that the Nationwide Insurance extended earnings plan is a deferred compensation benefit under N.C.G.S. § 50-20(b)(3) and its value of $179,151.90 should be distributed as marital property, because: (1) the parties' pretrial agreement

stipulating that the plan was marital property effectively waived defendant husband's right to a trial court's later determination of whether the plan was marital property and subject to the equitable distribution provisions of N.C.G.S. § 50-20; and (2) by agreeing that the plan was marital and thereby subject to equitable distribution, defendant also waived his right to retain as separate property that portion of deferred compensation which was not yet vested as of the date of separation.

3. Divorce— equitable distribution—valuation—deferred income compensation credits

The trial court did not err in an equitable distribution case by its valuation of defendant husband's deferred income compensation credits in the amount of $128,955.00 even though an exact figure as of the date of separation was not given, because the trial court's simple averaging of the figures resulted in an equitable figure for the purposes of distribution.

4. Divorce— equitable distribution—automobile—separate property

The trial court did not abuse its discretion in an equitable distribution case by finding that the parties' automobile was the separate property of plaintiff wife, because: (1) the 16 October 1996 consent judgment of the parties provides that defendant husband shall immediately execute the title to the automobile to plaintiff subject to the terms and conditions of the parties' separation agreement; and (2) there is no mention in the documents that the automobile shall be subject to later division.

Appeal by defendant from orders entered 7 May 1999 and 14 July 1999 by Judge Gregory R. Hayes in Catawba County District Court. Heard in the Court of Appeals 26 February 2001.

Tate, Young, Morphis, Bach & Taylor, LLP, by Thomas C. Morphis, Sr. and Paul E. Culpepper, for plaintiff-appellee.

Crowe & Davis, P.A., by H. Kent Crowe, for defendant-appellant.

HUNTER, Judge.

Arguing that the trial court failed to equitably distribute the marital assets of defendant-appellant William Richard Hamby and plaintiff-appellee Kimberly White Hamby, Mr. Hamby appeals to this

Court. Specifically, Mr. Hamby contends that his Nationwide Insurance Agency and the deferred compensation plans therefrom were improperly valued and distributed and that the parties' Isuzu Trooper automobile was marital property, and not the separate property of Mrs. Hamby as found by the trial court. We affirm the trial court's orders.

Due to the nature of Mr. Hamby's assignments of error, we need relay only a few facts occurring prior to trial, none of which are in dispute. The parties were married on 27 February 1988, separated on 17 August 1995, and divorced on 19 December 1996. The parties had two children born within the marriage. Mr. Hamby "sought and obtained primary custody of the[] children pursuant to a Consent Judgment." Prior to the marriage, Mr. Hamby worked as an Nationwide Insurance agent in an employee/employer relationship. However shortly thereafter, Mr. Hamby became an independent contractor with Nationwide, opening his own office "to sell Nationwide products as an exclusive representative."

Prior to trial,

> the parties entered into a comprehensive Pre-Trial Order for Equitable Distribution of Marital Property . . . [filed 29 July 1998 which] ma[de] substantial distribution of the personal property of the parties. . . . [Additionally], there were supplemental Pre-Trial Orders agreed upon by the parties prior to trial . . . . Certain real property and other assets of the parties were divided by the parties prior to trial and were not in dispute.

Therefore, the only assets of the parties in question at trial were: Mr. Hamby's Nationwide Insurance Agency, his Deferred Compensation and Incentive Credits, his Extended Earnings, and the parties' 1995 Isuzu Trooper automobile.

[1] Mr. Hamby's first assignment of error is that the trial court erred in its valuation of his insurance agency, in that the valuation was not supported by competent evidence. It is Mr. Hamby's position that since, pursuant to his agency agreement with Nationwide, he cannot transfer or sell the business, the trial court should not have valued the agency as though it could be sold.

We begin by acknowledging that:

> The distribution of marital property is vested in the discretion of the trial courts and the exercise of that discretion will not be

> upset absent clear abuse. [Therefore, i]n order to reverse the trial court's decision for abuse of discretion, we must find that the decision was unsupported by reason and could not have been the result of a competent inquiry. Accordingly, the findings of fact are conclusive [on appeal] if they are supported by any competent evidence from the record.

Beightol v. Beightol, 90 N.C. App. 58, 60, 367 S.E.2d 347, 348 (1988) (citations omitted). In making an equitable distribution, the trial court must conduct a three-step analysis: (1) determining which property is marital property; (2) calculating the net value of the marital property—which is the fair market value less any encumbrance on the property; and, (3) distributing the property in an equitable manner. *Id.* at 63, 367 S.E.2d at 350. "An equal division of the marital property is mandatory, *unless* the court determines in the exercise of its discretion that such a distribution is inequitable." *Id.* (emphasis added).

The parties do not dispute that Mr. Hamby's insurance agency is marital property. However, Mr. Hamby argues that because he is an exclusive agent, representing only one company, he "has virtually no business to sell." The evidence presented at trial revealed that Mr. Hamby does not own the policies he sells and that Nationwide "ha[s] the authority to transfer those policies or do anything [with them] it wishes at its sole discretion." Thus, "with respect to [Mr. Hamby's] ability to sell or transfer [the] agency," there was no controversy.

From the record, we see that Mr. Hamby's expert witness, Mr. Blanton, valued the agency at $18,950.00 as of the date of separation. In mentioning the various valuation methods he declined to use, Mr. Blanton stated "because of the unique situation that [Mr. Hamby]'s in, and the fact that he doesn't have control over many areas, . . . you can't be sure that the future earnings will be like the past earnings." Mr. Blanton further stated that he "made the determination that . . . the agency had no right to future earnings. It couldn't sell its book of business to anyone, it couldn't assign the income stream to anyone else." Thus, Mr. Blanton "gave the adjusted book value method an 85%. And . . . gave the capitalization of earnings method a 15% to come up with a value of $18,950."

> And then the company specific premium I assigned it a value of 60%. Why did I assign it a value so high? Mr. Hamby cannot sell the agency. The contract, the agency administration manual

makes specific points that he cannot sell or assign policies to anyone. The lack of ownership, the lack of control over the income stream, the fact that he is a key person, without him there is no agency, there is no earning's [sic] stream made me assign it a higher value. . . .

Conversely, Mrs. Hamby's expert witness, Mr. Whitt valued the agency at $110,000.00 as of the date of separation. Disagreeing with Mr. Blanton's valuation and methods used, Mr. Whitt stated:

> To begin with I valued the . . . Agency as a going concern. It was a going concern on date of separation. And it's my understanding when we say we're valuing at fair market value we're trying to determine *what if the entity that's being valued could have traded hands* on date of separation, date of valuation. We don't have to know there's a buyer. It's a hypothetical situation. . . . [W]e know on date of separation that the sale wasn't imminent nor was it necessary. So my purpose in valuing, and I think the appropriate purpose in valuing the agency at date of separation is what is it worth to Mr. Hamby as a going concern. So I certainly agree with the definition of a going concern, is one that we do expect it is an operating entity and we expect it to continue to operate as it has been in the most recent past.
>
> So there are many businesses that I valued that might not be able to trade hands that easily. . . . [However,] there can still be a value to having a practice [or agency] over and above just earning a salary.
>
> My approach to valuing . . . was just to determine does Mr. Hamby have, by creating this entity of an insurance agency, has he created something of value to himself. Something that has allowed him to earn an above-average amount of earnings. . . .

(Emphasis added.) Mr. Whitt went further to explain that the

> purpose of valuing a business is to say, . . . if I owned a single business, if I'm working there, what can I earn if I'm working for somebody else? Surely I'm entitled to have at least that much for the efforts of my labors. Anything I make over and above that is because, probably because I have this business entity. I've got name recognition, I've got the Nationwide name, or whatever. If [Mr. Hamby] had worked for another agency, he would've made something.

> And so by capitalizing in this methodology here we have capitalized his actual salary as well as any earnings that come from the business. . . .

We agree with the trial court and Mr. Whitt, in that even though Mr. Hamby cannot sell it, the agency still has value as to Mr. Hamby above and beyond a salary or the net worth of the agency's fixed assets which could be sold.

We note in the case at bar, Mr. Hamby does not argue that the trial court failed to conduct the required three step analysis for equitable distribution. Neither does Mr. Hamby argue that in conducting its analysis, the trial court itself miscalculated the net value of the agency or failed to distribute that value equitably based on expert testimony it accepted. What Mr. Hamby does argue is that the trial court erred in rejecting the expert testimony of Mr. Blanton as to the agency's valuation, instead accepting as true the testimony of Mrs. Hamby's expert, Mr. Whitt. Mr. Hamby argues Mr. Whitt's expert opinion was incompetent "at best."

" 'The decision to qualify a witness as an expert is ordinarily within the exclusive province of the trial judge or hearing officer.' " *Hall v. Hall*, 88 N.C. App. 297, 308, 363 S.E.2d 189, 196 (1987) (quoting *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 75 N.C. App. 201, 230, 331 S.E.2d 124, 144, *disc. review denied*, 314 N.C. 547, 335 S.E.2d 319 (1985)). The record reveals that before accepting Mr. Whitt as an expert in the "area of accounting and valuation of businesses," the trial court admitted Mr. Whitt's resume into evidence, which listed Mr. Whitt's "activities as a CPA, . . . the positions [he has] held in various professional and business organizations[] . . . [and] a listing of the business valuations, litigation courses [he has] taken." Mr. Whitt also testified that he had been similarly tendered as an expert in over 100 cases. Furthermore, Mr. Hamby's attorney entered "a stipulation to [Mr. Whitt's] information."

In its order of 7 May 1999, the trial court found, in pertinent part, that:

> 22. Both experts [plaintiff's expert, Mr. Whitt and defendant's expert, Mr. Blanton] made assumptions in their analysis of the value of the . . . Insurance Agency that Rick Hamby cannot sell his Insurance Agency. The Court finds, based on the evidence presented . . . that the Rick Hamby Insurance Agency cannot be sold but that the Agency still has value.

23. . . . [T]he Court does not accept the methodology used by Mr. Blanton in his valuation in that Mr. Blanton used only the capitalization of earnings method and adjusted book value method or going concern method of valuation analysis. The Court finds that Mr. Blanton did not use a capitalization of excess earnings method in that Mr. Blanton testified that the capitalization of excess earnings method is appropriate to use when all net tangible and intangible assets can be clearly identified and that he was not furnished with the necessary information to identify those assets. In addition, Mr. Blanton testified that he did not use a discounted future earnings method or the public guideline company method, both of which methods would seem to the Court to have analytical value and which Mr. Whitt testified should have been used.

24. . . . The Court accepts, with one exception, the methodology used by Mr. Whitt. The Court questions Mr. Whitt's valuation based on "*Guideline Market Transactions*", because of the nature of the comparables used by Mr. Whitt in that, the sale dates occurred in 1992 and 1988 and that the location of the sales were out of the state of North Carolina. For that reason, the Court will reduce the value by $10,000. The Court finds as true and accepts all other testimony of Mr. Whitt as a valid method of valuing the Rick Hamby Insurance Agency. . . .

Thus, the trial court valued the agency at $100,000.00, $10,000.00 less than the value given by Mr. Whitt.

We hold therefore, that the record contains "evidence [which] is sufficient to permit a finding that, by reason of his specialized knowledge, [Mr. Whitt] was in a position to assist the court, as fact finder, in determining relevant facts, i.e., the value of certain marital assets," namely the insurance agency. *Hall*, 88 N.C. App. at 308, 363 S.E.2d at 196. Hence, we find the trial court's "decision was []supported by reason and [was] the result of a competent inquiry." *Beightol*, 90 N.C. App. at 60, 367 S.E.2d at 348. Further, in response to Mr. Hamby's contention that Mr. Whitt's valuation was improper because it was not based on the date of separation, we find that the record does not support Mr. Hamby's contention, in that Mr. Whitt plainly testified that his "analysis and valuation . . . [was] as of August 17, 1995[] . . . the date of separation . . . ." Accordingly, being supported by competent evidence of record, the trial court's findings of fact are conclusive on appeal. Mr. Hamby's objection is thus overruled.

[2] Mr. Hamby next assigns error to the trial court's finding as fact that the Nationwide Insurance Extended Earnings Plan is a Deferred Compensation Benefit Plan pursuant to N.C. Gen. Stat. § 50-20(b)(3) and as such, had a value of $179,151.90, which should be equitably distributed as it is marital property. Although Mr. Hamby admits that he stipulated in the parties' pre-trial order that his Deferred Compensation Plans were marital property, he nevertheless argues in his brief to this Court, that "[d]espite this stipulation, . . . neither of [his] retirement or deferred compensation plans with Nationwide are marital property under N.C.G.S. § 50-20 as it existed in 1995. . . . [I]t was a mistake to characterize these deferred compensation plans as marital property." Thus, Mr. Hamby thereafter argues that the trial court committed reversible error in finding the Plans to be marital property and subjecting them to equitable distribution. We disagree.

Because the applicable statute in effect at the time the parties separated plainly states that "[m]arital property *includes all vested pension, retirement, and other deferred compensation rights*," we understand that ordinarily, Mr. Hamby's *nonvested* pension would not then be subject to equitable distribution. N.C. Gen. Stat. § 50-20(b)(1) (1995) (emphasis added). However, this Court has long held that "[t]he right to equitable distribution does not arise from the parties' common law rights and obligations as spouses, but is a statutory property right *which may be waived* by a complete property settlement." *Small v. Small*, 93 N.C. App. 614, 621, 379 S.E.2d 273, 277 (1989) (emphasis added). Accordingly, N.C. Gen. Stat. § 50-20(d) (1995) provides for "distribution of . . . marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties." *Id.*

> [A] married person is entitled to maintain an action for equitable distribution upon divorce if it is properly applied for *and not otherwise waived.* However, equitable distribution is not automatic. . . .
>
> *A valid separation agreement that waives rights to equitable distribution will be honored by the courts and will be binding upon the parties.* N.C.G.S. § 52-10 (1984); *Blount v. Blount*, 72 N.C. App. 193, 323 S.E.2d 738 (1984); *Blankenship v. Blankenship*, 234 N.C. 162, 66 S.E.2d 680 (1951).

Hagler v. Hagler, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987) (emphasis added).

In the present case, there is no dispute as to whether the parties had a signed and binding pre-trial agreement which the trial court incorporated into its pre-trial order. Therefore, we reject Mr. Hamby's argument that "neither of [his] retirement or deferred compensation plans with Nationwide are marital property," and subject to equitable distribution. We hold then that by the parties' pre-trial agreement, Mr. Hamby effectively waived his right to a trial court's later determination of whether the Plans were marital property and subject to the equitable distribution statutory provisions of N.C. Gen. Stat. § 50-20. *See Prevatte v. Prevatte*, 104 N.C. App. 777, 781, 411 S.E.2d 386, 388 (1991). Furthermore, by agreeing that the Plans were marital property and thereby subject to equitable distribution, Mr. Hamby also waived his right to retain, as separate property, that portion of Deferred Compensation which was not yet vested as of the date of separation. *Id.*

We find *Prevatte*, *supra*, analogous. In that case, this Court held:

> [W]e agree that the agreement released all the wife's property rights which arose out of the marriage and also operated to release her statutory right to equitable distribution. We hold that the antenuptial agreement was a valid bar to wife's claim and the trial court erred in concluding the property acquired during the marriage was subject to equitable distribution.

Id. at 782, 411 S.E.2d at 389. Thus, just as in *Prevatte* where the wife was able to sign away her statutory right to equitable distribution, we believe that Mr. Hamby was able to sign away his right to keeping separate property separate. Therefore, it matters not that pursuant to statutory authority in place at the time of separation (17 August 1995), "[t]he expectation of nonvested pension, retirement, or other deferred compensation rights [was to] be considered separate property." N.C. Gen. Stat. § 50-20(b)(2).

The record reflects that Ms. Riggs, "a representative of Nationwide Insurance testified that she was familiar with [Mr. Hamby's] rights concerning . . . [his] Extended Earnings Plan," and she further testified as to the amounts Mr. Hamby would have been entitled to receive had he "die[d], retire[d], or [been] otherwise severed from service with Nationwide" on 31 December 1994 and 31 December 1995. Ms. Riggs went on to testify as to the amount to which Mr. Hamby would have been entitled as of 31 December 1994 and 31 December 1995, stating that there was no way to calculate the

exact amount as of the date of the parties' separation. Subsequently, in its finding of fact number 27, the trial court found that:

> Pursuant to the Pre-Trial Order the parties have stipulated that [Mr. Hamby's] Extended Earnings [Plan] was marital property. . . .
>
> [Moreover,] the Nationwide Insurance Extended Earnings Plan is a deferred compensation benefit plan under the provisions of North Carolina General Statutes § 50-20(b)(3) and that the same as of the date of separation had a value of **$179,151.90** and is marital property.

(Emphasis in original.) Additionally, the trial court set out its method of calculating the value of the Extended Earnings Plan to Mr. Hamby as of the date of separation. By averaging the end-of-year Extended Earnings' amounts of $167,450.00 for 1994 and $186,102.00 for 1995, the trial court was able to calculate a relatively accurate amount that the Plan increased per day ($51.10), and thereby calculate what the Plan was worth as of 17 August 1995, the parties' date of separation. Thus, we find the record supports the trial court's findings as to the valuation of Mr. Hamby's Extended Earnings Plan. Again, we are reminded that if there is *any* competent evidence of record to support the trial court's findings, those findings are conclusive on appeal. *Beightol*, 90 N.C. App. 58, 60, 367 S.E.2d 347, 348. Having so held, we find no error in the trial court's equitable distribution of such asset. Further, we find no merit in Mr. Hamby's argument that "it is impossible with any degree of accuracy to calculate the value of extended earnings."

[3] Next, Mr. Hamby assigns error to the trial court's equitable distribution of his Deferred Income Compensation Credits in the amount of $128,955.00, on the basis that there is not competent evidence of record to support the valuation finding of fact. We have already held that the Deferred Income Compensation Plan is marital property pursuant to the parties' pretrial agreement. Therefore, as in the earlier argument regarding the Extended Earnings Plan, we need not address Mr. Hamby's contention as to whether his Income Compensation Credits had vested as of the parties' date of separation.

As to his argument that the trial court erred in its valuation of the Plan, Mr. Hamby does not contend that the Court's "March 1, 1995 statement [figures], which is for the period ending December 31, 1994 . . . [or] the March 1, 1996 statement [figures], which is for the period

ending December 31, 1995" are incorrect. Instead, Mr. Hamby simply argues that because neither the documents nor any witness gave a specific figure for the Deferred Compensation *as of the date of separation*, the trial court erred in attempting to calculate one. We find that if we were to follow Mr. Hamby's logic, a trial court could never calculate the equitable amount of any asset for which a document or an expert witness was unable to positively give an exact figure as of the date of separation. This Court, like the trial court below, refuses to accept Mr. Hamby's logic. We believe the trial court's simple averaging of the figures resulted in an equitable figure for the purposes of distribution. We hold that the record supports the trial court's findings and conclusions as to this issue.

[4] Finally, Mr. Hamby assigns error to the trial court's finding that the parties' Isuzu Trooper automobile was the separate property of Mrs. Hamby. In the parties' 9 October 1995 Separation Agreement, under the heading of "Exclusive Possession," it was stated that:

> The Husband shall have as his sole and separate property that certain 1995 Isuzu Rodeo . . . . The Husband agrees to indemnify and hold the Wife harmless for the payment of any obligations on said vehicle, pursuant to the terms of this conveyance. *The Wife shall have as her sole and separate property that certain 1995 Isuzu Trooper LS (Limited), presently used by the Wife*, with [sic] the Husband shall assume all indebtedness on said vehicle including taxes, tag, and title, and maintenance on said vehicle during the one (1) year separation agreement. The Husband further agrees to indemnify and hold the Wife harmless from any payments on the subject vehicle pursuant to the terms of this agreement. . . .

(Emphasis added.)

In its order, the trial court found that:

> While there is language in said article referring to action to be taken by the Husband during the one (1) year separation agreement . . . said language agrees to the Husband's obligation to pay taxes, tag, title and maintenance on said vehicle during the one (1) year separation agreement and does not limit the prior language granting the Isuzu to the Wife "as her sole and separate property".

Therefore, the trial court held the automobile to be Mrs. Hamby's separate property. We agree.

The law has long been that where the plain language of a statute (or contract) is unambiguous on its face, the court is bound by the clear meaning. *Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 82 (1995). "The most common rule of construction used by the courts is to 'gather the intention of the parties from the four corners of the instrument.' " *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 462, 490 S.E.2d 593, 597 (1997) (quoting Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 10-36 (4th ed. 1994)). Thus, we hold that the record supports the trial court's finding that

> the October 16, 1996 Consent Judgment of the parties . . . provides that [Mr. Hamby] shall immediately execute the title to the 1995 Isuzu Trooper to [Mrs. Hamby] subject to the terms and conditions of the parties' separation agreement and there is no mention made in any of said documents that the Isuzu shall be subject to later division. . . .

Mr. Hamby's assignment of error is therefore overruled.

Having found that the trial court's findings of fact are supported by competent evidence in the record, and that its conclusions of law are supported by the findings of fact, the trial court's orders are,

Affirmed.

Chief Judge EAGLES and Judge CAMPBELL concur.

IN RE THE ESTATE OF CANDICE LEIGH LUNSFORD, DECEASED

No. COA00-674

(Filed 5 June 2001)

1. Intestate Succession— death of child—willful abandonment by father prior to death

The trial court did not err by finding that respondent father could not inherit money from his intestate eighteen-year-old daughter's estate because the evidence reveals that respondent willfully abandoned his daughter prior to her death. N.C.G.S. § 31A-2.

2. Parent and Child— death of child—willful abandonment by father prior to death—inheritance disallowed for child of any age

Although respondent father contends that N.C.G.S. § 31A-2 which provides protection from an abandoning parent inheriting from a child is inapplicable to this case since respondent's deceased daughter was eighteen years old when she died, N.C.G.S. § 31A-2 applies to the estate of any son or daughter of an individual, even after the child has reached the age of majority.

3. Parent and Child— death of child—willful abandonment by father prior to death—not deprived of custody

Respondent father is barred from inheriting from his daughter's estate based on his willful abandonment of her prior to her death and N.C.G.S. § 31A-2(2) does not apply to allow respondent to inherit from the child despite his abandonment, because: (1) respondent was not deprived of the custody of his child under the order of a court of competent jurisdiction and he was not prevented from helping to contribute to her care and maintenance; and (2) there was no language in the divorce judgment that prevented respondent from seeking visitation or even custody of his daughter.

4. Estates— administration—death of child—mother was proper administratrix

The trial court's findings of fact naming petitioner mother as the administratrix of her daughter's estate are affirmed.

Chief Judge EAGLES dissenting.

Appeal by respondent from order entered 3 March 2000 by Judge L. Todd Burke in Surry County Superior Court. Heard in the Court of Appeals 20 April 2001.

Law Offices of Jonathan S. Dills, P.A., by Jonathan S. Dills and Daniel B. Anthony, for respondent appellant.

Royster and Royster, by Michael D. Beal and Stephen G. Royster, for petitioner appellee.

McCULLOUGH, Judge.

The subject of this appeal is the distribution of the estate of Candice Leigh Lunsford, who died at the age of eighteen in an auto-

mobile accident on 30 June 1999. Decedent's parents, petitioner Dawn Bean and respondent Randy Lunsford, were married in November 1980. Their only child, Candice Leigh Lunsford ("Candi"), was born on 21 June 1981. Respondent suffered from alcoholism, and the marriage deteriorated after a short time. Petitioner and respondent separated in 1982, and a decree of absolute divorce was entered on 30 January 1985. Petitioner was granted sole custody, care, and control of the couple's daughter, Candi. The divorce judgment did not bar respondent from participating in Candi's care and maintenance, nor did it operate to terminate his parental rights.

During Candi's lifetime, respondent paid no more than $100.00 toward her support. Respondent maintains that he offered to pay more, but that petitioner repeatedly refused his offers of financial support. Respondent visited Candi less than a dozen times from the time the couple separated until Candi's death in 1999.

On 9 July 1999, petitioner applied for Letters of Administration so that she could serve as administratrix of her daughter's estate. Candi's estate consisted of some personal effects; there was also a potential claim for wrongful death arising under N.C. Gen. Stat. § 28A-18.2 (1999), the proceeds of which were also part of the estate. Petitioner was appointed administratrix, and respondent appealed to the clerk of superior court. The clerk heard the matter on 16 November 1999 and determined that respondent willfully abandoned Candi Lunsford and was therefore barred from inheriting from her estate.

Respondent then filed a complaint requesting that petitioner be relieved of her duties as administratrix because she allegedly abused her position and violated her fiduciary duty by failing to notify him that she was applying for Letters of Administration. Respondent also asked the trial court to grant injunctive relief by delaying the disbursement of the estate proceeds until his appeals were exhausted. The clerk of superior court denied respondent's motion and dismissed his complaint on 20 December 1999, whereupon respondent appealed to the Surry County Superior Court for a trial *de novo*. The trial court entered judgment in favor of petitioner on 3 March 2000.

Respondent appealed, arguing that the trial court erred by (I) finding that he willfully abandoned his daughter; (II) determining that exception (2) to N.C. Gen. Stat. § 31A-2 does not apply to this case; and (III) finding that petitioner was the only proper person to serve

as administrator. We disagree with respondent's arguments, and affirm the decision of the trial court.

I. Willful Abandonment

[1] North Carolina intestacy laws allow parents to inherit in equal shares when an intestate child dies without leaving issue. N.C. Gen. Stat. § 29-15(3) (1999). A parent can, however, act in a way that negates the right to inherit. If a parent abandons a child, that parent cannot share in the deceased child's estate. N.C. Gen. Stat. § 31A-2 (1999) states that

> [a]ny parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except—
>
> (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or
>
> (2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.

Though it is clear that abandonment prevents a parent from inheriting from an intestate child, the determination of what behavior actually constitutes abandonment is a factual issue to be addressed on a case-by-case basis.

Prior North Carolina case law has dealt with the issue of abandonment. Abandonment has been defined as

> any wilful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Wilful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence.
>
> . . . .
>
> Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial

> affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

Pratt v. Bishop, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citations omitted); *Hixson v. Krebs*, 136 N.C. App. 183, 188, 523 S.E.2d 684, 687 (1999), *disc. review denied*, 352 N.C. 356, 544 S.E.2d 546 (2000).

A finding of abandonment is key to the ultimate disposition of this case. If respondent abandoned his daughter, he falls under the provisions of N.C. Gen. Stat. § 31A-2 and is precluded from sharing in the estate's wrongful death proceeds. "The proceeds of a settlement for wrongful death of a child are subject to the provisions of G.S. 31A-2 even though such proceeds are not assets of the estate of the deceased child." *Lessard v. Lessard*, 77 N.C. App. 97, 101, 334 S.E.2d 475, 477 (1985), *aff'd*, 316 N.C. 546, 342 S.E.2d 522 (1986).

After initial appearances before the Surry County Clerk of Superior Court, respondent appealed to the Surry County Superior Court for a trial *de novo*. The trial court made findings of fact and concluded, as a matter of law, that

1. The Respondent, Randy Keith Lunsford, willfully abandoned his late daughter, Candice Leigh Lunsford, whose estate is the subject of this dispute, in accordance with North Carolina General Statute 31A-2.

2. North Carolina General Statute 31A-2(2) does not apply to the facts of this case as there was no Order of a Court depriving the defendant of custody.

3. The Petitioner, Dawn Collins Bean, is the only proper person to serve as Administratrix.

4. Although the Respondent maintains his objection to jurisdiction, all parties agreed and stipulated to a *de novo* hearing on the appeal from the Clerk of Superior Court.

5. All parties stipulate that this Order may be signed out of Session, Term and/or County.

The Surry County Superior Court also entered the following Order:

> That the Respondent, Randy Keith Lunsford, willfully abandoned his late daughter, Candice Leigh Lunsford, and is, therefore, precluded by North Carolina General Statute 31A-2, from sharing in

the proceeds of the Estate of Candice Leigh Lunsford. Further, the Petitioner, Dawn Collins Bean, shall continue to administer the Estate of Candice Leigh Lunsford. Finally, with the consent of all parties, this matter may be executed out of Session, Term and/or County.

The superior court conducted a bench trial in this case and undertook the role of fact-finder. We are bound by the trial court's findings of fact if they are supported by competent evidence. "[T]he scope of appellate review . . . is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Petitioner and respondent each presented evidence on the issue of abandonment. Respondent maintained that he initially left petitioner and Candi because of his alcoholism and his inability to handle the rigors of family life. He presented evidence that he and Candi always had a good relationship, as evidenced by the fact that he attended her high school graduation and made plans for furthering their relationship just before her death. Respondent acknowledged that he was not always emotionally stable, but stated that he intentionally limited his contact with Candi to those times when he could nurture their relationship. Respondent also maintained that he offered to financially support his daughter, but that petitioner refused his offers.

Petitioner, on the other hand, provided evidence that respondent visited Candi less than a dozen times from the date of their separation in 1985 to Candi's death in 1999. She also stated that respondent paid less than $100.00 during those fifteen years (though she also acknowledged that she refused his offers to pay support). Petitioner referenced the divorce judgment and noted that it did not terminate respondent's parental rights, nor did it prevent him from taking an active role in his daughter's life. Petitioner argued that respondent could have financially supported their daughter in a variety of ways, and could have taken a more active visitation stance over the years, perhaps by initiating a court action to get visitation or custody of Candi. Finally, petitioner noted that respondent's mother was the one who facilitated visits between respondent and Candi because respondent was immature and battled alcoholism.

The trial court heard the conflicting evidence and was in the best position to render a decision based on the parties' positions. The trial

court's findings of fact and conclusions of law ended the factual dispute and resolved the issue of abandonment in favor of petitioner. The trial court concluded that respondent abandoned his daughter, and we are bound by that conclusion, as it is supported by the evidence of record. Respondent's first assignment of error is therefore overruled.

II. Applicability of N.C. Gen. Stat. § 31A-2

[2] Petitioner and respondent agree that N.C. Gen. Stat. § 31A-2 is the relevant statute in this case; however, they disagree on its interpretation and the applicability of its provisions to their dispute. Respondent first argues that the statute does not apply in this case because the Legislature meant it to apply only to the estates of minor children; that is, those children who are under the age of eighteen when they die. It is undisputed that Candi Lunsford was eighteen years old at the time of her death. Respondent contends that his daughter should not be covered under the statute's purview. Petitioner urges this Court to give the statute its plain meaning and find that N.C. Gen. Stat. § 31A-2 applies to the estate of any son or daughter of an individual.

This argument constitutes an issue of first impression, as this is the first time this question has been squarely presented to this Court. We agree with petitioner's reading of the statute, however, and hold that N.C. Gen. Stat. § 31A-2 applies to the estate of any son or daughter of an individual, even after that child has reached the age of majority. Absent some inequitable result, words or phrases in a statute are to be given their ordinary, everyday meaning. *Wood v. J.P. Stevens and Co.*, 297 N.C. 636, 643, 256 S.E.2d 692, 697 (1979) (citations omitted). There are numerous other statutes wherein the Legislature specifically noted that "child" meant a child under the age of eighteen. In those instances, the Legislature chose to insert the words "minor child" into the statutory scheme. *See* N.C. Gen. Stat. Chapter 48A, "Minors," effective 5 July 1971. N.C. Gen. Stat. § 48A-1 (1999) abrogates the common-law definition of minor. N.C. Gen. Stat. § 48A-2 (1999) states that "[a] minor is any person who has not reached the age of 18 years." When the two statutes are read together, "the effect is that wherever the term 'minor,' 'minor child' or 'minor children' is used in a statute, the statute now refers to age 18." *Crouch v. Crouch*, 14 N.C. App. 49, 51, 187 S.E.2d 348, 349, *cert. denied*, 281 N.C. 314, 188 S.E.2d 897 (1972). We interpret this to mean that, unless the word "minor" is inserted before the word "child," then "child" can be a person of any age.

Webster's Dictionary defines a child as "[a] son or a daughter; an offspring." *The American Heritage Dictionary* 165 (2d ed. 1985). Black's Law Dictionary defines a child as "[p]rogeny; offspring of parentage." *Black's Law Dictionary* 239 (6th ed. 1991). These definitions do not place an upper age limit on a child; thus, a parent's child may be a newborn or a person of any age.

The law has singled out certain ages and attributed legal significance to them. Generally, the Legislature has used the term "minor child" when the age of eighteen is significant. Black's Law Dictionary defines a minor as "[a]n infant or person who is under the age of legal competence. . . . In most states, a person is no longer a minor after reaching the age of 18[.]" *Black's Law Dictionary* 997 (6th ed. 1991). We note that the Legislature did not use the term "minor child" in N.C. Gen. Stat. § 31A-2. As a practical matter, it does not seem logical to believe that the Legislature meant that only a "minor" child would be protected by N.C. Gen. Stat. § 31A-2. If that were the case, an abandoning parent could inherit from a child if that child was over eighteen, but the abandonment would be held against the parent if the child was under the age of eighteen. In any event, it is not the province of this Court to rewrite the General Statutes. If the Legislature wishes to change or clarify the meanings of certain words in the General Statutes, it may do so. Until then, we give the word "child" its plain meaning and decline to place an age limit on the word unless so directed by the Legislature. The child's age does not change the facts of abandonment, if they are present in a case. Thus, we hold that N.C. Gen. Stat. § 31A-2 applies to all children of an individual, not just to minor children under the age of eighteen.

[3] N.C. Gen. Stat. § 31A-2 prevents parents who abandon their children from inheriting from those children unless the parent meets one of two exceptions. N.C. Gen. Stat. § 31A-2(2) allows a parent to inherit from a child—despite evidence of parental abandonment—if the parent has been "deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child." N.C. Gen. Stat. § 31A-2(2).

Petitioner and respondent divorced when Candi was a small child. The 1985 divorce judgment granted sole "care, custody and control" of Candi Lunsford to petitioner. That judgment did not, however, prevent respondent from helping to raise his daughter or contribute to her care and maintenance. The prior cases of *Hixson* and

Lessard shed light on the issue of a divorce judgment and its significance to N.C. Gen. Stat. § 31A-2(2). We note, however, that both *Hixson* and *Lessard* dealt with divorce judgments that relied on provisions in prior separation agreements. There was no prior separation agreement in the present case. However, we can analogize and reason that the divorce judgment in this case did not operate to terminate respondent's parental rights. Indeed, the divorce judgment did not speak to future relationships. It merely gave custody, care, and control of Candi to her mother at the time of the divorce. There was no language in the divorce judgment that prevented respondent from seeking visitation or even custody of Candi. Our Supreme Court has previously noted that "the control and custody of minor children cannot be determined finally. Changed conditions will always justify inquiry by the courts in the interest and welfare of the children, and decrees may be entered as often as the facts justify." *In re Marlowe*, 268 N.C. 197, 199, 150 S.E.2d 204, 206 (1966). *See also* N.C. Gen. Stat. § 50-13.7 (1999).

The divorce judgment in this case did not order respondent to support Candi; however, parents have a duty to support their children until they reach the age of majority. *See Nisbet v. Nisbet*, 102 N.C. App. 232, 402 S.E.2d 151, *disc. review denied*, 329 N.C. 499, 407 S.E.2d 538 (1991), and N.C. Gen. Stat. § 50-13.4(b) (1999). Pursuant to N.C. Gen. Stat. § 31A-2, parents have a duty to provide "care and maintenance" for their children until they reach the age of majority. Undoubtedly, the duty of care is a natural obligation, whereby a parent shows love and affection for the child and is a presence in the child's life, while the duty of maintenance pertains to the legal duty a parent has for a child.

Therefore, because the divorce judgment did not deprive respondent of custody of Candi, N.C. Gen. Stat. § 31A-2(2) does not apply. Respondent remains under the provisions of N.C. Gen. Stat. § 31A-2, and the trial court has already found that respondent abandoned Candi Lunsford. No exceptions to this conclusion exist, and respondent cannot inherit from his daughter's estate.

III. The Proper Administrator

[4] The trial court sat as the fact-finder in this matter, and concluded that respondent abandoned his daughter. Because the trial court's findings are supported by the evidence, we are bound by those findings. Therefore, we do not reach the issue of whether petitioner was the only proper administrator of Candi Lunsford's estate, and we also

need not examine whether petitioner breached her fiduciary duties, as these points are now moot.

Therefore, the trial court's findings of fact and judgment naming petitioner as the administratrix of Candi Lunsford's estate are

Affirmed.

Judge BRYANT concurs.

Chief Judge EAGLES dissents.

EAGLES, Chief Judge, dissenting.

I respectfully dissent.

The majority's logic would be flawless if the intestate had died while a minor. Had intestate died as a minor, her father's abandonment of her would have properly deprived him of the right to inherit from her by intestacy. G.S. 31A-2. Here, however, the intestate was no longer a minor. Since intestate died as an adult, her father has a statutory right to inherit without regard to his prior sins of omission. G.S. 29-15(3). As an adult, intestate could have prepared a will and could have specified how her estate would be distributed. G.S. 31-1. Whether through negligence or by intention, intestate (like most people her age) never executed a will to assure that the principles of North Carolina intestate law would not control disbursement of her estate. Here, I believe the intestate succession act mandates that the father share in intestate's estate.

G.S. 31A-2 bars abandoning parents' right to administer a deceased child's estate and to share in the estate by intestate succession. In the statute's exceptions it refers to a parent resuming "its care and maintenance," G.S. 31A-2(1), and a parent having "been deprived of the custody of his or her child" and having "substantially complied with all orders . . . requiring contribution to the support of the child." G.S. 31A-2(2). Generally, only where a *minor* child is involved does a parent have responsibility for "care and maintenance" and only where a *minor* child is involved does a parent have custody rights or obligations to support a child. Nothing in this record indicates that the father here any longer had responsibilities for care and maintenance, or custody and support. It is clear from the plain language of the statute when read in context that "child" for the purposes of G.S. 31A-2 is limited to minor children.

On the facts of this case, this result might not seem "fair." We have all learned, however, that "hard cases make bad law." This is the most recent example. To rule as the majority has decided will foster estates disputes and potential litigation in every case where parents and deceased adult children are estranged at the time of death or were estranged at any time in the child's minority. I think certainty in the law requires us to conclude that G.S. 31A-2 applies only to minor children-decedents.

ROSE MARY MERRICK, A MINOR PLAINTIFF v. GLENN R. PETERSON, BERNICE CROOM, ELSIE JANE PETERSON, LINWOOD PETERSON, ISMAE P. BRINSON, LOIS P. SAUNDERS, MARY BURNS LENNON, ET ALS DEFENDANTS v. CARNEAL HOOPER, FLOYD HENRY HOOPER, WILLIAM FITZGERALD HOOPER, LILLY GAIL HOOPER NEWKIRK AND JAMES ALMO WILLIAMS, GUARDIAN AD LITEM FOR THE UNNAMED, UNKNOWN, INCOMPETENT AND MINOR HEIRS OF JOHN H. HOOPER AND JOSHUA HOOPER, SR.

No. COA00-247

(Filed 5 June 2001)

1. **Appeal and Error— timeliness of appeal—any time after judgment rendered in open court**

Although defendants claim plaintiff's appeal is untimely under N.C. R. App. P. 3 based on the appeal being filed at 10:45 a.m. on 3 August 1999 which was prior to the entry of judgment at 1:42 p.m. on 3 August 1999, plaintiff's appeal is proper because she was entitled to file and serve written notice of appeal at any time after the judgment was rendered in open court.

2. **Civil Procedure— directed verdict—all grounds stated in motion considered**

The Court of Appeals can consider all of the grounds specifically stated in defendants' motion to the trial court for a directed verdict under N.C.G.S. § 1A-1, Rule 50(a).

3. **Collateral Estoppel and Res Judicata— res judicata—ownership of property—not same subject matter or issues**

Plaintiff's cause of action to quiet title by adverse possession is not barred by the doctrine of res judicata even though defendants claim there was an adjudication concerning this property in a prior action, because: (1) plaintiff's surveyor testified that the

property to which plaintiff is claiming title is not identical to the property to which defendants claimed record title in the previous action; and (2) the surveyor further testified the property in the deed relied upon by defendants only encompasses a portion of the property that plaintiff was claiming through another deed.

4. Adverse Possession— no evidence of possession—directed verdict proper

The trial court did not err by granting a directed verdict in favor of defendants at the close of plaintiff's evidence in an action to quiet title under N.C.G.S. § 41-10 by adverse possession, because: (1) plaintiff admitted she never possessed the property; (2) plaintiff failed to present evidence of adverse possession by any ancestors or relatives through which plaintiff gained an interest in the property; and (3) there was no evidence plaintiff was ever conveyed or inherited an interest in the property.

Appeal by plaintiff from judgment entered 3 August 1999 by Judge Henry V. Barnette, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 12 January 2001.

Nunalee & Nunalee, L.L.P., by Mary Margaret McEachern Nunalee; and Jacqueline Morris-Goodson, for plaintiff-appellant.

Frink, Foy and Yount, P.A., by Henry G. Foy, for defendants-appellees.

CAMPBELL, Judge.

Plaintiff appeals, arguing that the trial court erred in granting defendants' motion for directed verdict at the close of plaintiff's evidence. We disagree and affirm the trial court's judgment.

Plaintiff, a minor, by and through her duly appointed guardian ad litem, filed an action on 19 May 1997 to quiet title to a parcel of land located in Brunswick County. In her complaint, plaintiff asserted ownership of the disputed property based on adverse possession under color of title for more than seven years, and adverse possession for more than forty years (twenty years of adverse possession being sufficient under N.C. Gen. Stat. § 1-40). Plaintiff also alleged that she was not bound by the judgment entered in a prior action (89 CVS 232) involving a large number of plaintiff's blood relatives, and involving what defendants claim to be the same piece of property. Plaintiff

claims she was a real party in interest in 89 CVS 232 and that she was not properly joined as a party defendant in that action.

In their answer, defendants raised numerous defenses, including the affirmative defenses of *res judicata*, failure to join necessary parties, and lack of standing. Defendants alleged plaintiff was barred from pursuing this action based on the existence of a final judgment in 89 CVS 232. Defendants also asserted ownership of the disputed property based on adverse possession for more than twenty years, and adverse possession under color of title for more than seven years.

Plaintiff subsequently moved to amend her complaint to join necessary parties. This motion was allowed by the trial court, and an amended complaint was filed.

Plaintiff then filed a motion to strike certain of defendants' defenses, including *res judicata*, arguing that plaintiff was not bound by the judgment in 89 CVS 232, because she was an unrepresented minor at the time, and was not in privity with any of the parties named or represented in 89 CVS 232. Plaintiff also argued that *res judicata* was inapplicable because the present action involved a different set of issues than those adjudicated in 89 CVS 232. Plaintiff's motion to strike defendants' *res judicata* defense was denied.

Defendants then filed a motion for summary judgment on 27 February 1998, which was subsequently denied by the trial court. In its order, the trial court again ordered the joinder of additional necessary parties to the action.

On 16 September 1998, the trial court entered an order granting plaintiff's motion to add parties defendant and ordering plaintiff to file an amended complaint naming certain parties as third-party defendants. This order also discharged plaintiff's guardian ad litem because plaintiff had reached the age of majority, and denied a motion to dismiss filed by defendants. On 25 November 1998, James Almo Williams was appointed guardian ad litem for the unnamed, unknown, incompetent and minor heirs of John H. Hooper and Joshua Hooper, Sr., direct ancestors of members of the Hooper family through whom plaintiff traces her claim to the subject property.

On 1 February 1999, plaintiff filed a motion for partial summary judgment as to defendants' counterclaim of adverse possession under color of title. The record reflects no ruling on this motion.

Plaintiff's evidence at trial was as follows: G. Douglas Jeffries, a Registered Land Surveyor, testified that he surveyed a tract of land at the request of Sherman Davis and Herbert Willis, members of the Hooper family and cousins of the plaintiff, based on the property description contained in a 1953 Deed recorded in the Brunswick County Register of Deeds in Book 113, Page 560 (the Hooper Deed). This deed conveyed property from Alfred and Josephine Hooper (plaintiff's great-grandparents) and Lillie Davis (plaintiff's great-great aunt) to Josh Hooper and Davis Hooper (plaintiff's great-great uncles). Based on its legal description, as well as maps and deeds of adjoining property, the surveyor was able to place the property in the 1953 Deed on the ground. The surveyor also testified that the deed on which defendants based their claim of record title to the property in the prior action (89 CVS 232), a 1944 conveyance from F.L. Formyduval and wife Thelma C. Formyduval and C.H. Zibelin and wife Suzie Tharp Zibelin to H.O. Peterson (the Peterson Deed), does not describe the same piece of property as that described in the Hooper Deed. Instead, the surveyor testified that the Peterson Deed describes only a portion of the property described in the Hooper Deed. The surveyor also testified that the property described in the Peterson Deed could not be placed on the ground.

Herbert L. Willis testified that he was the grandson of Alexander Hooper, Jr. (plaintiff's cousin), and that the Hooper family had lived on, farmed, hunted, and harvested timber from the subject property for as long as he could remember. He also testified that the Hooper family had erected gates around the property to block entrance upon it, and had chased people from the property when they were on it without the family's permission.

William Cartwright Clemmons, Sr. testified that he had married into the Hooper family, was president of the Hooper Hill Hunting Club located on the disputed property, and that the Hunting Club had never sought permission to use the property from anyone other than a member of the Hooper family.

Other members of the Hooper family, all of whom are related to plaintiff in some fashion, testified to the family's possession of, and activities on, the property through the years. However, there was no testimony that plaintiff herself had ever actually been in possession of the property, or performed any acts (fencing the property, removing trespassers, timbering, etc.) indicating possession of the property. In fact, Herbert Willis, compiler of the Hooper family history, testified that he had never seen the plaintiff hunting on the property, cutting

timber on the property, running trespassers off the property, or in any other way exercising dominion over the property. Likewise, there was no evidence that plaintiff's mother, or any of plaintiff's direct ancestors, had possessed the subject property since the property was conveyed by plaintiff's great-grandparents in the 1953 Deed.

At the close of plaintiff's evidence, defendants moved for a directed verdict on the following grounds: (1) *res judicata*, (2) failure of plaintiff to meet her burden of proving title to the disputed property; and (3) failure of plaintiff to place the property described in the 1953 Hooper Deed on the ground. The trial court granted defendants' motion, and plaintiff appeals to this Court.

I.

[1] As a threshold matter, defendants claim plaintiff's appeal is untimely under N.C. R. App. P. 3 (Rule 3). "The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737, *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997). In *Abels*, this Court stated:

> Reading N.C.R. App. P. 3(a) and (c) *in pari materia* and in conjunction with the decisions of our courts interpreting these rules, we believe rendering of an order commences the time when notice of appeal *may* be taken by filing and serving written notice, while entry of an order initiates the thirty-day time limitation within which notice of appeal *must* be filed and served.

Id. at 803-04, 486 S.E.2d at 738 (internal citations omitted). We believe the reasoning of *Abels* applies equally in the case of a judgment.

In the instant case, the trial court rendered and signed the judgment on 2 August 1999, at which time plaintiff gave oral notice of appeal, which is no longer sufficient to perfect an appeal under our Rules of Appellate Procedure. *See Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 394 S.E.2d 683, *appeal dismissed and disc. review denied*, 327 N.C. 633, 399 S.E.2d 326 (1990). The judgment was filed with the clerk of court on 3 August 1999 at 1:42 p.m. Plaintiff filed written notice of appeal on 3 August 1999 at 10:45 a.m. Defendants argue that notice of appeal was not timely because it was filed prior to entry of judgment. However, *Abels* makes it clear that plaintiff was entitled to file and serve written notice of appeal any time after the judgment was rendered in open court. Plaintiff's

appeal thus is properly before us, and we therefore proceed to consider the merits thereof.

II.

[2] Plaintiff assigns as error the trial court's granting of defendants' motion for a directed verdict at the close of plaintiff's evidence. "A directed verdict is properly granted where it appears, as a matter of law, that the nonmoving party cannot recover upon any view of the facts which the evidence reasonably tends to establish." *Beam v. Kerlee*, 120 N.C. App. 203, 210, 461 S.E.2d 911, 917 (1995), *cert. denied*, 342 N.C. 651, 467 S.E.2d 703 (1996). When a court considers the propriety of a directed verdict motion, the nonmoving party is entitled to the benefit of every reasonable inference which may be legitimately drawn from the evidence, and all evidentiary conflicts must be resolved in favor of the nonmoving party. *See Chappell v. Donnelly*, 113 N.C. App. 626, 439 S.E.2d 802 (1994). Under this standard, this Court must determine whether plaintiff's evidence, when considered in the light most favorable to plaintiff, was legally sufficient to withstand defendants' motion for a directed verdict as to plaintiff's claims. The motion for directed verdict should be denied if there is more than a scintilla of evidence supporting each element of plaintiff's claim. *Beam*, 120 N.C. App. at 210, 461 S.E.2d at 917.

Plaintiff argues on appeal that directed verdict for defendants was improper, because plaintiff's claim was not barred by the doctrine of *res judicata*. Plaintiff contends that the judgment in the prior action (89 CVS 232) did not involve the same parties, or their privies, the same subject matter, or the same issues. Defendants contend that directed verdict was not based solely on the doctrine of *res judicata*, and, in support of the directed verdict, they argue all of the grounds specifically stated in their motion to the trial court.

Our review of the record indicates that, at the close of plaintiff's evidence, defendants' counsel moved to dismiss the case on the following grounds: (1) *res judicata*, (2) failure to meet the burden of proof to quiet title; and (3) failure to place the property in the 1953 Hooper Deed on the ground. Following arguments by both sides, the trial court granted defendants' motion. In describing its decision to the jury, the trial court indicated that the directed verdict was based on the doctrine of *res judicata*. However, in an exchange with plaintiff's counsel, the trial court also indicated that it did not feel plaintiff had presented sufficient evidence of possession. The trial court entered a simple judgment with no findings of fact or conclusions of

law. We must first decide if this Court, in determining whether the trial court erred in granting defendants' directed verdict motion, can consider all of the grounds specifically stated in defendants' motion to the trial court.

Rule 50(a) of the North Carolina Rules of Civil Procedure requires that "[a] motion for a directed verdict shall state the specific grounds therefor." N.C. R. Civ. P. 50(a). The purpose behind this requirement that specific grounds for a motion for directed verdict be stated is to give the trial court and the adverse party notice of the grounds for the motion. *Anderson v. Butler*, 284 N.C. 723, 202 S.E.2d 585 (1974). We hold that this Court, in reviewing a grant of directed verdict, may consider all of the grounds specifically stated by the moving party in its motion to the trial court. This result is consistent with the notice purpose of Rule 50(a), and it does not allow a moving party to make an argument in support of directed verdict for the first time on appeal. *See Feibus & Co. v. Construction Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980), *rehearing denied*, 301 N.C. 727, 274 S.E.2d 228 (1981) (holding this Court erred in upholding a directed verdict on a ground not stated in the defendants' motion to the trial court, based on the notice purpose of Rule 50(a)). We now proceed to the merits of this case.

A.

[3] Plaintiff contends that her cause of action is not barred by the doctrine of *res judicata*. We agree.

Under 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." *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). "Generally, in order that the judgment in a former action may be held to constitute an estoppel as *res judicata* in a subsequent action there must be identity of parties, of subject matter and of issues." *Light Co. v. Insurance Co.*, 238 N.C. 679, 691, 79 S.E.2d 167, 175 (1953), *rehearing denied*, 240 N.C. 196, 81 S.E.2d 404 (1954). When parties in a subsequent action claim ownership of lands which are not the identical lands to which rights were adjudicated in the former action, or where there is a question of lappage, there is neither identity of subject matter nor of issues. *Blake v. Norman*, 37 N.C. App. 617, 247 S.E.2d 256, *disc. review denied*, 296 N.C. 106, 250 S.E.2d 35 (1978).

In the instant case, plaintiff's surveyor testified that the property to which plaintiff is claiming title is not identical to the property to which defendants claimed record title in the previous action. The surveyor further testified that the property in the Peterson Deed only encompassed a portion of the property plaintiff was claiming through the Hooper Deed. Viewing the evidence in the light most favorable to the nonmoving party, in this case the plaintiff, we find that the two deeds do not describe identical pieces of property. Therefore, the two cases have neither identity of subject matter, nor issues, and *res judicata* does not bar plaintiff's action in this case.

B.

[4] Defendants contend the trial court was correct in granting a directed verdict, on the grounds that plaintiff failed to meet her burden of proof to quiet title. In an action to quiet title under N.C. Gen. Stat. § 41-10, the burden of proof is on the plaintiff to establish his title. *Heath v. Turner*, 309 N.C. 483, 488, 308 S.E.2d 244, 247 (1983). This may be accomplished by either (1) reliance on the Real Property Marketable Title Act, or (2) utilization of traditional methods of proving title. *Id.* at 488, 308 S.E.2d at 247. From our review of plaintiff's complaint and the evidence in the case *sub judice*, it appears plaintiff made the following two claims of title to the property: (1) title by more than twenty years of adverse possession, and (2) title by more than seven years of adverse possession under color of title. Both of these theories of ownership require a minimum period of adverse possession.

To acquire title to land by adverse possession, the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period (seven years or twenty years) under known and visible lines and boundaries. *Curd v. Winecoff*, 88 N.C. App. 720, 364 S.E.2d 730 (1988); N.C. Gen. Stat. § 1-38 (1999); N.C. Gen. Stat. § 1-40 (1999). Successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period (twenty years or seven years). *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974). Under the legal principle of tacking, it is permissible to tie the possession of an ancestor to that of an heir when there is no hiatus or interruption in the possession. *Paper Company v. Jacobs*, 258 N.C. 439, 128 S.E.2d 818 (1963).

Although plaintiff admits in her reply brief that she never actually possessed the property herself, she argues that she should be able to

tack onto the possession of her direct ancestors. The fact that plaintiff admits that she never actually possessed the property is fatal to her claim of adverse possession. To benefit from the principle of tacking, plaintiff would have to show evidence of adverse possession by a direct ancestor, or some other individual in privity with plaintiff, followed by adverse possession by plaintiff, with no hiatus or interruption of the possession. Here, not only has plaintiff admitted that she never possessed the property in question, plaintiff has failed to present evidence of adverse possession by any ancestors or relatives through which plaintiff gained an interest in the property. There is no evidence of adverse possession by plaintiff's mother or grandparents. The only evidence of possession by a direct ancestor is the 1953 Deed by which plaintiff's great-grandparents conveyed their interest in the property to two of plaintiff's cousins. Further, there is no evidence plaintiff was ever conveyed, or ever inherited, an interest in the property at issue. Even treating all of plaintiff's evidence as true, there is insufficient evidence of adverse possession.

For the foregoing reasons, we hold the trial court did not err in granting directed verdict in favor of defendants.

Affirmed.

Judges WALKER and HUNTER concur.

JACK M. TAYLOR, JR. AND WILLIAM H. TAYLOR, PLAINTIFFS v. JACK M. TAYLOR, SR. AND EVELYN V. TAYLOR TRUST, ROBERT N. PAGE, III, TRUSTEE; EVELYN V. TAYLOR; AMANDA LAWSON; ALEX McCASKILL AND WINGATE UNIVERSITY, (FORMERLY WINGATE COLLEGE), DEFENDANTS

No. COA00-789

(Filed 5 June 2001)

Trusts— inter vivos—declaratory judgment—contingent beneficiaries—motion to dismiss proper

The trial court did not err by granting defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) based on plaintiffs' failure to state a claim upon which relief may be granted in their complaint seeking a declaratory judgment regarding a trust, because: (1) plaintiffs admit they are only contingent benefici-

aries of the trust and as such are not entitled to monetary relief from either defendant stepmother or the trust at this point in time; (2) the assets which plaintiffs are requesting declaratory judgment did not belong to their father at the time of his death since he transferred them to his wife by inter vivos transfer, meaning plaintiffs' interest in those assets are not only contingent upon defendant's preceding estate ending but also upon her transfer of those assets into the trust either by inter vivos transfer or by will; and (3) the additional contingency disallows plaintiffs' interest from being considered vested as to the assets transferred by their father to his wife.

Appeal by plaintiffs from orders entered 24 January 2000 and 9 February 2000 by Judges Catherine C. Eagles and Russell G. Walker, Jr., respectively, in Moore County Superior Court. Heard in the Court of Appeals 18 April 2001.

Haywood, Denny & Miller, L.L.P., by B. M. Sessoms and Thomas H. Moore, for plaintiff-appellants.

Webb & Graves, PLLC, by Rick E. Graves, for defendant-appellees Evelyn V. Taylor, Amanda Lawson and Alex McCaskill.

Page and Page, by Robert N. Page, III, Trustee for defendant-appellee Jack M. Taylor, Sr. and Evelyn V. Taylor Trust.

HUNTER, Judge.

Plaintiff-appellants Jack M. Taylor, Jr. and William H. Taylor (herein collectively, "plaintiffs") appeal: (1) the trial court's grant of defendant-appellees', Jack M. Taylor, Sr. and Evelyn V. Taylor Trust (herein individually, "the Trust") and Robert N. Page, III, Trustee, motion to dismiss for misjoinder pursuant to N.C.R. Civ. P. 21; and (2) the trial court's grant of defendant-appellees', Evelyn V. Taylor, Amanda Lawson, and Alex McCaskill (herein collectively with the Trust and Trustee, "defendants"), motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(6). (Notably, plaintiffs voluntarily dismissed their claims against Wingate University pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a).) We agree that plaintiffs have failed to state a claim upon which relief may be granted. Thus, we affirm the trial court's orders.

Since defendants provide no factual background in their brief to this Court, we accept the facts as presented by plaintiffs as true.

Those pertinent to the case are as follows: On 21 June 1991, defendant Jack M. Taylor, Sr. and his second wife, defendant Evelyn V. Taylor ("Mr. and Mrs. Taylor") created an irrevocable living trust, making themselves the lifetime beneficiaries. Mr. Taylor's three children (plaintiffs and Jim Taylor—not a party to this lawsuit) by a prior marriage, and Mrs. Taylor's two children (Amanda Lawson and Alex McCaskill) also by a prior marriage, were named remainder beneficiaries of the Trust. The Trust agreement specifically provided that,

> when both Jack M. Taylor[, Sr.] and Evelyn V. Taylor are deceased, the Trustee shall collect all property of the Trust whether due the Trust by Will or otherwise. All such property, together with all other property constituting this Trust shall then be divided into five (5) equal shares[] . . . [with each of Jack and Evelyn Taylor's five children from prior marriages] receiv[ing] one of the aforementioned equal shares. . . .

However, Mr. and Mrs. Taylor created the Trust with an initial deposit of only $100.00. Also on 21 June 1991, Mr. Taylor executed his last will and testament in which, except for a few specific things mentioned in the codicil of the will, he granted a life estate to Mrs. Taylor and thereafter bequeathed

> [a]ll of the rest, residue and remainder of my Estate, all of my property of every sort, kind and description, real, personal and mixed, wheresoever located, whether now owned or hereafter acquired, all of my residuary Estate, all of my property not otherwise disposed of in this Will and/or by the Codicil aforementioned, I give, will, devise and bequeath as follows: 10% . . . thereof to First Baptist Church . . . , 10% . . . thereof to Wingate College; and 80% . . . to the Jack M. Taylor and Evelyn V. Taylor Trust . . . .

Between 1988 and the time that he died, Mr. Taylor "transferred his bank accounts, stock holdings, and real estate holdings to his wife, with Mrs. Taylor either taking sole or joint ownership for the various assets. . . . These transfers . . . involved more than $2 million in assets." According to plaintiffs:

> At the time the trust was created, Mr. Taylor was a defendant in a pending civil action filed by the Environmental Protection Agency in the United States District Court . . . . The action, filed pursuant to Section 107 of the Comprehensive Environmental

> Response, Compensation and Liability Act . . . sought reimbursement costs for a "Superfund" site being cleaned up in Moore County. The site had been used as a dump by a company once owned by Mr. Taylor. . . .

Thus, plaintiffs believe

> the above conveyances and transfers by [Mr.] Taylor were motivated by [the] civil action against him . . . .
>
> . . .
>
> [And that it was Mr. Taylor's intent that he] would transfer and convey such property to [Mrs.] Taylor and she would transfer and convey the property to the Trust either by *inter vivos* transfer or by will[. T]hus the property would be available to [Mr. and Mrs. Taylor] during their joint lives, to [Mr.] Taylor upon [Mrs.] Taylor's prior death; and upon the death of the survivor the remainder of the property would be divided equally between [Mr.] Taylor's three children . . . and [Mrs.] Taylor's two children . . . .

(Emphasis added.)

On 12 May 1994, Mr. Taylor died. During the administration of Mr. Taylor's estate, plaintiffs encouraged and requested Mrs. Taylor to fund the Trust with the assets transferred to her by Mr. Taylor. Though "Mrs. Taylor did not deny that the trust was created with the intention that it would be funded with these assets, [she] took no steps to [so fund the Trust]." Following the probate of Mr. Taylor's will, the Trust received $3,405.10 from Mr. Taylor's estate. Thereafter, on 9 September 1999, Mrs. Taylor offered to "transfer her home (and its contents) . . . to the [plaintiffs and their brother Jim,]" on condition that plaintiffs release her, "her family and her agents" from any further liability as to Mr. Taylor's assets or the Trust. Plaintiffs declined Mrs. Taylor's offer and instead, on 1 October 1999, instituted an Action for Declaratory Judgment (pursuant to N.C. Gen. Stat. § 1-253 (1999)) requesting the trial court settle the parties' respective rights and obligations regarding the Trust. On 7 October 1999, Mrs. Taylor filed an Offer of Judgment with the trial court, which made the same offer of the family home to be transferred to plaintiffs and their brother, Jim. Then on 8 November 1999, defendants Mrs. Taylor, Amanda Lawson and Alex McCaskill filed a motion to dismiss for failure to state a claim upon which relief may be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). That motion was granted on 20 January 2000. Finally, on 9 February 2000, the trial court granted a

motion to dismiss in favor of the Trust and Trustees, dismissing them as parties to the lawsuit pursuant to N.C. Gen. Stat. § 1A-1, Rule 21 regarding misjoinder of parties. Plaintiffs appeal.

Plaintiffs bring forward two assignments of error. However, due to our disposition of the first, we need not address the second. Plaintiffs assign error to the trial court's grant of defendants' motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), arguing that "plaintiffs' complaint states a claim under the Declaratory Judgment Act" and therefore, they are entitled to have the trial court issue the requested declaration. We disagree.

It has long been the law in North Carolina that:

> A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). This Court has summarized the trial court's duty in ruling upon such a motion as follows:
>
> *"In order to withstand [a 12(b)(6) motion], the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must state allegations sufficient to satisfy the substantive elements of at least some recognized claim.* The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. In general, 'a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*' "
>
> *Id.* at 670-71, 355 S.E.2d at 840 (citations omitted).

Werner v. Alexander, 130 N.C. App. 435, 437-38, 502 S.E.2d 897, 899-900 (1998) (emphasis added and emphasis in original). Thus, in the case at bar, where plaintiffs' claim is that they are entitled to have a declaratory judgment rendered by the trial court, plaintiffs' complaint must establish every element of the claim.

Our Supreme Court has clearly outlined the elements a plaintiff must establish in order to be entitled to a declaratory judgment regarding a will or trust:

> "Where, . . . it appears from the allegations of the complaint in an action instituted under the authority and pursuant to the provi-

> sions of the act, (1) that a real controversy exists between or among the parties to the action; (2) that such controversy arises out of opposing contentions of the parties, made in good faith, as to the validity or construction of a . . . will [or, as in the present case, a trust] . . . ; and (3) that the parties to the action have or may have legal rights, or are or may be under legal liabilities which are involved in the controversy, the court has jurisdiction, and on the facts admitted in the pleadings or established at the trial, may render judgment, declaring the rights and liabilities of the respective parties, as between or among themselves, and affording the relief to which the parties are entitled under the judgment." *Light Co. v. Iseley*, [203 N.C.] at page 820, [167 S.E. at page 61 (1933).]

Little v. Trust Co., 252 N.C. 229, 243, 113 S.E.2d 689, 701 (1960). Further, under N.C. Gen. Stat. § 1-253, our General Assembly has given:

> Courts of record within their respective jurisdictions . . . power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Id. Therefore, we focus on whether plaintiffs have met their burden in showing that ". . . 'there is an actual or real existing controversy between parties having adverse interests in the matter in dispute.' " *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 703, 249 S.E.2d 402, 413-14 (1978) (quoting *Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409 (1949)). In the present case, we find that plaintiffs have failed to show an actual controversy between themselves and defendants.

It is true that an action for declaratory judgment may be maintained without a showing that there has been a wrong done or an actual loss incurred. *McCabe v. Dawkins*, 97 N.C. App. 447, 449, 388 S.E.2d 571, 572, *cert. denied*, 326 N.C. 597, 393 S.E.2d 880 (1990). However, *plaintiff must prove that an actual loss is certain to occur or that an asserted right will be invaded. Newman Machine Co. v Newman*, 2 N.C. App. 491, 494, 163 S.E.2d 279, 281 (1968), *rev'd on other grounds*, 275 N.C. 189, 166 S.E.2d 63 (1969).

Looking to the facts of the present case, plaintiffs admit that they are only "contingent beneficiaries" of the Trust and as such, "[p]laintiffs are not entitled to monetary relief from either Mrs. Taylor or the . . . Trust at this point in time . . . ." Plaintiffs further state in their complaint that they *believed* Mr. Taylor desired Mrs. Taylor to "transfer and convey the property to the Trust *either by inter vivos transfer or by will[.]*" (Emphasis added.) Moreover, plaintiffs admit that it was their father's intent that "the property . . . be available to [both himself and Mrs. Taylor] during their joint lives . . . and upon the death of the survivor the remainder of the property . . . be divided equally between [the five] children . . . ." Nonetheless, plaintiffs argue that "Mrs. Taylor has a[] duty to provide additional assets for the trust . . . ," which Mrs. Taylor has, by her actions if not expressly, refused to do thus far; and therefore, plaintiffs are entitled to the requested declaratory judgment. We find plaintiffs' own argument thwarts their claim.

Applying the law to the facts where, as here, plaintiffs' only actual ". . . 'loss . . . or . . . asserted right [to] be invaded' " (*Newman Machine Co.*, 2 N.C. App. at 494, 163 S.E.2d at 281 (quoting 22 Am. Jur. 2d, *Declaratory Judgments*, § 1)) is based on a contingency interest, plaintiffs must necessarily have demonstrated in their complaint that the contingency would be satisfied so that their right was certain to become valid—and thus, could be invaded by defendants.

> " 'The remainder is vested, when, throughout its continuance the remainderman and his heirs have the right to the immediate possession whenever and however the preceding estate is determined; or, in other words, *a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estate; or, again, a remainder is vested if it is subject to no condition precedent save the determination of the preceding estate.*' It is the general rule that remainders vest at the death of the testator, unless some later time for vesting is clearly expressed in the will, or is necessarily implied therefrom. It is likewise a prevailing rule of construction with us that adverbs of time, and adverbial clauses designating time, do not create a contingency but merely indicate the time when the enjoyment of the estate shall begin." *Trust Co. v. McEwen*, [241 N.C. 166, 84 S.E.2d 642]; *Priddy & Co. v. Sanderford*, 221 N.C. 422, 424-5, 20 S.E.2d 341. . . .

Little, 252 N.C. at 249, 113 S.E.2d at 705 (emphasis added).

Therefore, under Mr. Taylor's will and pursuant to case law, we find that after his death plaintiffs did have a vested, although contingent, interest in the assets of the Trust and the income to be derived therefrom. However, the assets about which plaintiffs are requesting declaratory judgment did not belong to Mr. Taylor at the time of his death—having been transferred by him to Mrs. Taylor by *inter vivos* transfer. Thus, plaintiffs' interest in those assets are not only contingent upon Mrs. Taylor's "preceding estate" ending, but is also contingent upon Mrs. Taylor's transfer of those assets into the Trust either by *inter vivos* transfer or by will. *Id.* at 249, 113 S.E.2d at 705 (quoting *Trust Co. v. McEwen*, *supra*, at 169, 84 S.E.2d at 644). This additional contingency disallows plaintiffs' interest from being considered vested as to the assets transferred by Mr. Taylor to Mrs. Taylor. *Id.* (Of specific importance here is the fact that Mr. Taylor himself was under no obligation to fund the Trust with those assets either by *inter vivos* or testamentary transfer.)

We find the line of cases regarding life insurance beneficiaries instructive. In those cases where an insured has the right to change—at any time during their lifetime—the designated beneficiary of his or her life insurance policy, our courts have repeatedly stated that

> "the rights of a designated beneficiary do not vest until the death of the insured." *[Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378,] 382, 348 S.E.2d [794,] 797 [(1986)]. [Until then, t]he designated beneficiary has a "mere expectancy," *Harrison v. Winstead*, 251 N.C. 113, 117, 110 S.E.2d 903, 906 (1959), which cannot "ripen into a vested interest before the death of the insured." *Russell v. Owen*, 203 N.C. 262, 266, 165 S.E. 687, 689 (1932). "This is true, because the beneficiary whose right, under the policy, or certificate, may thus be taken away, has only a contingent interest therein, which will not vest until the death of the insured." *Wooten v. Grand United Order of Odd Fellows*, 176 N.C. 52, 56, 96 S.E. 654, 656 (1918).

Pierson v. Buyher, 330 N.C. 182, 185, 409 S.E.2d 903, 905 (1991). Likewise then, we believe that where, as here, Mrs. Taylor has the right to the assets to the Trust, plaintiffs cannot become vested contingent beneficiaries of those assets until such time as Mrs. Taylor actually makes the transfer—whether in life or death. Again, without being vested beneficiaries, plaintiffs cannot produce evidence necessary to gain a declaratory judgment, namely: that they are certain to suffer an actual loss, or that they have an asserted right which will be invaded. *Newman Machine Co.*, 2 N.C. App. at 494, 163 S.E.2d at 281.

Moreover, if we consider plaintiffs' argument in light of the fact that Mrs. Taylor's right to use the property was unlimited, even if she had an obligation to transfer into the Trust those assets she did not exhaust, we believe it is feasible that Mrs. Taylor could theoretically need and use all of the assets to support herself until her death. Under such circumstances, there would be no loss to plaintiffs because there would be no assets to be transferred into the Trust. Further, because plaintiffs admit that Mrs. Taylor can transfer the remaining assets *post mortum* by will, it must also be undisputed that she is under no obligation to transfer the assets while she is living. Until Mrs. Taylor dies, plaintiffs' contention that Mrs. Taylor refuses to fund the Trust while living, are irrelevant and groundless as plaintiffs have no vested interest in the property. Therefore, under these circumstances, plaintiffs have failed to state a claim upon which relief may be granted, and the trial court did not err in granting defendants' Rule 12(b)(6) motion.

Affirmed.

Judges WALKER and TYSON concur.

STATE OF NORTH CAROLINA v. MARDY JOHN ROURKE

No. COA00-286

(Filed 5 June 2001)

1. Evidence— tape recording of 911 call—sufficiently audible—substantive evidence

The trial court did not abuse its discretion or commit plain error in a second-degree murder case by concluding a tape recording of the call made to the 911 emergency dispatch center including the final seconds of the argument between the victim and defendant, gunshot noises, and then a dialogue between a witness and the 911 dispatcher about the homicide was sufficiently audible to be played at trial, because: (1) the tapes were properly authenticated under N.C.G.S. § 8C-1, Rule 901(a); (2) the "click" noises between gunshots two and three did not render the tape inadmissible and the statements heard on the tape provided an objective way to reconcile the varying accounts given at trial;

(3) N.C.G.S. § 8C-1, Rule 2001 did not require the State to obtain a more reliable presentation of the tape since defendant did not request the original tape at trial nor does he present any support for the suggestion that the "clicks" were not an accurate copy of noises from the original digital recording; and (4) the tape was admissible as substantive evidence since defendant never asked for a limiting instruction that would have restricted the jury's use of the tape to corroborative evidence.

2. **Homicide— second-degree murder—premeditation and deliberation instruction—no provocation by decedent**

The trial court did not improperly instruct the jury in a second-degree murder case that there had been no provocation by decedent, because the challenged instruction was part of the trial judge's charge to the jury on the issue of premeditation and deliberation and was simply part of a list of illustrative examples of the kinds of evidence that might properly be considered by the jury.

3. **Evidence— victim's reputation for engaging in fights— cross-examination**

The trial court did not err in a second-degree murder case by allegedly failing to permit defendant to cross-examine a witness under N.C.G.S. § 8C-1, Rule 611 regarding the victim's reputation for engaging in fights, because: (1) the trial court did not prevent this inquiry but merely ruled against the form of the question; and (2) defendant did not attempt to elicit the same information by asking a better-formulated question.

Appeal by defendant from judgment entered 26 July 1999 by Judge B. Craig Ellis in Brunswick County Superior Court. Heard in the Court of Appeals 21 February 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Robert M. Curran, for the State.

Lisa Miles, for the defendant-appellant.

BIGGS, Judge.

Mardy John Rourke (defendant) was convicted of second degree murder, and appeals from the conviction and judgment. The evidence at trial indicated the following: On 29 January 1999 the defendant was living in Calabash, North Carolina with a friend, Thomas Stockner

(Stockner). During that week, the defendant and Stockner had been spending time with Kenneth Long (Long), and with Jennifer Billings (Billings). The four had been drinking together in the evenings, and Long and Billings had stayed at Stockner's house for several nights. There had been no conflicts among them prior to this incident. On the night of January 29, Billings and Long arrived at Stockner's house at around 9:00 P.M. They found Stockner at home, although the defendant was out. The three drank and played pool, then visited several nearby taverns. When they returned to Stockner's house, the defendant was there. The four continued drinking, talking, and playing pool for two or three hours. They were all intoxicated, Stockner even more so than the others. At some time after midnight, an argument developed between Long and the defendant. Stockner tried to break up their dispute by displaying a shotgun, until the others told him to put his gun away. The argument between Long and the defendant grew louder and more contentious, until Long suggested that they "take it outside." The defendant declined, and retired to his room.

Billings testified that, although the defendant initially retreated from the quarrel with Long, he rejoined the others several minutes later, holding a revolver. He threatened several times to shoot Long and, when Billings intervened, he threatened to shoot her too, and fired a shot in the air. Long suggested they leave, and the two started to go out through the garage. Once in the garage, they realized that the garage door was locked, and also that Billings had left her purse inside. Long went back inside the house to unlock the door and retrieve the purse. Ten or twenty seconds after Long disappeared inside the house, Billings heard gunshots. She ran to a neighbor's house to summon help, and then waited on Stockner's porch until the police arrived.

Stockner also testified about the events of 29 January 1999. He could not recall details, because he had been so intoxicated. He did not remember an argument between Long and the defendant, and he was unable to reconstruct the sequence of events. However, he distinctly recalled hearing gunshots, and remembered that he had called 911.

The defendant testified as follows: He had previously suffered a workplace injury that left him disabled and vulnerable to paralysis if his neck were injured. When Long threatened him during their argument, the defendant got the revolver for his protection. After Long and Billings went out to the garage, Long returned and hit him on the head from behind. Long continued to hit him, and the defendant

feared that Long would twist his neck and cause him to become paralyzed. He acknowledged that he had fired several shots in the air. However, he did not know at the time that he had hit Long. He left the house and spent the night in a shed.

When the police arrived at Stockner's, they found Long lying on the floor, already dead from the gunshot wounds. The defendant had left the house by then. Stockner was present, although very drunk and belligerent. The sheriff's office immediately mounted a search of the area. They located the defendant the following morning, and arrested him for Long's murder.

Defendant presents three arguments in support of four of the assignments of error set forth in his record on appeal. The other eighteen assignments of error have not been discussed in his brief, and thus are deemed abandoned. N.C.R. App. P. 28(a) and 28(b)(5).

[1] Defendant first assigns plain error to the playing at trial of a tape recording of the call made to the 911 emergency dispatch center (911 tape) from Stockner's house during the homicide. The tape includes sounds originating from the emergency center, and other voices and noises that apparently were recorded at Stockner's house during the incident. These include the final seconds of the argument between Long and the defendant, gunshot noises, and then a dialogue between Stockner and the 911 dispatcher about the homicide. The tape's relevance to trial issues is indisputable. The defendant did not object at trial to the tape's admission into evidence, nor did he request an instruction limiting it to corroborative evidence. However, defendant argues on appeal that the trial court committed plain error by admitting the 911 tape as substantive evidence.

The plain error analysis is the appropriate standard of review when a defendant does not object to the admission of evidence at trial. *State v. Ridgeway*, 137 N.C. App. 144, 526 S.E.2d 682 (2000) (plain error analysis applied where defendant raises admissibility of hearsay on appeal, but did not object when evidence was introduced during trial). Under the plain error rule, the defendant "must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (2000) (citations omitted). This Court has often noted that:

> [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[.]' (emphasis in original).

State v. Odum, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Further, the defendant who fails to object to evidence at trial bears the burden of proving that the trial court committed plain error. *State v. Reaves*, 142 N.C. App. 629, 544 S.E.2d 253 (2001); *State v. Allen*, 141 N.C. App. 610, 541 S.E.2d 490 (2000). Thus, the issue for this Court is whether the defendant has met the burden of proving that the admission of the 911 tape as substantive evidence was plain error. We find that he has not met this burden.

Defendant raises several issues regarding the 911 tape. First, he contends that it was not properly authenticated. Under N.C.G.S. § 8C-1, Rule 901(a) (1999), a tape recording may be authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(b)(5) includes voice identification among the examples of means by which a party may authenticate a tape. In the instant case, the State claimed that the tape was a record of the 911 call between Stockner's house and the 911 emergency center. Jason Benton, of the Brunswick County 911 center, testified that the tape was an exact copy of the digital telephone recording made the night of the incident. He had listened both to the original and to the copy, and testified that they were identical. He identified the voices of 911 emergency center employees on the tape. Billings and defendant testified that they could identify the other voices on the tape as those of Stockner, Long, and the defendant. We find this evidence sufficient to support a finding that the tape was what the State contended it to be: a recording of the 911 call made during this incident.

The defendant also contends that the presence of clicking noises on the tape, which the prosecutor argued were the sounds of the defendant cocking his gun between shots, were "inaudible" and rendered the tape inadmissible. We disagree. Defendant correctly states that an otherwise properly authenticated tape should not be admitted unless it is audible, intelligible, and not obviously fragmented. *State v. Williams*, 334 N.C. 440, 434 S.E.2d 588 (1993), *judgment vacated on other grounds*, 511 U.S. 1001, 128 L. Ed. 2d 42 (1994); *State v. Lynch*, 279 N.C. 1, 181 S.E.2d 561 (1971). Whether a tape is suffi-

ciently audible to be admitted is in the discretion of the trial judge, and will not be reversed absent an abuse of that discretion. *State v. Womble*, 343 N.C. 667, 473 S.E.2d 291 (1996). "[A] tape [recording] should not be excluded merely because parts of it are inaudible if there are other parts that can be heard." *Searcy v. Justice and Levi v. Justice*, 20 N.C. App. 559, 565, 202 S.E.2d 314, 318, *cert. denied*, 285 N.C. 235, 204 S.E.2d 25 (1974). The defendant contends that a clicking noise heard on the tape was "inaudible." We do not find that the 'click' noises between gunshots two and three render the tape inadmissible. Moreover, the defendant does not argue that the voices heard on the tape were inaudible. We do not agree with defendant that the click noises were "the crux of the state's case." The most significant feature of the tape is the conversation immediately before, during, and after the gunshots. This is especially true in view of the fact that at the time of trial the defendant was the only eyewitness who testified in detail about the moments surrounding the gunshots. Long was deceased; Billings had been in the garage and had neither seen the men, nor been able to hear their conversation at the time of the shooting; and Stockner was unable to recall the events with clarity. The statements heard on the tape provide an objective way to reconcile the varying accounts given at trial. We do not find that the trial court abused its discretion or committed plain error by finding the tape sufficiently audible to be admitted.

The defendant also argues that the 'click' might be an artifact of the taping process, and that N.C.G.S. § 8C-1, Rule 1002 (1999) (the "best evidence" rule) required the State to obtain "a more reliable presentation of the tape" before it could be admitted. However, he did not request the original tape at trial, nor does he present any support for the suggestion that the 'clicks' were not an accurate copy of noises from the original digital recording.

Defendant also contends that, assuming the tape to be admissible for corroborative purposes, it was error to admit it as substantive evidence. We do not agree. Upon a proper foundation, a tape recording is admissible as either illustrative or substantive evidence. N.C.G.S. § 8-97 (1999). We find that the tape was properly authenticated, and that it was relevant to trial issues. *See, e.g., State v. Brewington*, 343 N.C. 448, 471 S.E.2d 398 (1996) (videotape relevant to "critical issue" of sequence of events at the time of the shooting); *State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986) (stating rule that tape recordings admissible as substantive evidence upon proper foundation). We find the tape admissible as substantive evidence. Further, the defendant

never asked for a limiting instruction that would have restricted the jury's use of the tape to corroborative evidence. "The admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by the defendant for limiting instructions." *State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988). *See also State v. Taylor*, 344 N.C. 31, 473 S.E.2d 596 (1996) (defendant who fails to ask that hearsay testimony be received only for corroboration "cannot now complain" that no limiting instruction was given). Thus, even assuming *arguendo*, that the tape was admissible only as corroborative evidence, the defendant has waived this issue.

This Court has examined the record, including the exhibit at issue, and does not find that the trial court committed plain error in the admission of the 911 tape. This assignment of error is overruled.

[2] Defendant next argues that the trial judge committed plain error by instructing the jury that there had been no provocation by the decedent. This argument is without merit. The challenged instruction was part of the trial judge's charge to the jury on the issue of premeditation and deliberation, in which the court stated the following:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred such as the lack of provocation by the victim, conduct of the defendant before, during, and after the killing, threats and declarations of the defendant, use of grossly excessive force, infliction of lethal wounds after the victim is felled, brutal or vicious circumstances of the killing, the manner in which or the means by which the killing was done. (emphasis added).

The defendant's contention is that the court's use of the word "the" (in the phrase "the lack of provocation by the victim") amounted to an instruction that there had in fact been no provocation. We cannot agree. It is clear from a reading of this instruction that the challenged phrase was simply part of a list of illustrative examples of the kinds of evidence that might properly be considered by the jury on the issue of premeditation and deliberation. This instruction previously has been upheld by our appellate courts. In *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990), the defendant made a similar argument, in regard to the same instruction. The North Carolina Supreme Court held:

> The above-cited instruction was delivered straight from the North Carolina Pattern Jury Instructions. N.C.P.I.—Crim. 206.10. The elements listed are merely examples of circumstances which, if found, the jury could use to infer premeditation and deliberation.

Id. at 315, 389 S.E.2d at 76. *See also State v. Stevenson*, 327 N.C. 259, 393 S.E.2d 527 (1990) (holding that court giving this instruction does not express an opinion that lack of provocation was proven in the case). It is not required that there be evidence of each of these circumstances before the court may give this instruction. *State v. Blakeney*, 352 N.C. 287, 531 S.E.2d 799 (2000). We find no error in the trial judge's instruction on premeditation and deliberation, and accordingly overrule this assignment of error.

[3] Finally, defendant asserts that the trial court committed reversible error by not permitting him to cross-examine Stockner regarding Long's reputation for engaging in fights. This assignment of error arose from the following exchange during the defendant's cross-examination of Stockner:

> Q. You know Kenny Long's reputation or character for being a fighting person, do you not?
>
> A. I have never seen him fight.
>
> Q. You know of instances, though, when he had been in fights?
>
> A. I don't know of any. I have heard talk of the past.
>
> Q. So he does have a reputation of sometimes getting into fights?
>
> MR. BOLLINGER: OBJECTION TO THAT.
>
> THE COURT: SUSTAINED AS TO THE FORM. (emphasis added)
>
> Q. Kenny Long was not the kind of person who would take being pushed around, was he?
>
> A. I wouldn't think so. I would hope he would stand up for himself.

N.C.G.S. § 8C-1, Rule 611 (1999), which governs cross-examination, provides that:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the

ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Rule 611(a). This Court has held that "the scope of cross-examination rests largely within the trial court's discretion and is not ground for reversal unless the cross-examination is shown to have improperly influenced the verdict." *State v. Parker*, 140 N.C. App. 169, 183, 539 S.E.2d 656, 666 (2000) (citation omitted). In the present case, the defendant sought to cross-examine Stockner regarding Long's reputation for violence and fighting, in support of his trial testimony that Long was the aggressor in their fight. We find that the trial judge did not prevent the defendant from exploring this avenue of inquiry. The court merely ruled against the form of one question. The defendant did not attempt to elicit the same information by asking a better-formulated question. This assignment of error is overruled.

For the reasons discussed above, we find that the defendant received a fair trial, free from any reversible error. Accordingly, we find no prejudicial error.

No error.

Judges WALKER and SMITH concur.

STATE OF NORTH CAROLINA v. CHARLIE LEE PARKER AND BRIAN HOLLOWAY A/K/A BYRON HOLLOWAY

No. COA99-1572

(Filed 5 June 2001)

1. Homicide— attempted second-degree murder—crime does not exist in North Carolina

The trial court committed plain error by instructing the jury on the issue of attempted second-degree murder because our Supreme Court has stated since defendant's conviction that attempted second-degree murder does not exist under North Carolina law.

2. Sentencing— consolidation of judgment for attempted second-degree murder and first-degree kidnapping—improper

Resentencing is required in a case where defendant's improper conviction for attempted second-degree murder was consolidated for judgment with the conviction of first-degree kidnapping, because whether the crime of first-degree kidnapping standing alone would support the sentence of 116 to 149 months imposed in connection with the two crimes is a matter for the trial court to reconsider.

3. Robbery— dangerous weapon—plural victims in indictment versus single victim in jury instruction

The trial court did not err by submitting the charge of robbery with a dangerous weapon to the jury even though there was an insertion of plural victims in the indictment compared to the requirement of only a single victim in the jury instructions, because: (1) the use of a conjunctive in the indictment does not require the State to prove various alternative matters alleged; (2) the evidence showed that both defendants acting in concert forced the two victims into the bedroom where one defendant stole a necklace; (3) there are no substantial discrepancies between the allegations in the indictment and the evidence presented at trial; and (4) defendant has failed to cite any authority in support of this assignment of error.

4. Kidnapping— first-degree and second-degree—proper resentencing based on erroneous maximum term

A defendant was not improperly resentenced by the trial court for the consolidated offenses of first-degree kidnapping and second-degree kidnapping, because: (1) the maximum term established by N.C.G.S. § 15A-1340.17(e) should have been 129 months instead of 120 months; (2) N.C.G.S. § 15A-1340.17 does not provide for judicial discretion in the determination of maximum sentences; and (3) defendant's sentence was properly corrected by the trial court to reflect the maximum sentence required by statute.

5. Burglary; Kidnapping; Robbery— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendants' motions to dismiss the charges of first-degree burglary, first-degree kidnapping, second-degree kidnapping, and robbery with a dangerous weapon, because the State presented evidence that: (1) three vic-

tims and eyewitnesses of the crimes testified that two armed intruders entered the house late at night, forced two victims out of the house at gun point, re-entered the house, stole jewelry, and shot one victim in the back of the head; and (2) these witnesses knew the intruders and recognized them as the defendants.

6. Kidnapping— first-degree—failure to instruct on lesser included offense of second-degree kidnapping

The trial court did not err by failing to instruct the jury on the charge of second-degree kidnapping as a lesser included offense of the first-degree kidnapping instruction, because: (1) the evidence reveals that defendants fled after shooting one victim and chased another victim as she escaped, leaving the shot victim in the backyard and a third victim inside the house; and (2) there was no evidence defendants consciously and willfully left the victims in a safe place.

Appeal by defendants from judgments entered 13 April 1999 by Judge G.K. Butterfield, Jr. in Nash County Superior Court. Heard in the Court of Appeals 14 February 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General James Peeler Smith, for the State.

Batts, Batts & Bell, L.L.P., by Joseph L. Bell, Jr.; and Charles E. Robinson, for defendants-appellants.

WALKER, Judge.

Defendant Parker appeals his conviction of attempted second degree murder, first degree burglary, first degree kidnapping, second degree kidnapping and robbery with a dangerous weapon. Defendant Holloway appeals his conviction of first degree burglary, first degree kidnapping, second degree kidnapping and robbery with a dangerous weapon. Defendants were convicted in a joint trial and sentenced on 13 April 1999. Defendant Parker was sentenced to consecutive terms of 103 to 133 months, 116 to 149 months and 34 to 50 months. Defendant Holloway was sentenced to consecutive terms of 100 to 129 months and 77 to 102 months.

The State's evidence at trial tended to show that both defendants attended a cook-out at the home of Randy Perry (Perry), Felicia Bynum (Bynum) and Teresa Moore (Moore) on Saturday, 28 March 1998. Around 4:00 a.m. on the following Monday morning,

Moore had just begun preparing breakfast when she heard loud banging on the front door and someone yell, "Rocky Mount Police Department." The noise woke up Perry and, as he approached the front door, two armed men entered the back door. Moore testified that although she could not see the men, she knew they were not policemen. She hid in a space between the freezer and the counter in the kitchen out of sight of the assailants. Perry testified that the men were wearing ski masks on their heads but had not yet pulled them down over their faces, allowing him to identify them. Perry identified the men as defendants Parker and Holloway, whom he had known for a number of years.

As the defendants approached Perry, they pulled their masks down over their faces and forced Perry into the bedroom with Bynum. They searched the room and then ordered Perry and Bynum out the back door to Perry's car. Perry and Bynum were led back inside briefly to allow Perry to get the keys to his car and to allow Bynum to get her shoes. While inside, Perry testified that defendant Parker stole a necklace from a shelf in the house. During this time, Perry repeatedly spoke to Holloway, asking him "B, man, why are you doing this?" Defendant Parker also called out to defendant Holloway, referring to him as "B." Outside, defendant Perry unsuccessfully attempted to wrestle the gun away from defendant Parker, after which defendant Holloway told defendant Parker to kill Perry because he "knew exactly who he is." Defendant Parker then fired a shot which struck Perry in the back of the head. Bynum was pursued by defendants as she ran away but was able to escape.

Although Perry was seriously wounded, he was able to walk back inside and call his family. Moore emerged from hiding and Bynum soon returned. All three testified at trial that they were able to recognize one or both of defendants on the night of the incident. Defendants did not offer any evidence.

[1] Defendants raise issues on appeal both individually and jointly. We first address defendant Parker's sole assignment of error that the trial court committed plain error by instructing the jury on the issue of attempted second degree murder. At the time of defendant's trial in April 1999, attempted second degree murder was recognized as a crime in this State. *See State v. Cozart*, 131 N.C. App. 199, 203, 505 S.E.2d 906, 909-10 (1998). However, since defendant's conviction, our State Supreme Court has held that the "crime denominated as 'attempted second-degree murder' does not exist under North

Carolina law." *State v. Coble*, 351 N.C. 448, 453, 527 S.E.2d 45, 49 (2000). Thus, defendant's conviction of that crime must be vacated. *See State v. Tew*, 352 N.C. 362, 544 S.E.2d 557 (2000).

[2] The State concedes that our Supreme Court's holding in *Coble* is controlling. However, the State argues that because the conviction of attempted second degree murder was consolidated for judgment with the conviction of first degree kidnapping, and both are classified as Class C felonies, resentencing is not required for defendant Parker. The trial court consolidated both crimes for judgment and sentenced defendant Parker to 116 to 149 months. The presumptive minimum sentence for each of those offenses at defendant Parker's prior record level is 93 to 116 months. N.C. Gen. Stat. § 15A-1340.17(c) (1999). Thus, the State argues that because defendant's conviction of first degree kidnapping remains, resentencing is not necessary. We disagree.

In the case of *State v. Brown*, 350 N.C. 193, 513 S.E.2d 57 (1999), the defendant received a consolidated sentence of thirty years in connection with her conviction of solicitation to commit murder and conspiracy to commit murder. On appeal, the Supreme Court vacated the conviction of solicitation to commit murder. The Court held that judgment on the conspiracy to commit murder conviction must be remanded to the trial court for resentencing because "we cannot assume that the trial court's consideration of two offenses, as opposed to one, had no affect [sic] on the sentence imposed." *Brown* at 213, 513 S.E.2d at 70.

In the case at bar, defendant Parker's conviction of first degree kidnapping would support a sentence of 116 to 149 months. However, whether that crime warrants the sentence imposed in connection with the two crimes is a matter for the trial court to reconsider. Thus, the case must be remanded for resentencing.

[3] We next address the assignments of error set forth by defendant Holloway individually. Defendant Holloway first asserts that the charge of robbery with a dangerous weapon was improperly submitted to the jury because a fatal variance existed between the indictment and the State's proof at trial. The indictment for robbery with a dangerous weapon charged that defendant Holloway "unlawfully, willingly and feloniously did steal, take, and carry away another's personal property . . . from the presence, and person of Randy Murphy Perry and Felicia Bynum." However, the trial court's instructions to the jury stated that a verdict of guilty was proper if the jury believed

defendant Holloway "took or carried away property from the person or presence of a person." Defendant Holloway asserts that the insertion of plural victims in the indictment as compared to the requirement of only a single victim in the jury instructions constitutes reversible error.

"The use of a conjunctive in the indictment does not require the State to prove various alternative matters alleged." *State v. Montgomery*, 331 N.C. 559, 569, 417 S.E.2d 742, 747 (1992), *citing State v. Williams*, 314 N.C. 337, 356, 333 S.E.2d 708, 721 (1985). Here, the evidence presented at trial showed that both defendants, acting in concert, forced Perry and Bynum into the bedroom where Parker stole the necklace. Although the indictment alleges two victims, there are no substantial discrepancies between the allegations in the indictment and the evidence presented at trial. Further, defendant Holloway has failed to cite any authority in support of this assignment of error. Thus, it is overruled.

[4] Defendant Holloway next contends that he was improperly resentenced by the trial court, resulting in an unauthorized increase of his sentence. Defendant Holloway was initially sentenced for the consolidated offenses of first degree kidnapping and second degree kidnapping to a minimum of 100 months and a maximum of 120 months. The maximum term, as established by N.C. Gen. Stat. § 15A-1340.17(e), should have been 129 months. The sentence was later corrected so that defendant Holloway was sentenced to a minimum of 100 months and a maximum of 129 months by a subsequent trial court judge. Defendant Holloway now argues that the original sentence was not error but was an exercise of discretion permitted by the Structured Sentencing Act. Thus, defendant asserts he was improperly re-sentenced.

This Court has held that "absent precedent, we are bound by the plain language of the act in determining the legislative intent." *State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997). N.C. Gen. Stat. § 15A-1340.17 provides "[u]nless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below . . . ." *See also* N.C. Gen. Stat. § 15A-1340.13(c) (1999).

The Structured Sentencing Act clearly provides for judicial discretion in allowing the trial court to choose a minimum sentence

within a specified range. *Caldwell* at 162, 479 S.E.2d at 283. However, the language of the Act provides for no such discretion in regard to maximum sentences. The legislature did not provide a range of possible maximum sentences nor did it create a vehicle to alter the maximum sentences based on the circumstances of the case as with minimum sentences. *See* N.C. Gen. Stat. § 1340.16 (1999). Rather, the Act dictates that once a minimum sentence is determined, the "corresponding" maximum sentence is "specified" in a table set forth in the statute. Thus, N.C. Gen. Stat. § 15A-1340.17 (1999) does not provide for judicial discretion in the determination of maximum sentences. Defendant Holloway's sentence was properly corrected by the trial court to reflect the maximum sentence required by statute.

[5] We now address defendants' joint assignments of error, the first of which is that the trial court improperly denied their motion to dismiss for insufficiency of the evidence. Defendants assert that the testimony of the three witnesses—Perry, Bynum and Moore—differed in several respects and was "inherently incredible." Further, defendants point to the absence of any physical evidence that would link these defendants to the crimes.

"In ruling on a motion to dismiss, the issue before the trial court is whether substantial evidence of each element of the offense charged has been presented, and that defendant was the perpetrator of the offense." *State v. Carr*, 122 N.C. App. 369, 371-72, 470 S.E.2d 70, 72 (1996). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). All the evidence, whether direct or circumstantial, must be considered by the trial court, in the light most favorable to the State, with all reasonable inferences to be drawn from the evidence being drawn in favor of the State. *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518, *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994). "The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss." *State v. Riddick*, 315 N.C. 749, 759, 340 S.E.2d 55, 61 (1986).

Here, the State presented the testimony of three people who were victims of and eyewitnesses to the criminal activity. These witnesses testified that two armed intruders entered the house late at night, forced Perry and Bynum out of the house at gun point, re-entered the house, stole jewelry and shot Perry in the back of the head. The State

also presented evidence that these witnesses knew the intruders and recognized them as the defendants. We find the evidence, taken in the light most favorable to the State, to be sufficient to uphold defendants' convictions.

[6] Defendants next argue that the trial court erred in failing to instruct the jury on the charge of second degree kidnapping as a lesser-included offense to the first degree kidnapping instruction. The crime of kidnapping occurs when one confines, restrains, or removes from one place to another a person for the purpose of:

> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

N.C. Gen. Stat. § 14-39(a) (1999). However, the crimes of first and second degree kidnapping are differentiated in section (b) of the statute. First degree kidnapping occurs when "the person kidnapped either [is] not released by the defendant in a safe place or [is] seriously injured or sexually assaulted." N.C. Gen. Stat. § 14-39(b) (1999). Second degree kidnapping occurs when the victim is "released in a safe place by the defendant and [is] not seriously injured or sexually assaulted." *Id.* Defendants argue that Perry and Bynum were left in the back yard and Moore was left in the house, both of which should constitute a "safe place." Thus, the trial court should have instructed the jury on second degree kidnapping.

In the case of *State v. Jerrett*, 309 N.C. 239, 262, 307 S.E.2d 339, 351 (1983), the Supreme Court stated that in order to leave a victim in a safe place within the meaning of the statute, a "conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety" was required. Furthermore, in the case of *State v. Raynor*, 128 N.C. App. 244, 495 S.E.2d 176 (1998), the defendant fled the victim's home after being overpowered by the victim. This Court held that the defendant did not release the victim in a safe place because there was no evidence of any "willful action" by the defendant to release the victim in a place of safety. *Id.*

In the case at bar, the evidence showed that defendants fled after shooting Perry and chased Bynum as she escaped, leaving Perry in the back yard and Moore inside the house. "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed." *State v. Murry*, 277 N.C. 197, 176 S.E.2d 738 (1970). In accordance with *Jerrett* and *Raynor*, there was no evidence that defendants consciously and willfully left the victims in a safe place as required. Thus, the trial court did not err in refusing to instruct the jury on the lesser-included offense of second degree kidnapping.

After careful review, we find the defendants' remaining assignments of error to be without merit. Thus, for the reasons discussed above, we find the defendants received a fair trial free from prejudicial error.

In *State v. Parker*, No. 98 CRS 5278, vacated and remanded for re-sentencing.

In *State v. Parker*, Nos. 98 CRS 5277, 5280, no error.

In *State v. Holloway*, Nos. 98 CRS 5327, 5329, no error.

Judges BIGGS and SMITH concur.

BRIGITTE HAKER-VOLKENING, PETITIONER v. WERNER ANDREAS HAKER, RESPONDENT

No. COA00-598

(Filed 5 June 2001)

1. Divorce— foreign support order—UIFSA—not an interlocutory order

Although petitioner contends respondent's appeal from an order registering and enforcing a Swiss support order pursuant to the Uniform Interstate Family Support Act (UIFSA) should be dismissed as interlocutory, this argument is without merit because: (1) respondent requested a hearing within 20 days of notice of registration under UIFSA, a hearing was held, and respondent's

contest was unsuccessful, N.C.G.S. § 52C-6-608; and (2) pursuant to UIFSA, the result of the hearing was confirmation of the original order which served both as registration and enforcement of the Swiss order, N.C.G.S. § 52C-6-607(c).

2. Divorce— foreign support order—UIFSA—posting of bond not required

Although petitioner contends respondent's appeal from an order registering and enforcing a Swiss support order pursuant to the Uniform Interstate Family Support Act (UIFSA) should be stayed until such time as the trial court enters an order directing respondent to make support payments and respondent posts a bond in the amount of such payment under N.C.G.S. § 1-289, this argument is without merit because N.C.G.S. § 1-289 does not require respondent to post a bond, but instead gives him the option to stay the execution of a judgment by posting bond.

3. Divorce— foreign support order—UIFSA—definition of "state"

The trial court erred by registering a Swiss support order under the Uniform Interstate Family Support Act (UIFSA), because: (1) only judgments or orders of "another state" may be registered under UIFSA, N.C.G.S. § 52C-3-301(3); and (2) Switzerland does not constitute a "state" pursuant to the definition provided in UIFSA since the record fails to establish that Switzerland has substantially similar law or procedures to UIFSA.

4. Divorce— foreign support order—UIFSA—comity

Although petitioner contends a Swiss support order should be enforced as a matter of comity even though Switzerland is not a "state" under the Uniform Interstate Family Support Act (UIFSA), the issue of comity is not properly before the Court of Appeals since petitioner did not file a civil complaint seeking enforcement.

Appeal by respondent from order entered 27 March 2000 by Judge Robert S. Cilley in Transylvania County District Court. Heard in the Court of Appeals 28 March 2001.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Dale A. Curriden, for petitioner-appellee.

James M. Kimzey, for respondent-appellant.

HUDSON, Judge.

The background facts here are not in dispute. Brigitte Haker-Volkening (petitioner) and Werner Andreas Haker (respondent) were married in 1967 and lived in Switzerland at that time. In 1984, respondent commenced a civil action in the Zuerich District Court seeking divorce. On 29 April 1985, petitioner and respondent entered into a voluntary agreement regarding alimony payments, distribution of property, and custody, visitation and support in relation to their two minor children. On 7 May 1985, the Zuerich District Court entered an order (the Swiss order) granting the divorce, determining custody of the two minor children, ordering visitation, requiring respondent to pay child support, and expressly approving the 29 April 1985 document embodying the agreement between the parties. Respondent complied with the alimony provisions of the 29 April 1985 agreement through 1994, at which time he relocated to North Carolina.

On 10 June 1998, petitioner filed a petition in the district court of Transylvania County, North Carolina, seeking to have the Swiss order registered and enforced in North Carolina pursuant to the Uniform Interstate Family Support Act (UIFSA), N.C.G.S. §§ 52C-1-100 to -9-902 (1999). On 10 June 1998, the Clerk of Superior Court for Transylvania County filed a "Notice of Registration of Order," notifying respondent that the Swiss order had been registered in Transylvania County pursuant to N.C.G.S. § 52C-6-602 (1999). This registration order provides that respondent was, as of 22 May 1998, in arrears of 57'074 in Swiss Francs. On 22 June 1998, respondent filed a motion challenging the validity and enforcement of the registration. Following a hearing, the trial court entered an order on 27 March 2000, holding the Swiss order registered and enforced under UIFSA. Respondent appeals from this order.

[1] We first address petitioner's motion to dismiss this appeal. Petitioner contends the appeal should be dismissed because it is interlocutory. In the alternative, petitioner contends this Court should stay the appeal until such time as the trial court enters an order directing respondent to make support payments and respondent posts a bond in the amount of such payments pursuant to N.C.G.S. § 1-289 (1999). Both arguments are without merit.

UIFSA, which became effective 1 January 1996, replaced former Chapter 52A of the General Statutes, the Uniform Reciprocal Enforcement of Support Act (URESA). The statutory schemes set forth in the two acts are significantly different. URESA provided for a

two-step procedure concerning foreign support orders in North Carolina: (1) registration of the order (and, if required, a hearing on whether to vacate the registration or grant the respondent other relief); and (2) enforcement of the order. *See Lang v. Lang*, 132 N.C. App. 580, 582, 512 S.E.2d 788, 790 (1999). URESA provided that a petitioner could seek to accomplish both of these steps simultaneously, or, in the alternative, seek first to register the order, and then seek to enforce the order separately at a later date. *Id.* In *Lang*, we explained the significant differences between the registration of a foreign support order and the enforcement of a foreign support order under URESA:

> "Personal jurisdiction is not a requisite for registration of an order under [URESA]." Furthermore, "[r]egistration does not prejudice any rights of the obligor; it merely changes the status of the foreign support order by allowing it to be treated the same as a support order issued by a court of North Carolina." "Once the order is so treated the obligee or the obligor may request modifications in the order, and when the obligee attempts to enforce the order, the court must determine whether jurisdiction exists over the person or property of the obligor and what amount, if any, is in arrears."

Id. at 582-83, 512 S.E.2d at 790 (citations omitted). For these reasons, we held that where a petitioner had successfully registered a foreign support order, but had not yet sought enforcement of the order, the registration alone did not finally determine the action and did not affect a substantial right of the respondent. Therefore, the respondent's appeal of the registration order was held to be interlocutory and not immediately appealable.

However, under UIFSA, the filing of a foreign support order by definition achieves both registration and enforcement of the order. *See* N.C.G.S. § 52C-6-603 (1999). As explained in the UIFSA Official Comments:

> The common practice under RURESA was to initiate a new suit for the establishment of a support order, even though there was an existing order . . . . That practice is specifically rejected by UIFSA. . . .
>
> Under the one-order system of UIFSA, only one existing order is to be enforced prospectively . . . . Rather than being an optional procedure, as was the case under RURESA, registration

> for enforcement under UIFSA is the primary method for interstate enforcement of child support. . . .
>
> Registration should be employed if the purpose is enforcement. Although registration not accompanied by a request for affirmative relief is not prohibited, the Act does not contemplate registration as serving a purpose in itself.

Official Comment, N.C.G.S. § 52C-6-601 (1999) ("Registration of order for enforcement.").

Once a foreign support order is registered for enforcement, a respondent's only remedy is to request a hearing to contest the validity or enforcement of the registered order, which request must be made within 20 days after notice of registration. *See* N.C.G.S. § 52C-6-606 (1999). The final step in the UIFSA scheme is "confirmation," which can only occur in two ways. Confirmation occurs where a respondent contests a registered order within 20 days, a hearing is held, and respondent's contest is unsuccessful. *See* N.C.G.S. § 52C-6-608 (1999). Otherwise, confirmation occurs by operation of law where a respondent fails to contest a registered order within 20 days. *See* G.S. § 52C-6-606(b).

Here, petitioner registered the Swiss order for enforcement under UIFSA. Respondent requested a hearing within 20 days of notice of registration, a hearing was held, and respondent's contest was unsuccessful. Pursuant to UIFSA, the result of the hearing, therefore, was confirmation of the original order which served both as registration and enforcement of the Swiss order. *See* N.C.G.S. § 52C-6-607(c) (1999) (trial court only has authority to "issue an order confirming the order"). The original order directs respondent to pay to petitioner the support payments contained in the foreign support order, including arrears of 57'074 in Swiss Francs as of 22 May 1998. Unlike the situation in *Lang*, the order from which respondent here appeals is both a registration and enforcement order. Therefore, respondent's appeal is not interlocutory.

[2] In response to petitioner's alternative argument for dismissal of this appeal, we note that G.S. § 1-289 does not require an appellant to post a bond. Rather, that statute gives an appellant the option to stay the execution of a judgment by posting a bond. The only result of the fact that respondent has not posted a bond is that there has been no stay of the execution of the registration order directing respondent to pay support in accordance with the Swiss order. However, the failure to post a bond, contrary to petitioner's contention, does not require

that this Court stay the appeal. Petitioner's motion to dismiss is therefore without merit and is denied.

[3] Turning to the substance of this appeal, respondent contends the trial court erred in denying his contest of the validity and enforcement of the registered order. Respondent offers a number of arguments in support of this contention. First, respondent argues that this matter does not fall within the purview of UIFSA because Switzerland does not constitute a "state" pursuant to the definition provided in UIFSA. Because we agree, and conclude that the trial court did not have the authority to register the Swiss order, we need not reach respondent's other arguments.

We first note that respondent contends that the issue of whether Switzerland constitutes a "state" under UIFSA is an issue of subject matter jurisdiction. However, a court's authority to act pursuant to a statute, although related, is different from its subject matter jurisdiction. Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. *See* 1 Restatement (Second) of Judgments § 11, at 108 (1982). This power of a court to hear and determine (subject matter jurisdiction) is not to be confused with the way in which that power may be exercised in order to comply with the terms of a statute (authority to act). *See Amodio v. Amodio*, 247 Conn. 724, 727-28, 724 A.2d 1084, 1086 (1999). Here, UIFSA provides that the district courts of North Carolina are authorized to hear matters falling under UIFSA. *See* N.C.G.S. § 52C-1-102 (1999). Thus, there is no question that the Transylvania County District Court had subject matter jurisdiction to hear petitioner's petition for registration pursuant to UIFSA, and to hear respondent's contest of that registration.

However, only judgments or orders of "another state" may be registered under UIFSA. *See* N.C.G.S. § 52C-3-301(3) (1999). UIFSA defines a "state" as including any "foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under this Act." N.C.G.S. § 52C-1-101(19) (1999). In other words, UIFSA requires that "a foreign nation must have substantially similar law or procedures to . . . UIFSA . . . (that is, reciprocity) in order for its support orders to be treated as if they had been issued by a sister State." Official Comment, G.S. § 52C-1-101(19). Thus, if Switzerland is not a "state" under UIFSA, then the district courts of North Carolina do not have statutory authority to register an alimony or child support order from Switzerland under UIFSA.

"UIFSA does not specify who is responsible for determining whether a foreign country is entitled to reciprocity based on its adoption of laws or procedures that are 'substantially similar' to . . . UIFSA." John L. Saxon, *International Establishment and Enforcement of Family Support*, 10 Family Law Bulletin 1, 10 n.5 (1999). Even assuming that it may be the proper role of this Court to make such determinations, "there is very little precedent for how a trial court should make the determination of what constitutes 'substantially similar law or procedures.' " *Country of Luxembourg v. Canderas*, 338 N.J.Super. 192, 197, 768 A.2d 283, 286 (2000) (citing *Selected Topics in International Law for the Family Practitioner: International Child Support-1999*, 32 Fam. L.Q. 525, 550 (1998)).

The record here includes the order entered by the Zuerich District Court. It also includes a document entitled "Federal Act on Private International Law," which is apparently a copy of certain Swiss laws regarding the general enforcement of foreign judgments. The record contains no evidence that Switzerland has enacted a *law* for the issuance and enforcement of support orders that is "substantially similar to the procedures under [UIFSA]." Furthermore, although the Swiss order itself is arguably some evidence that legal *procedures* have been established in Switzerland for the issuance and enforcement of support orders, there is no evidence in the record documenting that such procedures are "substantially similar to the procedures under [UIFSA]." Thus, we must conclude that the record fails to establish that Switzerland is a "state" as that term is defined by UIFSA, and that the trial court was therefore without statutory authority to register the Swiss order pursuant to UIFSA.

[4] We note that petitioner argues in her brief that even if Switzerland is not a "state" under UIFSA, the Swiss order should still be enforced as a matter of comity. Comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens." *Southern v. Southern*, 43 N.C. App. 159, 161-62, 258 S.E.2d 422, 424 (1979) (quoting *Hilton v. Guyot*, 159 U.S. 113, 164, 40 L. Ed. 95, 108 (1895)). Under the doctrine of comity, North Carolina courts may choose to enforce foreign support orders issued by courts in foreign jurisdictions provided the foreign court had jurisdiction over the cause and the parties. *Id.* at 162, 258 S.E.2d at 424. We do not disagree with petitioner that the Swiss order may be enforceable in North Carolina as a matter of comity, and our holding does not preclude

petitioner from seeking enforcement of the Swiss order via a civil complaint seeking enforcement. However, petitioner did not file a civil complaint seeking enforcement, she filed a petition for registration of the Swiss order pursuant to UIFSA. Accordingly, the issue of comity is not properly before us. *See Pieper v. Pieper*, 90 N.C. App. 405, 407, 368 S.E.2d 422, 424, *aff'd*, 323 N.C. 617, 374 S.E.2d 275 (1988) (holding that issue of whether foreign support order was enforceable through civil remedies was not properly before Court on appeal from dismissal of petition to register foreign decree pursuant to URESA); *Pieper v. Pieper*, 108 N.C. App. 722, 728-29, 425 S.E.2d 435, 438-39 (1993) (holding that dismissal in *Pieper I* of petition for registration pursuant to URESA did not bar, under doctrine of *res judicata*, subsequent civil action seeking enforcement of foreign judgment).

For the reasons stated herein, we reverse the order of the trial court denying respondent's contest of the registration of the Swiss order, and we further vacate the trial court's registration of the Swiss order.

Reversed and vacated.

Judges WYNN and TIMMONS-GOODSON concur.

GATX LOGISTICS, INC., PLAINTIFF v. LOWE'S COMPANIES, INC., DEFENDANT

No. COA00-53

(Filed 5 June 2001)

1. Contracts— notice of claim—reasonable time—summary judgment improper

The trial court erred by granting summary judgment in favor of plaintiff on the issues of whether defendant notified plaintiff of its contract claim under a warehouse agreement where plaintiff stored items relating to defendant's trim-a-tree program, and whether defendant timely brought the subject action, because: (1) the conduct of the parties in making the 1996 agreement cannot be used to explain the term "a reasonable time" under the 1995 agreement; (2) a 29 February 1995 warehousing kerosene contract between the parties did not establish a course of dealing for understanding the 1995 trim-a-tree agreement; (3) even if the

provisions of the 1996 agreement presented evidence of usage of trade, the Uniform Commercial Code explicitly sets forth that the parties' course of dealing controls over usage of trade, N.C.G.S. § 25-1-205(4); and (4) since the 1995 agreement between the parties did not call for repeated occasions for performance by either party, it does not establish a course of performance relevant to determining the meaning of the 1995 trim-a-tree agreement.

2. Unfair Trade Practices— mere breach of contract—summary judgment proper

The trial court did not err by granting summary judgment in favor of plaintiff on defendant's counterclaim for unfair and deceptive trade practices, because: (1) a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1; and (2) defendant did not allege substantial aggravating circumstances attendant to the breach of contract.

Appeal by defendant from orders respectively entered 2 and 9 August 1999 by Judges Michael E. Helms and Larry G. Ford in Superior Court, Forsyth County. Heard in the Court of Appeals 14 February 2001.

McEllwee, P.L.L.C., by Christopher D. Lane and Elizabeth K. Mahan for defendant-appellant.

Little & Little, by Cathryn M. Little for plaintiff-appellee.

WYNN, Judge.

In this appeal, the defendant Lowe's Companies, Inc. argues that factual issues exist as to whether it notified plaintiff GATX Logistics, Inc. of its contract claim, and whether it timely brought the subject action. We agree and therefore reverse the trial court's grant of summary judgment. *See Superior Foods, Inc. v. Harris Teeter Super Markets, Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975).

Lowe's secondly argues that issues of fact exist on its unfair and deceptive trade practice claims. We disagree because Lowe's evidence at best shows a mere breach of contract which is not sufficient to sustain an action under N.C. Gen. Stat. § 75-1.1. *See Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C., Inc.*, 124 N.C. App. 383, 390, 477 S.E.2d 262, 266 (1996).

The facts show that under a warehouse agreement, GATX agreed to store items related to the Lowe's trim-a-tree program. Lowe's estimated the total value of the inventory under the program as $38,000,000. The parties acknowledge a dispute over the 1995 agreement concerning the notice of claim section. In its complaint, GATX alleges that the following version of that section applies:

> NOTICE OF CLAIM—Section 14
>
> (a) Claims by a Client . . . must be presented in writing to Warehouseman within a reasonable time and in no event longer than either 60 days after delivery of the goods by Warehouseman, or 60 days after Client of record or the last known holder of a negotiable warehouse receipt is notified by Warehouseman that loss or injury to the goods has incurred [sic], whichever time is shorter.
>
> (b) No action may be maintained by Client . . . against Warehouseman for loss or injury to the goods stored unless timely written claim has been given as provided in paragraph (a) of this section unless such an action is commenced either within 12 months after date of delivery by Warehouseman, or within nine months after Client of record or the last known holder of a negotiable warehouse receipt is notified that loss or injury to part or all of the goods have occurred, whichever time is shorter.

In its answer and counterclaim, Lowe's alleges that before signing the contract, it modified these sections by striking through the language regarding when to present a claim or to file an action and leaving the phrase "within a reasonable time."

The written agreement provided an allowable inventory shrinkage of 0.2% of shipments due to inventory loss or damage. From about 26 June 1995 to 5 November 1996, Lowe's shipped products to the GATX warehouses under the 1995 agreement. On 17 January 1996, Lowe's prepared an inventory shrinkage report that estimated its losses under the trim-a-tree program to be $354,457. Subsequently, Lowe's Inventory Control department completed the final analysis of the 1995 trim-a-tree program and found the final inventory losses to be $155,995. Nonetheless, on 13 December 1996, Lowe's notified GATX its claim was for $303,949 ($354,457 less the contracted 0.2% shrinkage allowance).

In the meantime, in April 1996, the parties negotiated a second public warehousing agreement that contained the following limita-

tions: Claims must be presented in writing no longer than ninety days after delivery of the goods to the warehouseman; and, no action shall be maintained against warehouseman for loss or injury to the goods unless such action is commenced within twelve months after date of delivery by warehouseman.

On 8 June 1998, Lowe's brought an action against GATX in Wilkes County. However, on 7 August 1998, GATX brought a declaratory judgment in Forsyth County seeking a declaration of its rights under the 1995 warehousing agreement with Lowe's. Ultimately, the trial court dismissed Lowe's Wilkes County action under North Carolina Rules of Civil Procedure 12 (b) (2), (4), (5) and 12 (h) on the grounds that Lowe's had improperly named GATX. Thereafter, Lowe's filed a counterclaim against GATX, seeking to recover damages for breach of contract, unfair and deceptive trade practice, fraud, conversion, and negligence. Following a summary judgment motion hearing, Superior Court Judge Larry G. Ford granted partial summary judgment for GATX on Lowe's unfair and deceptive trade practice claim and denied summary judgment for Lowe's claims of breach of contract, fraud, conversion and negligence. On 2 August 1999, Superior Court Judge Michael E. Helms granted GATX's motion for summary judgment on the declaratory judgment thereby rendering Lowe's counterclaims moot. Lowe's appeals from both orders granting summary judgment.

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 judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). In reviewing a trial court's order, the evidence must be reviewed in the light most favorable to the party opposing summary judgment. *Massengill v. Duke Univ. Med. Ctr.*, 133 N.C. App. 336, 515 S.E.2d 70 (1999).

[1] Lowe's argues that whether it notified GATX of its claim under the 1995 agreement and brought action within a reasonable time is a question of fact for the jury. Here, the parties dispute two versions of the 1995 agreement that contain different time limitations as to when Lowe's was required to notify GATX of a claim or file an action against GATX for warehousing "shrinkage" over 0.2%. In either event, the issue on appeal is whether the trial court could determine as a matter of law that Lowe's failed to present its claim and bring an action against GATX within "a reasonable time."

The parties acknowledge that the Uniform Commercial Code (UCC) applies to this case because GATX is a "warehouseman" under N.C. Gen. Stat. § 25-7-102(1)(h) (1999) (" 'Warehouseman' is a person engaged in the business of storing goods for hire"). Article 7 of North Carolina's enactment of the UCC, which deals with warehousemen, incorporates the general definitions and principles of construction and interpretation contained in UCC Article 1. N.C. Gen. Stat. § 25-7-102(4) (1999). Under Article 1, "[w]hat is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action." N.C. Gen. Stat. § 25-1-204(2). *See also Superior Foods, Inc. v. Harris Teeter Super Markets, Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975). Generally, a determination of what is a reasonable time under UCC Section 25-1-204(2) is a question of fact for the jury; however, the issue can become a question of law "only when the facts are undisputed and only when an inference can be drawn as to reasonableness of notice." *Maybank v. Kresge Co.*, 302 N.C. 129, 134, 273 S.E.2d 681, 684 (1981). Moreover, if specific facts and circumstances must be examined to determine what constitutes a reasonable time under N.C. Gen. Stat. § 25-1-204, then such determinations should be made by the fact-finder. *See Superior Foods.*

GATX argues that the trial court properly entered summary judgment because the course of dealing between the parties establish as a matter of law that Lowe's claims under the 1995 agreement were not submitted within a reasonable period of time. Under UCC Section 25-1-205(1), "[a] course of dealing is a sequence of *previous conduct* between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." N.C. Gen. Stat. § 25-1-205(1) (1999) (emphasis supplied). It follows that conduct of the parties to this action after the 1995 agreement may not be used to show a course of dealing. Thus, we must reject GATX's contention that the conduct of the parties in making the 1996 agreement can be used to explain the term "a reasonable time" under the 1995 agreement.

Likewise, we reject GATX's contention that a 29 February 1995 warehousing kerosene contract between the parties established a course of dealing for understanding the 1995 trim-a-tree agreement. The record fails to establish conclusively that the warehousing kerosene contract evidenced a "particular transaction" that could be regarded as showing a "common basis for understanding" the term "a reasonable time" under the 1995 trim-a-tree agreement. Accordingly,

we are unable to conclude as a matter of law that the terms of the 1995 kerosene warehousing contract are sufficiently similar enough to establish the parties' course of dealing in the trim-a-tree warehousing contract.

GATX also argues that the 1996 written agreement specifying time limitations may be considered usage of trade as defined by the UCC. N.C. Gen. Stat. § 25-1-205. Usage of trade would allow a consideration of the industry standards to determine contract meaning. *Id.* However, even if the provisions of the 1996 agreement presented evidence of usage of trade, the UCC explicitly sets forth that the parties' course of dealing controls over usage of trade. N.C. Gen. Stat. § 25-1-205 (4).

Nonetheless, GATX cites the commentary[1] to § 25-1-205 to argue that while course of dealing is

> restricted literally to a sequence of conduct between the parties previous to the agreement, . . . the provisions of the Act on *course of performance* make it clear that a sequence of conduct *after . . . the agreement* may have equivalent meaning.

Official Commentary No. 2, N.C. Gen. Stat. § 25-1-205 (emphasis supplied). Under the UCC, course of performance applies where the agreement involves repeated occasions for performance by either party. *See* N.C. Gen. Stat. § 25-2-208. Because the 1995 agreement between the parties did not call for repeated occasions for performance by either party, it does not establish a course of performance relevant to determining the meaning of the 1995 trim-a-tree agreement. Accordingly, we hold that the trial court erred in granting summary judgment in favor of GATX.

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1. The commentaries printed in the General Statutes were not enacted into law by the General Assembly. Our Supreme Court has stated that

> the General Assembly intended that the commentaries be used to "clarify legislative intent or reflect amendments to the rules . . ." and instructed the Revisor of Statutes to "cause the Commentary to each rule to be printed with the rule in the General Statutes." 1983 N.C. Sess. Laws ch. 701, § 2. This approach by the General Assembly was prudent, since the commentaries contain references to case law of other states and other matters subject to change without the consent or knowledge of the General Assembly. In accord with what we perceive to be the intent of the General Assembly, we will not treat the commentaries printed with the North Carolina Rules of Evidence in the General Statutes as binding authority but, instead, will give them substantial weight in our efforts to comprehend legislative intent.

State v. Hosey, 318 N.C. 330, 337-38, n. 2, 348 S.E.2d 805, 810, n. 2 (1986).

[2] Lowe's next contends the trial court erred in granting summary judgment for GATX on Lowe's counterclaim for unfair and deceptive trade practices. We disagree.

"It is well established that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under G.S. section 75-1.1." *Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C., Inc.*, 124 N.C. App. 383, 390, 477 S.E.2d 262, 266 (1996). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). *See also* N.C. Gen. Stat. § 75-1.1 (1994). To prevail under this statute, plaintiff must prove: (1) defendant committed an unfair or deceptive act or practice, (2) that the action in question was in or affecting commerce, (3) that said act proximately caused actual injury to plaintiff. *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 480 (1991).

In the case at bar, the record shows that in its counterclaim for breach of contract, Lowe's did not allege substantial aggravating circumstances attendant to the breach. "Defendants' claim, at most, is a simple breach of contract, as they have failed to allege any substantially aggravating circumstances which would give rise to an unfair or deceptive practices claim." *Miller v. Rose*, 138 N.C. App. 582, 593, 532 S.E.2d 228, 235 (2000).

Reversed in part, affirmed in part.

Judges McGEE and THOMAS concur.

GREENE CITIZENS FOR RESPONSIBLE GROWTH, INC., HENRY GREY FIELDS, JR., DOYLE R. FOSSO, EDWIN B. JONES, JOHN LINDSEY, WILLIAM H. LEWIS, JR., FRANKLIN P. HARRIS, GEORGE F. WARREN, WALLACE TILGHMAN, AND LINDA FIELDS, PLAINTIFFS v. GREENE COUNTY BOARD OF COMMISSIONERS, DEFENDANT AND ADDINGTON ENVIRONMENTAL, INC., (NOW REPUBLIC SERVICES OF NORTH CAROLINA, LLC), INTERVENOR

No. COA99-1467

(Filed 5 June 2001)

Eminent Domain— condemnation for landfill—alternative sites

The trial court erred by granting summary judgment on the issue of the condemnation of a site for a sanitary landfill in favor of defendant board of commissioners and intervenor waste disposal company, because: (1) N.C.G.S. § 153A-136(c) requires a board of commissioners to give careful and thorough consideration to alternative sites for a landfill within the county; and (2) the record is unclear as to whether the board considered alternative sites.

Appeal by plaintiffs from judgment entered 2 June 1999 by Judge W. Russell Duke, Jr. in Greene County Superior Court. Heard in the Court of Appeals 14 February 2001.

Fuller, Becton, Slifkin & Bell, by James C. Fuller; and James F. Hopf and Catherine W. Cralle, for plaintiffs-appellants.

Baddour, Parker, Hine & Orander, P.C., by E. B. Borden Parker and Philip A. Baddour, Jr., for defendant-appellee.

Parker, Poe, Adams & Bernstein L.L.P., by Jack L. Cozort and John J. Butler, for intervenor-appellee.

John D. Runkle for amicus curiae Conservation Council of North Carolina, Inc., Blue Ridge Environmental Defense League, Inc., and North Carolina Environmental Justice Network.

WALKER, Judge.

Plaintiffs initiated this action on 19 October 1998 seeking declaratory and injunctive relief to prevent defendant from proceeding with the development of a landfill in Greene County (County). Plaintiffs allege, in part, that the Greene County Board of Commissioners

(Board) failed to properly consider alternative sites for the landfill as required by N.C. Gen. Stat. § 153A-136(c) (1999). Intervenor Addington Environmental, Inc., now Republic Services of North Carolina, LLC (Republic), was granted leave to intervene on 28 October 1998. The trial court denied plaintiffs' motion for injunctive relief and thereafter granted summary judgment in favor of both the Board and Republic on 2 June 1999.

Plaintiffs' claims arise from the process undertaken by the Board to locate a site for a new landfill after Greene County was forced to close its existing landfill at the end of 1997. After the Board heard proposals from several private waste disposal companies, it signed a contract with Republic in August 1997 to create a landfill in the County. The contract required Republic to identify areas in the County suitable for the location of the landfill including "any and all potential development sites." On 29 December 1997, before the Board voted on the location of the landfill, Republic secured an option on a tract of land located adjacent to the existing landfill known as the Bridgers Tract.

On 20 April 1998, the Board received a site study from Republic which purported to analyze potential sites within the County. Part I of the study consisted of a "combined exclusionary map" which ruled out those areas where locating a landfill, according to Republic, would be imprudent based on ten factors: geological characteristics; hydro-geological characteristics; groundwater well proximity; socio-economic and demographic information; wetland proximity; proximity to highways and population centers; effects on endangered species, cultural resources or natural and historical preserves; availability of property; sufficiency of soil for cover; and airport safety. The study identified "exclusionary zones" created by the application of each of the aforementioned factors with the remaining areas in the County being suitable for a landfill site. Part II of the study contained a statement that "considered sites in the non-excluded area" would be evaluated. Although the "combined exclusionary map" showed other areas which were not excluded in the County, the only site evaluated in Part II of the study and presented to the Board was the Bridgers Tract.

In August 1998, Republic presented the Board with a facility plan which included socioeconomic and demographic information about the area surrounding the Bridgers Tract. This data was also made available to the public. On 2 September 1998, the Board published a legal notice in the local newspaper announcing a public hearing

would be held on 5 October 1998 at which the Board would "consider alternative sites and relevant socioeconomic and demographic data." At the meeting on 5 October 1998, the Board received extensive public comment, a report by Republic regarding the site selection process and additional socioeconomic and demographic data. Included in the presentation was the location of possible alternative sites considered by Republic; however, each of the possible alternative sites had been ruled out by Republic as being within, or partially within, an "exclusionary zone."

After the public hearing was closed, the Board voted to approve the Bridgers Tract as the site for the landfill, as submitted by Republic. Thereafter, on 2 November 1998, the Board met again and reaffirmed its decision to approve this site. The Board stated specifically that it "had [an] additional opportunity to consider alternative sites, whether or not to approve any site, and the socioeconomic and demographic data" and that it had "considered alternative sites." However, the record does not reflect whether any new or additional information regarding alternative sites was received by the Board since its 5 October 1998 meeting.

On appeal, plaintiffs assert that the trial court erroneously granted summary judgment in favor of the Board and Republic because the Board failed to properly consider alternative sites as required by N.C. Gen. Stat. § 153A-136(c) (1999).

Before approving a site for a new landfill that is within one mile of an existing landfill, N.C. Gen. Stat. § 153A-136(c) (1999) requires that:

> The board of commissioners of a county 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.

However, the statute does not offer guidance as to how a board of commissioners is to evaluate and consider alternative sites and the socioeconomic and demographic data associated with those sites.

Plaintiffs argue that Republic never intended to present alternative sites to the Board since the Bridgers Tract had been identified months before and an option had been secured on this tract. Plaintiffs

further assert that preliminary evaluations of this site had been completed in the Spring of 1998 and no other site was the subject of any such evaluation. In particular, plaintiffs emphasize that all of the alternative sites presented to the Board were within, or partially within, "exclusionary zones" and thus not alternatives as contemplated by the statute. As such, plaintiffs contend that the Board did not comply with the statutory mandate to "consider alternative sites."

Defendant counters the statute merely requires that alternative sites be considered and that interpreting the statute to require the Board to identify more than one site outside of the "exclusionary zones" which meets its criteria, based on the ten factors, would extend the scope of the statute beyond that intended by the legislature. Further, defendant asserts the Board examined other sites and the ultimate determination that only one site met all the criteria did not preclude meaningful consideration of alternative sites.

In interpreting N.C. Gen. Stat. § 153A-136(c) (1999), we must determine what the legislature intended by requiring a board of commissioners to "consider alternative sites." At the outset, we note that it is "an accepted rule of statutory construction that ordinarily words of a statute will be given their natural, approved, and recognized meaning." *Greensboro v. Smith*, 241 N.C. 363, 366, 85 S.E.2d 292, 294 (1955). Because the statute does not define the phrase "consider alternative sites," we must construe this phrase in accordance with its plain meaning to determine the legislative intent. *See Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). The plain meaning of "consider" is "to think carefully about" or "to look at thoughtfully." *The American Heritage College Dictionary* 297 (3rd ed. 1997). The plain meaning of "alternative" is stated as "allowing or necessitating a choice between two or more things." *The American Heritage College Dictionary* 40 (3rd ed. 1997).

This Court discussed consideration of "alternatives" in the context of the North Carolina Environmental Policy Act. *See Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 265 S.E.2d 890 (1980). Specifically, we addressed Section 4 of the Act which requires that any State agency, here the Board of Transportation, "shall include in every recommendation or report . . . a detailed statement . . . setting forth the following: (d) Alternatives to the proposed action." N.C. Gen. Stat. § 113A-4 (1999). In *Orange County*, the plain-

tiffs alleged the State's environmental impact report filed in conjunction with a proposed highway project failed to exhibit that the Board of Transportation properly considered alternatives to the proposed route as required by environmental regulations. *Id.* at 383, 265 S.E.2d at 911. In particular, plaintiffs argued that two alternative routes presented were not true alternatives because they were going to be built regardless of whether the proposed route was built. *Id.* This Court held:

> The primary purpose of both the state and federal environmental statutes is to ensure that government agencies seriously consider the environmental effects of each of the reasonable and realistic alternatives available to them. The standards for the content and adequacy of the [Environmental Impact Study] are articulated in 1 N.C.A.C. § 25.0201 and 23 C.F.R. § 771.18. The courts have subjected such standards to a "Rule of Reason" and have not required highway officials to consider every one of the 'infinite variety' of 'unexplored and undiscovered alternatives' that inventive minds can suggest." *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021, 1027 (4th Cir. 1975), *cert. denied*, 423 U.S. 912, 96 S.Ct. 216, 46 L. Ed. 2d 140 (1975) (holding that statutes requiring consideration of alternatives must be interpreted reasonably in light of limited resources).

Id. at 383, 265 S.E.2d at 911-12. In remanding the matter to the trial court for further determinations, this Court noted that it "does not sit as a trier of fact." *Id.*

In light of these principles, we construe N.C. Gen. Stat. § 153A-136(c) (1999) to require a board of commissioners to give careful and thorough consideration to alternative sites for a landfill within the County. Whether or not the Board met this requirement in the selection of the Bridgers Tract as the landfill site is a factual question not properly made by this Court.

The Board contends it is entitled to the presumption that it considered alternative sites. However, we are unable to conclude from the record before us that the Board considered alternative sites as required by the statute. Thus, we remand the case to the trial court for further proceedings consistent with this opinion.

In light of our disposition in this matter, we need not address the other issues raised in this appeal.

Reversed and remanded.

Judges BIGGS and SMITH concur.

TOWN OF HILLSBOROUGH, PLAINTIFF v. HERBERT CRABTREE, ET AL., DEFENDANTS

No. COA00-527

(Filed 5 June 2001)

1. **Eminent Domain— condemnation for reservoir—just compensation—fourteen separate tracts of land**

The trial court did not err by concluding that plaintiff town's condemnation of defendants' property for development of a new reservoir was a taking of fourteen separate tracts of land instead of a single tract of approximately 150 acres for the purpose of determining just compensation, because: (1) defendants had subdivided the property into fourteen lots and had accomplished numerous improvements and developments to the property before plaintiff publicly announced that defendants' property was being considered as the site of a new reservoir; (2) upon such announcement, defendants ceased developing the property for five years before plaintiff instituted action; and (3) plaintiff cannot now claim that defendants' cessation of development and failure to sell any of the lots demonstrates that defendants' property was not an actual existing subdivision.

2. **Eminent Domain— condemnation for reservoir—just compensation—not a partial taking**

N.C.G.S. § 40A-67 does not mandate that the interest plaintiff town acquired in defendants' property in a condemnation proceeding for development of a new reservoir was the taking of a single tract of land for the purposes of determining just compensation, because: (1) this statute and the common law "unity rule" have only been applied to cases involving partial takings; and (2) the trial court's finding that this case was not a partial takings case is supported by competent evidence.

Plaintiff appeals from order entered on 28 January 2000 by Judge James C. Davis in Orange County Superior Court. Heard in the Court of Appeals 15 March 2001.

The Brough Law Firm, by G. Nicholas Herman, for plaintiff-appellant.

Coleman, Gledhill & Hargrave, P.C., by Geoffrey E. Gledhill and Harmony Whalen, for defendants-appellees.

TYSON, Judge.

In 1977, Herbert I. Crabtree and Alene C. Holloway ("defendants") acquired approximately 150 acres of rural, undeveloped farm land in Orange County ("property") from their father. In 1991, defendants began work to develop the property into a residential subdivision. Among other things, defendants (1) surveyed the boundary of the property; (2) ordered soil analyses done by the Orange County Health Department to determine the property's suitability for septic systems; (3) obtained approval for the location of septic systems on each lot; (4) installed and upgraded underground electrical service; (5) contracted for the provision of electrical service; (6) constructed a new road and improved an existing road providing access to the property; (7) recorded a subdivision plat of the property entitled "Eno West Fork" depicting 14 separate lots; (8) obtained separate Parcel Identification Numbers for each lot; and (9) paid separate tax bills for each lot for five years. Each of the 14 lots were over ten acres, bordered a public road, and had frontage on the Eno River. Defendants also intended to reserve lots for their own use.

In November 1992, defendants learned that their property was under consideration by the City of Hillsborough ("plaintiff") as the site of plaintiff's new reservoir. Defendants ceased developing their property upon learning it was under consideration for the new reservoir. Nearly four years later, on 17 July 1996, defendants received "official notice" of plaintiff's intent to acquire their property for the new reservoir. On 13 January 1997, plaintiff authorized the acquisition of defendants' property.

Nearly a year after defendants received "official notice," on 20 June 1997, plaintiff filed an action in Orange County Superior Court to condemn the property. Defendants answered the complaint on 21 October 1997, and prayed, *inter alia*, for a jury trial on the issue of just compensation. On 20 September 1999, plaintiff filed a pretrial motion to have the trial court determine the interest in the property taken and the proper measure of compensation for the interest in the property taken. Plaintiff sought to have the property treated as a single tract of land for the purposes of valuation. Defendants argued

that the property was made up of 14 separate lots at the time of the condemnation. On 28 January 2000 the trial court ordered:

> 1. The Town in this action condemned all 14 lots in the Eno West Fork, which subdivision is depicted on a plat recorded at Plat Book 59, Page 157 of the Orange County Registry.
>
> 2. That at the time of the taking, the property taken by the Town in this action did not constitute a single tract of land for the purposes of valuation.
>
> 3. At the trial of this action on the issue of just compensation, otherwise admissible evidence may be introduced as to the value, at the time of taking, of each of the 14 lots condemned by the Town.

Plaintiff appeals.

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[1] Plaintiff assigns as error the trial court's conclusion that plaintiff's condemnation of defendants' property was a taking of 14 separate tracts of land for the purpose of determining compensation. Plaintiff contends, as it did in the trial court, that the condemnation was a taking of a single tract of approximately 150 acres. We disagree, and affirm the trial court's order.

Plaintiff argues that the property must be treated as a single tract for compensation purposes because defendants' property is merely a "paper" or "imaginary" subdivision. As a "paper" subdivision, plaintiff asserts that the 14 individual lots should be ignored and the property treated as a single tract for purposes of compensation.

In support of its argument, plaintiff cites the landmark case of *Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 109 S.E.2d 219 (1959). In *Barnes*, the State Highway Commission condemned a portion of landowner's property in order to relocate and improve U.S. Highways 158 and 421 in Winston-Salem. Prior to the condemnation, the landowner had not taken steps to develop the property. Landowner attempted to establish the value of his condemned property by the introduction of plats drafted "after the taking of the property." *Id.* at 386, 109 S.E.2d at 226. The plats depicted the property as a subdivision with mixed business and residential uses. Our Supreme Court held that:

> 'It is well settled that if land is so situated that it is actually available for building purposes, its value for such purposes may be

> considered, even if it is used as a farm or is covered with brush and boulders. The measure of compensation is not, however, the aggregate of the prices of the lots into which the tract could be best divided, since the expense of cleaning off and improving the land, laying out streets, dividing it into lots, advertising and selling the same, and holding it and paying taxes and interest until all of the lots are disposed of cannot be ignored and is too uncertain and conjectural to be computed.' Nichols on Eminent Domain (3rd Edition), Vol. 4, section 12.3142 (1), pp. 107-109. It is proper to show that a particular tract of land is suitable and available for division into lots and is valuable for that purpose, but it is not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof. In other words, it is not proper for the jury in these cases to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on a per lot basis.

Id. at 388-89, 109 S.E.2d at 228 (emphasis supplied).

The facts of the present case are clearly distinguishable from the facts in *Barnes*. Prior to notice of the condemnation, defendants (1) surveyed and subdivided the property into 14 separate lots all with road access and frontage on the Eno River; (2) ordered soil analyses done by the Orange County Health Department to determine the property's suitability for septic systems; (3) obtained approval for the location of septic systems on each lot; (4) installed and upgraded underground electrical service; (5) contracted for the provision of electrical service; (6) constructed a new road and improved an existing road providing access to the property; and (7) recorded a plat of the subdivision. In 1993, Orange County assigned separate Parcel Identification Numbers for each lot, and defendants paid separate tax bills for each lot for five years. All of these actions demonstrate that the defendants' property was not an "imaginary subdivision" like the landowner's property in *Barnes*. To the contrary, defendants' plan to develop a rural Orange County residential development had been accomplished.

Nonetheless, plaintiff argues that defendants' failure to market and sell any of the lots necessitates a finding that the property is a "paper" subdivision. This argument ignores the fact that plaintiff's actions prevented defendants from further developing the lots.

Defendants accomplished all of the above-listed improvements and developments before plaintiff publically announced that defendants' property was being considered as the site of the new reservoir. Upon such announcement, defendants ceased developing the property for five years before plaintiff instituted action. Plaintiff cannot now claim that defendants' cessation of development and failure to sell any of the lots demonstrates that defendants' property was not an actual, existing subdivision.

[2] Plaintiff also argues in its brief to this Court that N.C.G.S. § 40A-67 mandates that the interest it acquired in defendants' property was the taking of a single tract of land. Plaintiff's reliance on N.C.G.S. § 40A-67 is misplaced.

N.C.G.S. § 40A-67 (1999) provides:

> For the purposes of determining just compensation under this Article, all contiguous tracts of land that are in the same ownership and are being used as an integrated economic unit shall be treated as if the combined tracts constitute a single tract.

This statute is a codification of a portion of the common law of condemnation known as the "unity rule." *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 344, 451 S.E.2d 358, 362 (1994), *cert. denied*, 340 N.C. 110, 456 S.E.2d 311 (1995), *cert. denied*, 340 N.C. 260, 456 S.E.2d 519 (1995). All the cases applying N.C.G.S. § 40A-67 and the common law "unity rule" cited by plaintiff to this Court are "partial taking" cases. At oral arguments, plaintiff conceded that N.C.G.S. § 40A-67 and the "unity rule" have only been applied to cases involving "partial takings."

The trial court found that this case was not a partial takings case:

> 19. This condemnation action does not involve a taking of less than an entire tract of land; all 14 lots in the "Eno West Fork" subdivision are affected by the taking and have been, in their entirety, condemned by the Town.

This finding of fact is supported by competent evidence in the record. Therefore, we decline plaintiff's invitation to extend the application of N.C.G.S. § 40A-67 to the facts of this case. The order of the trial court is affirmed.

Affirmed.

Judges MARTIN and TIMMONS-GOODSON concur.

IN THE MATTER OF: JONATHAN EADES

No. COA00-313

(Filed 5 June 2001)

Juveniles— no adjudication of delinquency—disposition improper

The trial court erred by failing to enter an adjudicatory order stating that allegations in the juvenile delinquency petition had been proven beyond a reasonable doubt prior to entering disposition.

Appeal by juvenile from an order filed 9 November 1999 by Judge Franklin F. Lanier in Lee County District Court. Heard in the Court of Appeals 21 February 2001.

Attorney General Michael F. Easley, by Assistant Attorney General David Gordon, for the State.

Staton, Perkinson, Doster, Post & Silverman, by Jonathan Silverman, for juvenile-appellant.

BIGGS, Judge.

This appeal arises from a juvenile disposition order filed on 9 November 1999. The juvenile argues a number of assignments of error; however, we find that only assignment of error number four (4), which states that the trial court erred by failing to enter an adjudicatory order, merits further consideration. For the reasons stated herein, we find that the trial court did err in failing to enter an adjudicatory order and we thereby vacate the order of disposition and remand this matter for adjudication and disposition consistent with this opinion.

On 9 March 1999, two juvenile petitions were filed with the Lee County Juvenile Court alleging that Jonathan Eades, a fourteen (14) year old juvenile, was delinquent, having taken indecent liberties with

his cousins, ages 5 and 6, in violation of N.C.G.S. § 14-202.2 (1999). The record on appeal states that an order was entered on 18 May 1999, adjudicating the juvenile delinquent, and further states that no written adjudicatory order was entered in this action. On 9 November 1999, a disposition order was filed with the Lee County Clerk of Court. From this order, the juvenile now appeals.

The juvenile contends that the trial court committed reversible error when it failed to state that allegations in the petition had been proven beyond a reasonable doubt. We agree.

N.C.G.S. § 7A-631 (1995) (repealed 1 July 1999)[1] governing juvenile hearings contemplates two phases in juvenile hearings—adjudication and disposition. *See* N.C.G.S. § 7B-2405 (1999) ("The adjudicatory hearing shall be a judicial process designed to determine whether the juvenile is undisciplined or delinquent."); *see also*, *In re Fewell*, 32 N.C. App. 295, 297, 231 S.E.2d 925, 926-27 (1977) (refers to N.C.G.S. § 7A-285, which was repealed in 1980, and restated in N.C.G.S. § 7A-631 (1995)). During the adjudicatory phase, allegations of a petition alleging that a juvenile is delinquent shall be proven beyond a reasonable doubt. N.C.G.S. § 7A-635 (1995) (repealed 1 July 1999); *see also*, N.C.G.S. § 7B-2409 (1999). "If the judge finds that the allegations in the petition have been proved as provided in G.S. 7A-635 [beyond a reasonable doubt], he *shall* so state." N.C.G.S. § 7A-637 (1995) (repealed 1 July 1999) (emphasis added); *see also*, N.C.G.S. § 7B-2411 (1999). This Court has held that use of the language "shall" is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error. *In re Walker*, 83 N.C. App. 46, 47, 348 S.E.2d 823, 824 (1986); *In re Johnson*, 76 N.C. App. 159, 331 S.E.2d 756 (1985); *In re Wade*, 67 N.C. App. 708, 313 S.E.2d 862 (1984); *In re Mitchell*, 87 N.C. App. 164, 359 S.E.2d 809 (1987).

In the case *sub judice*, the State concedes, "that there is no Adjudicatory Order in the record; nor is there an adjudication reflected in the transcript originally filed with the record; nor is there an adjudication reflected in the transcript which the State had transcribed later. . . ." Likewise, our review reveals that the record is completely devoid of any order, written or oral, declaring that the allegations in the juvenile petitions were proven beyond a reasonable doubt. Consequently, we find that the trial court committed reversible

1. Chapter 7B, the Juvenile Code, became effective July 1, 1999, and is applicable to acts committed on or after that date.

error in failing to adjudicate the juvenile, delinquent, prior to entering disposition.

Furthermore, the absence of an order adjudicating the juvenile delinquent renders the disposition order improper. Absent an adjudication of delinquency, a trial court has no authority to order disposition. *In the Matter of Hull*, 89 N.C. App. 138, 141, 365 S.E.2d 221, 223 (1988); *see also*, *In the Matter of Kenyon N.*, 110 N.C. App. 294, 298, 429 S.E.2d 447, 449 (1993) (without a valid adjudication of delinquency, the trial court was without jurisdiction to commit the juvenile to the Division of Youth Services). Moreover, due process for juveniles requires a "determination of delinquency. . . ." *In the Matter of Arthur*, 27 N.C. App. 227, 229, 218 S.E.2d 869, 871, *rev'd on other grounds*, 291 N.C. 640, 231 S.E.2d 614 (1977); *In re Gault*, 387 U.S. 1, 18 L. Ed. 2d 527 (1967). As stated above, the record is completely devoid of an order adjudicating the juvenile delinquent. Therefore the disposition, which can only be entered upon an adjudication of delinquency, was improperly ordered.

This Court notes that the posture in which this appeal reached the Court is disturbing. It is incumbent upon the judge in a juvenile case to ensure that before entering a disposition an adjudication has occurred and is evident in the record. Further, both the State and defense attorney have an obligation to ensure that the record on appeal is complete so that the merits of the appeal can be addressed. This was not done here.

Accordingly, we vacate the disposition order filed 9 November 1999, and remand this matter to the trial court for adjudication and disposition consistent with this opinion.

Vacated and remanded.

Judges WALKER and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 JUNE 2001

ANDERSON v. SUMMERS No. 00-388	Iredell (99CVD1305)	Affirmed
BERMAN v. PINCISS No. 00-826	Orange (99CVS1328)	Reversed
BIVENS v. DELTA WOODSIDES/DELTA MILLS No. 00-565	Ind. Comm. (164471)	Reversed and remanded
BRYANT v. PATTERSON No. 00-770	Forsyth (99CVS6129)	Affirmed
CALLICOAT v. FAULKNER No. 00-166	Craven (99CVS111)	Affirmed
CHEEK v. SUTTON No. 99-1623-2	Forsyth (98CVS3123)	No error
DECO, INC. v. HEBERT No. 00-762	Cumberland (99CVS6039)	Appeal dismissed
EDMONDS v. TEMPLETON No. 00-654	Surry (98CVS95)	No error
FINKLEY v. FAULKNER No. 00-165	Craven (99CVS317)	Affirmed
HANHAN INV. CORP. v. M. K. McADOO, INC. No. 00-664	Guilford (99CVS8520)	Dismissed and remanded
IN RE HAYES No. 00-566	Forsyth (89SPC0377)	Affirmed
IN RE SPENCER No. 00-304	Forsyth (96J385) (96J386)	Affirmed
JOHNSON v. WRIGHT No. 00-509	Lenoir (99CVS549)	Reversed
LATTA v. REECE No. 00-881	Onslow (99CVS1977)	Affirmed
McCOWAN v. EDWARDS No. 00-649	Nash (97CVS838)	No prejudicial error
McFADDEN v. WAKE CTY. BD. OF EDUC. No. 00-535	Wake (99CVS432)	Affirmed

MILLER v. SHANOSKI No. 00-819	Durham (99CVD2761)	Dismissed
MOTE v. UNIV. OF N.C. AT WILMINGTON No. 00-230	Ind. Comm. (TA-14394)	Affirmed
PHIPPS v. McCANN No. 00-621	Alleghany (99CVD164)	Dismissed
SARR v. SARR No. 00-911	Wake (00CVD1514)	Affirmed
SCHENCK v. FREIGHTLINER CORP. No. 00-879	Ind. Comm. (724651)	Affirmed
STATE v. ALLEN No. 00-589	Mecklenburg (98CRS38319) (98CRS38321) (98CRS38322) (98CRS38323) (98CRS38324) (98CRS38325) (98CRS38326) (98CRS38327) (98CRS145938) (99CRS120928) (99CRS120929) (99CRS120930)	Case number 98CRS38325 remanded for resentencing
STATE v. BRANDON No. 00-682	Granville (99CRS1578)	No error
STATE v. BURWELL No. 00-502	Durham (98CRS38817) (99CRS18396)	No error
STATE v. CLARIDY No. 00-848	Cumberland (98CRS070751) (98CRS070752)	No error
STATE v. COLLINS No. 00-863	Wake (99CRS30359) (99CRS30360)	No error
STATE v. CRISP No. 00-844	Davidson (98CRS12675) (98CRS14503) (99CRS18979)	Affirmed
STATE v. DUCKER No. 00-866	Buncombe (99CRS63130) (99CRS63070)	No error

STATE v. EVANS No. 00-496	Guilford (98CRS87454)	No error
STATE v. FRIERSON No. 00-814	Hoke (99CRS3068)	Affirmed; remanded for entry of a corrected judgment
STATE v. GEORGE No. 00-457	Mecklenburg (98CRS7921) (98CRS7922) (98CRS7923) (98CRS7924) (99CRS130974)	No error
STATE v. HALL No. 00-546	Durham (98CRS28807)	Affirmed
STATE v. HEDGEPETH No. 00-870	Wake (98CRS12283) (98CRS12284)	No error
STATE v. HERNANDEZ No. 00-552	Sampson (99CRS0183)	No error
STATE v. JENKS No. 00-864	Richmond (99CRS5456)	No error
STATE v. MARCH No. 00-783	Mecklenburg (97CRS33524)	No error in defendant's trial; remanded for entry of a corrected judgment
STATE v. MARTINEZ No. 00-747	Wake (99CRS3734) (99CRS3735) (99CRS3736)	No error
STATE v. McKOY No. 00-564	New Hanover (98CRS34385)	No error
STATE v. MELVIN No. 00-892	Cumberland (98CRS38382) (98CRS40070) (00CRS3820) (98CRS40071) (98CRS7829)	Affirmed
STATE v. MILLER No. 00-817	Greene (98CRS002938) (98CRS002939) (98CRS002941) (98CRS002942)	No error
STATE v. MOCK No. 00-869	Forsyth (97CRS48380)	No error

STATE v. MONTGOMERY No. 00-868	Bladen (97CRS8969)	Affirmed
STATE v. MOORE No. 00-800	Lee (99CRS7340) (99CRS7341) (99CRS7183)	No error
STATE v. OTT No. 00-779	Lenoir (99CRS7737)	No error
STATE v. PAGE No. 00-329	Chatham (98CRS2474)	Affirmed
STATE v. POTEAT No. 00-307	Alamance (98CRS26048)	No error
STATE v. RODGERS No. 00-889	Cumberland (00CRS8785)	No error
STATE v. SANDERS No. 00-794	Guilford (99CRS42159)	No error
STATE v. SEXTON No. 00-498	Wake (98CRS415) (98CRS416)	No error in trial. Remanded for correction of judgments
STATE v. SLADE No. 00-804	Alamance (99CRS50030)	Reversed
STATE v. SOUTHERLAND No. 00-441	New Hanover (98CRS19371) (98CRS025876)	No error
STATE v. SPENCER No. 00-532	Martin (99CRS1005) (99CRS1006) (99CRS1917)	No error
STATE v. STATON No. 00-476	Halifax (98CRS11256) (98CRS11257) (98CRS11259)	No error
STATE v. STYLES No. 00-437	Mitchell (99CRS585) (99CRS586) (99CRS587) (99CRS588) (99CRS1306)	No error
STATE v. WALKER No. 00-818	Wake (98CRS102470)	No error

STATE v. WHITE No. 00-483	Mecklenburg (98CRS10121)	Remanded with instructions
STATE v. WHITE No. 00-764	Mecklenburg (97CRS37271) (97CRS37777)	No error
STATE v. WILLIAMS No. 00-516	Harnett (99CRS2120) (99CRS2122)	No error; remanded for resentencing
TRUJILLO v. VICK No. 00-646	Martin (99CVS37)	No error
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Equitable distribution—property acquired before marriage—constructive trust—The trial court erred in an equitable distribution action, remanded on other grounds, by imposing a constructive trust on real property acquired before marriage; the facts supporting a constructive trust must be supported by clear and convincing evidence and so stated in the equitable distribution action. **Glaspy v. Glaspy, 435.**

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Foreign support order—UIFSA—not an interlocutory order—Although petitioner contends respondent's appeal from an order registering and enforcing a Swiss support order pursuant to the Uniform Interstate Family Support Act (UIFSA) should be dismissed as interlocutory, this argument is without merit because the result of a hearing held at respondent's request was both registration and enforcement of the Swiss order. **Haker-Volkening v. Haker, 688.**

WORKERS' COMPENSATION—Continued

did not serve to meet his burden of supporting his claim of continuing disability. The burden of proof never shifted back to defendant. **Allen v. Roberts Elec. Contr'rs, 55.**

Jurisdiction—untimely filing of claim—no actual notice—The Industrial Commission lacked jurisdiction to hear a workers' compensation claim arising from an accident on 19 October 1992 where plaintiff was first injured on 8 April 1991; a second work-related accident occurred on 19 October 1992; plaintiff filed a claim on 28 October 1992 for neurological difficulties arising from the first accident which did not mention the second accident; and plaintiff filed a claim for that 19 October 1992 accident on 1 July 1996, which was beyond the two-year limit set forth in N.C.G.S. § 97-24(a). **Tilly v. High Point Sprinkler, 142.**

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